NORTH CAROLINA REPORTS

VOLUME 286

SUPREME COURT OF NORTH CAROLINA

FALL TERM 1974

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1975

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OF
NORTH CAROLINA

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SUSIE SHARP**
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J. FRANK HUSKINS
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*Retired 31 December 1974.
**Elected Chief Justice 5 November 1974 and took office 2 January 1975.
***Elected Associate Justice 5 November 1974 and took office 3 January 1975.

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[1] Elected 5 November 1974 and took office 1 January 1975 to succeed Dewey W. Wells who resigned 31 December 1974.
[2] Elected 5 November 1974 and took office 1 January 1975.
[3] Elected 5 November 1974 and took office 1 January 1975.
[4] Elected 5 November 1974 and took office 1 January 1975 to succeed Donald L. Smith whose term expired 31 December 1974.
[5] Appointed 19 February 1975 to succeed Edward B. Clark.
[6] Elected 5 November 1974 and took office 1 January 1975.
[7] Elected 5 November 1974 and took office 1 January 1975 to succeed James G. Exum, Jr.
[8] Elected 5 November 1974 and took office 1 January 1975 to succeed Frank M. Armstrong who retired 31 December 1974.
[9] Appointed 22 February 1975 to succeed W. E. Anglin who retired 31 December 1974.
[10] Elected 5 November 1974 and took office 1 January 1975.
[11] Elected 5 November 1974 and took office 1 January 1975.
[12] Elected 5 November 1974 and took office 1 January 1975.
[13] Elected 5 November 1974 and took office 1 January 1975 to succeed W. K. McLean who retired 31 December 1974.
[14] Appointed 1 January 1975.
[15] Appointed 1 January 1975.
[16] Appointed 1 January 1975.
[17] Appointed Emergency Judge 1 January 1975.
[18] Appointed Emergency Judge 1 January 1975.
[19] Appointed Emergency Judge 1 January 1975.

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[1] Appointed 31 January 1975 to succeed Emmett R. Wooten who retired 1 January 1975.

[2] Appointed 6 January 1975 to succeed Edwin S. Preston, Jr. whose term expired 31 December 1974.

[3] Appointed 20 March 1975 to succeed Giles R. Clark who was appointed Superior Court Judge 19 February 1975.

[4] Appointed 15 March 1975 to succeed Bruce B. Briggs who was appointed Superior Court Judge 22 February 1975.

[5] Appointed 10 January 1975 to succeed Kenneth A. Griffin whose term expired 31 December 1974.

[6] Appointed 27 January 1975 to succeed Robert W. Kirby whose term expired 31 December 1974.

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CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1974

JAMES RUSSELL MATTERNES, EXECUTOR OF THE ESTATE OF GWENDOLYN PORTER MATTERNES, DECEASED AND JAMES RUSSELL MATTERNES AND REBECCA LYNN MATTERNES BY HER GUARDIAN AD LITEM D. BLAKE YOKLEY v. CITY OF WINSTON-SALEM

No. 74

(Filed 26 November 1974)

1. **Municipal Corporations § 14— injury to user of streets — duty of municipality**

Liability of a city or town for damages for injuries sustained by a user of its streets, due to the defective condition of the street, arises only for a negligent breach of duty to exercise ordinary care to maintain streets in a condition reasonably safe for those who use them in a proper manner, and it is necessary for a complaining party to show more than the existence of a defect in the street and the injury.

2. **Municipal Corporations § 14— State highway within city limits — injury to user — liability of municipality**

Apart from defendant city's contract with the State Board of Transportation, the city has no responsibility for the maintenance or the condition of a bridge which is a part of the State highway system located within its boundaries and no liability to any person injured by reason of any defect in its condition, not due to an act of the city, or by reason of any failure to remove snow and ice therefrom.

3. **Municipal Corporations §§ 14, 22— contract with State Board of Transportation for maintenance of State highway — status of highway unchanged**

A contract between defendant city and the State Board of Transportation which provides for performance by the city of work which, apart from the contract, the Board would be under a duty to perform, and which provides that the work is to be performed by the city in accordance with the requirements of the Board and under the general administrative control of its engineer, but which does not provide for the liability of either party for injury or damage to users of the highway caused by defects therein or the accumulation of snow, ice or other substance thereon does not change the status of the street from one which is a part of the State highway system to one which is a part of the city system, and the status of the city under the contract is that of an employee of, or independent contractor with, the Board of Transportation.

4. **Contracts § 14— incidental beneficiary — no right to maintain action for breach**

Though the general rule is that one who is not a party to a contract may not maintain an action for its breach, there is an exception to that rule which permits such action to be maintained by a third party who is a beneficiary of the contract; however, a mere incidental beneficiary of the contract acquires by virtue of the promise no right against the promisor or the promisee.

5. **Contracts § 14— incidental beneficiary — intent of parties controlling**

The intention of the parties to the contract determines whether the plaintiff is a mere incidental beneficiary thereof.

6. **Contracts § 14; Municipal Corporations § 16— contract for maintenance of highway — plaintiff as incidental beneficiary**

The intention of defendant city and the State Board of Transportation in making a contract was none other than to provide the most convenient and economical method for doing necessary maintenance work on a highway which is a part of the State highway system located within the city, and the only beneficiaries contemplated were the parties to the contract themselves; consequently, while all travelers upon the highway would derive benefit from its being maintained in good condition, such benefit is incidental to the real purpose of the contract and is not of such a nature as to entitle one injured by the breach of the contract to sue for damages.

Chief Justice BOBBITT not sitting.

Justice HIGGINS concurs in result.

Justice SHARP concurring.

Justice HUSKINS dissenting.

APPEAL by plaintiffs from *McConnell, J.*, at the 13 May 1974 Session of FORSYTH, heard prior to determination by the Court of Appeals.

These are three actions for damages for wrongful death, personal injuries to a minor, and property damage and medical expenses incurred and to be incurred by the father of the minor child, all arising out of a one-car automobile accident on a bridge on Interstate Highway No. 40 in the City of Winston-Salem. The three complaints and the answers thereto are identical insofar as the basis of alleged liability is concerned.

The plaintiffs allege that a few minutes after 12 o'clock noon on Sunday, 7 January 1973, the deceased and her ten-year-old daughter, after attending church services in the City of Winston-Salem, were returning to their home. As they drove westwardly on Interstate Highway No. 40, they came to an overpass, known as the Hawthorne Bridge, on which there was an accumulation of snow and ice. There was a sharp curve on the bridge itself. The automobile driven by the deceased went out of control, struck the side rail of the bridge, knocked off one rail, went over the remaining rail and fell to the street below the bridge, causing injuries to the deceased, from which she died shortly thereafter, injuries to the minor child and damage to the vehicle.

The plaintiffs allege that the accident and resulting injuries were proximately caused by negligent inaction of the city, as set forth below, and that this was a breach of the city's contract with the State Highway Commission (now the Board of Transportation), of which contract the plaintiffs were third party beneficiaries. They allege that by this contract the city "assumed liability for the maintenance, upkeep and repair of certain roads, highways, streets and bridges, including the Hawthorne Bridge portion of Interstate 40, including interstate highways located within the boundaries of the City of Winston-Salem, North Carolina." They allege that the city broke the said contract and was negligent in the following respects (summarized):

(1) The city failed to repair the surface of Hawthorne Bridge so that it would not have in it holes, cracks, slick and rough places;

(2) The city failed to take any actions or precautions to provide for repairs on the bridge in order to correct defects existing in the pavement, which were known or should have been known by the city;

(3) The city failed on the morning of 7 January 1973 to take any action whatsoever to "reduce the dangers created by the preexisting conditions and atmospheric conditions on that date" and failed to place any sand, salt or other material on the bridge;

(4) The city took no action to reenforce or correct inadequate guard rails of the bridge;

(5) The city failed to remove rocks, pieces of pavement and other debris from the bridge which had been present on the roadway for several days and the presence of which thereon was or should have been known by the city;

(6) The city failed to correct the conditions which existed on the roadway, many of which had existed thereon for weeks and all of which had existed thereon for many hours prior to the accident, the atmospheric conditions prevailing on the morning of the accident having been predicted on the day prior thereto, and that the "City took no precautions on the morning of January 7, 1973, to correct or reduce the hazards" then and there existing;

(7) The city failed "to have any plan of action or appropriate measures to maintain, properly repair and keep the roads which was its responsibility * * * had no plans or measures to correct or reduce the hazard which existed on Hawthorne Road Bridge in such atmospheric conditions, and * * * failed * * * to follow any and all appropriate standards which apply to municipal corporations engaged in such responsibility";

(8) The city failed to have adequate personnel, equipment and procedures to deal with many of the conditions set out in the complaint;

(9) The city failed adequately to warn the deceased of the conditions alleged in the complaint;

(10) The said conditions then and there existing constituted an "ultrahazardous condition and nuisance."

The plaintiffs further alleged that the city, "in the exercise of the obligations herein described, used certain vehicles for which it had purchased liability insurance, and * * * on account of the use of vehicles, purchase of insurance and the failure in said responsibility the defendant expressly waived any alleged immunity for said acts, omissions and conditions."

They also allege that the city received (from the State Highway Commission) money for the performance of its responsibilities under the said contract and so "was acting in a non-governmental and proprietary capacity and waived any immunity at the time and place complained of."

The city, in its answers, asserts the following defenses (summarized):

(1) The complaint fails to state a claim against the defendant upon which relief can be granted;

(2) Notwithstanding the contract between the city and the State Highway Commission, the State had the sole responsibility for the maintenance of the bridge. The plaintiffs are not third party beneficiaries of the contract and the city was not negligent in any respect alleged in the complaint.

(3) The city had nothing to do with and no liability on account of the location, design or construction of the Hawthorne Bridge.

(4) The death, injuries to the minor child and damage to the automobile resulted from the negligence of the deceased driver in respects set forth in detail in the answers;

(5) The alleged negligent acts or omissions resulted from the discharge of "a governmental or legislative function of the State Highway Commission in that the negligence charged in the Complaint is based solely upon a defect or negligence in the construction and upkeep of Hawthorne Bridge on Interstate 40, a State highway system street, and thus any work on the part of the City in assisting the State to fulfill this responsibility would constitute the carrying out of a governmental function for the State for which there could be no liability on the part of the State or City."

(6) The death, injury to the minor child and damage to the vehicle resulted from "an unavoidable accident and * * * an act of God for which the City of Winston-Salem cannot be held liable."

In each case, the city moved for summary judgment "on the grounds that the alleged acts of negligence, even if they occurred (which is denied), were the sole responsibility of the State of North Carolina and not the City of Winston-Salem; and, therefore, there is no genuine issue as to any material fact

and the defendant City of Winston-Salem is entitled to Judgment as a matter of law."

In each case, the court allowed the motion for summary judgment and dismissed the action, finding and concluding that:

> "As to the question presented by the Motion for Summary Judgment the record shows there is no genuine issue as to any material fact on the question of whether any alleged acts of negligence and any other claims for relief, even if they occurred (which is denied by defendant and which alleged negligence and other claims for relief are not determined by this judgment) were the sole responsibility of the State of North Carolina and not the City of Winston-Salem, and the City of Winston-Salem cannot be held liable for said acts of negligence and any other claims for relief, and that the defendant is entitled to judgment as a matter of law."

From these judgments, the plaintiffs appeal.

The above mentioned contract between the State Highway Commission and the city contained the following provisions material to this litigation:

> "1. The Municipality shall provide for the routine maintenance, upkeep and repair of the State Highway System streets within the Municipality in accordance with the requirements of the Commission under the general administrative control of the Commission's Division Engineer. * * *
>
> "3. The Division Engineer shall notify the Municipality in writing at the beginning of each fiscal year * * * of the amount of money estimated to be available to the Municipality for the maintenance and repair of the State Highway System streets within the Municipality. * * *
>
> "4. If the Municipality desires to subcontract a particular job * * * the Municipality shall forward the plans, specifications, proposals and other bid documents * * * to said Division Engineer FOR APPROVAL PRIOR TO ADVERTISING FOR BIDS. Further, the Municipality shall submit the tabulation of bids to said Division Engineer, who upon recommending the award of the contract, shall forward the

information to the Commission in Raleigh, North Carolina, * * * for the concurrence in the Municipality's award of bids to the lowest qualified bidder.

* * * *

"6. The Municipality shall submit to the Commission a quarterly invoice in the form approved by the State Highway Commission, for work completed under the terms of this Agreement. The Commission shall reimburse the Municipality within thirty (30) days after receipt of the invoice for the costs incurred in furnishing personnel, labor, equipment, and materials for the work performed."

An affidavit by John H. Davis, Chief Engineer for the State Highway Commission (now the North Carolina Department of Transportation, Division of Highways), stated that the Commission adopted a set of policies dealing with such contracts, which policies provided:

"The State Highway System streets and highways, at all times, are the responsibility of the State Highway Commission, and this overall responsibility is not shifted to the municipality by reason of their [sic] assumption, under reimbursable contract, of maintenance, construction, or improvement on behalf of the State Highway Commission as outlined in G.S. 136-66.1."

The deposition of Joe H. Berrier, Director of Public Works for the city, stated that the Hawthorne Bridge and curve were designed and constructed by contractors under contract with the State Highway Commission and the Commission determined what kind of surfacing and safety devices, including the guard rail, the bridge would have.

The plaintiffs' answers to interrogatories submitted by the defendant indicated that the plaintiffs would produce witnesses who would testify that snow began falling throughout the Winston-Salem and surrounding area about 9:30 a.m. on 7 January, that at the time of the accident there was an accumulation of snow at the Hawthorne Bridge and that there were defects in the surface of the bridge on the day prior to the accident and approximately one week later.

William G. Pfefferkorn, Charles O. Peed, and M. Beirne Minor for plaintiffs.

Womble, Carlyle, Sandridge & Rice by W. F. Womble, Allan R. Gitter, and Roddey F. Ligon, Jr., for defendant.

LAKE, Justice.

Upon this appeal, we do not reach the question of whether the city was negligent or otherwise broke its contract with the Board of Transportation, formerly called the State Highway Commission. The trial court granted summary judgment for the city on the ground that if the city, having so contracted with the Board of Transportation, failed in all of the respects alleged in the complaints, the plaintiffs have no cause of action against the city for the death, personal injuries and damages resulting from any or all of such failures.

[1] The liability of a city or town for damages for injuries sustained by a user of its streets, due to the defective condition of the street, nothing else appearing, was thus stated by Justice Parker, later Chief Justice, speaking for this Court in *Smith v. Hickory,* 252 N.C. 316, 113 S.E. 2d 557:

> "The governing authorities of a town or city have the duty imposed upon them by law of exercising ordinary care to maintain its streets and sidewalks in a condition reasonably safe for those who use them in a proper manner. Liability arises only for a negligent breach of duty, and for this reason it is necessary for a complaining party to show more than the existence of a defect in the street or sidewalk and the injury * * *."

To the same effect, see: *Waters v. Roanoke Rapids,* 270 N.C. 43, 153 S.E. 2d 783; *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558; *Faw v. North Wilkesboro,* 253 N.C. 406, 117 S.E. 2d 14; *Gettys v. Marion,* 218 N.C. 266, 10 S.E. 2d 799; *Bailey v. Winston,* 157 N.C. 252, 72 S.E. 966; *Fitzgerald v. Concord,* 140 N.C. 110, 52 S.E. 309; *Bunch v. Edenton,* 90 N.C. 431.

By virtue of applicable statutes, a different rule applies, nothing else appearing, when the street on which the injury occurred is a part of the State highway system. G.S. 160A-297(a) provides:

> *"Streets under authority of Board of Transportation.*— (a) A city shall not be responsible for maintaining streets or bridges under the authority and control of the Board of Transportation, *and shall not be liable for injuries to persons or property resulting from any failure to do so."* (Emphasis added.)

G.S. 136-45 provides:

"*General purpose of law: control, repair and maintenance of highways.*—The general purpose of the laws creating the Board of Transportation is that said Board of Transportation shall take over, establish, construct, and maintain a statewide system of hard-surfaced and other dependable highways * * * and for the further purpose of permitting the State to assume control of the State highways, repair, construct, and reconstruct and maintain said highways at the expense of the entire State, and to relieve the counties and cities and towns of the State of this burden."

G.S. 136-47 provides:

"*Routes and maps; objections; changes.*—The designation of all roads comprising the State highway system as proposed by the Board of Transportation shall be mapped, and * * * the * * * street-governing body of each city or town in the State shall be notified of the routes that are to be selected and made a part of the State system of highways; and if no objection or protest is made by the * * * street-governing body of any city or town in the State within 60 days after the notification before mentioned, then and in that case the said roads or streets, to which no objections are made, shall be and constitute links or parts of the State highway system * * *."

G.S. 136-66.1 provides:

"*Responsibility for streets inside municipalities.*—Responsibility for streets and highways inside the corporate limits of municipalities is hereby defined as follows:

(1) The State Highway System.—The State highway system inside the corporate limits of municipalities shall consist of a system of major streets and highways necessary to move volumes of traffic efficiently and effectively from points beyond the corporate limits of the municipalities through the municipalities and to major business, industrial, governmental and institutional destinations located inside the municipalities. The Board of Transportation shall be responsible for the maintenance, repair, improvement, widening, construction and reconstruction of this system. * * *

(2) The Municipal Street System.—In each municipality the municipal street system shall consist of those streets and highways accepted by the municipality which are not a part of the State highway system. The municipality shall be responsible for the maintenance, construction, reconstruction, and right-of-way acquisition for this system.

(3) Maintenance of State Highway System by Municipalities.—Any city or town, by written contract with the Board of Transportation, may undertake to maintain, repair, improve, construct, reconstruct or widen those streets within municipal limits which form a part of the State highway system. * * * All work to be performed by the city or town under such contract or contracts shall be in accordance with Board of Transportation standards, and the consideration to be paid by the Board of Transportation to the city or town for such work, whether in money or in services, shall be adequate to reimburse the city or town for all costs and expenses, direct or indirect, incurred by it in the performance of such work * * *."

G.S. 136-41.3 provides:

"Use of funds; records and annual statement; excess accumulation of funds; contracts for maintenance, etc., of streets.—* * * The Board of Transportation within its discretion is hereby authorized to enter into contracts with municipalities for the purpose of maintenance, repair, construction, reconstruction, widening or improving streets of municipalities. And the Board of Transportation in its discretion may contract with any city or town which it deems qualified and equipped so to do that the city or town shall do the work of maintaining, repairing, improving, constructing, reconstructing, or widening such of its streets as form a part of the State highway system * * *."

[2] Interstate Highway No. 40, including the Hawthorne Bridge, is part of the State highway system over which the Board of Transportation had and has authority. It is clear that, under the foregoing statutes, apart from its contract with the Board of Transportation, the city has no responsibility for the maintenance or the condition of the Hawthorne Bridge and no liability to any person injured by reason of any defect in its

condition, not due to an act of the city, or by reason of any failure to remove snow and ice therefrom. In our opinion, it is equally clear that the above quoted provisions of G.S. 160A-297(a) are intended to apply where there is no such contract and do not, per se, absolve a city from liability for injury, if any, imposed upon it by such contract. Consequently, the matters alleged in the complaints, assuming the allegations to be true, do not give to the plaintiffs a right of action against the city for the death of Mrs. Matternes, the injuries sustained by her daughter or the damage to the automobile and the medical expenses incurred by the father of the child, unless liability for these arises out of the contract between the city and the Board of Transportation.

[3] The material portions of the contract are quoted above. It does not contain any specific provision as to the liability of either party thereto for injury or damage to users of the highway caused by defects therein or the accumulation of snow, ice or other substance thereon. It provides for the performance by the municipality of work, which, apart from the contract, the Board of Transportation would be under a duty to perform, and for the compensation to be paid to the city for such work. It provides that the work is to be performed by the city in accordance with the requirements of the Board of Transportation and under the general administrative control of its engineer. Such contract does not change the status of the street from one which is a part of the State highway system to one which is part of the city system, and so bring it within the general rule, above quoted, concerning a city's duty to travelers upon its streets. See, *Taylor v. Hertford,* 253 N.C. 541, 117 S.E. 2d 469. The status of the city under this contract is that of an employee of, or independent contractor with, the Board of Transportation.

It is to be observed that the plaintiffs do not complain of any act of the city which created, or increased the hazard of, any condition upon the Hawthorne Bridge or upon the highway of which it is a part. The question of a city's liability for so doing, with or without a contract with the Board of Transportation, is not before us. The complaint is that the city did nothing; that is, that the city broke its contract with the Board of Transportation by failing to correct or to remove a dangerous condition not the result of any act of the city. The liability of the city to the Board of Transportation for such breach of the contract is not before us.

[6] The question upon this appeal is, Can an individual user of a street, which is part of the State highway system, who sustains personal injuries or property damage as the result of a dangerous condition of such street, maintain an action for damages against a city which contracted with the Board of Transportation to repair or remove such condition and then did nothing whatsoever about it? The answer is, No.

[4] The general rule is that one who is not a party to a contract may not maintain an action for its breach. The plaintiffs contend that they fall within the well recognized exception to the general rule which permits such an action to be maintained by a third party who is a beneficiary of the contract. The scope and effect of the third party beneficiary rule was clearly stated by Justice Huskins, speaking for this Court in *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E. 2d 273. There, we held that a summary judgment for the defendant should have been entered in a suit for breach of a construction contract, for the reason that the plaintiff was a mere incidental beneficiary of the contract and, as such, could not maintain an action for its breach. We said:

> "The American Law Institute's Restatement of Contracts provides a convenient framework for analysis. Third party beneficiaries are divided into three groups: *donee* beneficiaries, where it appears that the 'purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary'; *creditor* beneficiaries, where 'no purpose to make a gift appears' and 'performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary'; and *incidental* beneficiaries, where the facts do not appear to support inclusion in either of the above categories. Restatement of Contracts § 133 (1932). While duties owed to donee beneficiaries and creditor beneficiaries are enforceable by them, Restatement of Contracts §§ 135, 136, a promise of incidental benefit does not have the same effect. 'An incidenal beneficiary acquires by virtue of the promise no right against the promisor or the promisee.' Restatement of Contracts § 147.
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> * * * *
>
> "Restatement § 133 correctly states the law of this State and we therefore expressly approve the Restatement formula."

To the same effect, see: Williston on Contracts, 3rd Ed., §§ 356, 402; Corbin on Contracts, §§ 776, 782; 17 AM. JUR. 2d, Contracts, §§ 305, 307.

[5] The intention of the parties to the contract determines whether the plaintiff is a mere incidental beneficiary thereof. *Vogel v. Supply Co.* and *Supply Co. v. Developers, Inc., supra;* 17 AM. JUR. 2d, Contracts, §§ 304, 305, 307. "A third person cannot maintain an action upon a simple contract merely because he would receive a benefit from its performance or because he is injured by the breach thereof." *Kelly v. Richards,* 95 Utah 560, 83 P. 2d 731, 129 A.L.R. 164.

In *Moch Co. v. Rensselaer Water Co.,* 247 N.Y. 160, 159 N.E. 896, it was held that an individual whose building is burned by reason of the inadequacy of water pressure at fire hydrants, in violation of the water company's contract with the city, cannot maintain an action against the company, a result contrary to that reached by this Court in *Gorrell v. Water Supply Co.,* 124 N.C. 328, 32 S.E. 720. Speaking through Chief Justice Cardozo, the New York Court of Appeals said:

> "In a broad sense it is true that every city contract, not improvident or wasteful, is for the benefit of the public. More than this, however, must be shown to give a right of action to a member of the public not formally a party. The benefit, as it is sometimes said, must be one that is not merely incidental and secondary. * * * It must be primary and immediate in such a sense and to such a degree as to bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost. The field of obligation would be expanded beyond reasonable limits if less than this were to be demanded as a condition of liability. A promisor undertakes to supply fuel for heating a public building. He is not liable for breach of contract to a visitor who finds the building without fuel and thus contracts a cold. The list of illustrations can be indefinitely extended. The carrier of the mails under contract with the government is not answerable to the merchant who has lost the benefit of a bargain through negligent delay."

Gorrell v. Water Co., supra, decided by a closely divided court and recognized in the majority opinion therein as contrary to the great weight of authority from other jurisdictions, is dis-

tinguishable from the present case in that there the contract between the city and the water supply company granted to the company a franchise to carry on within the city a public utility business. One accepting and operating under such a franchise assumes duties and incurs obligations more extensive than those incurred by the promisor in an ordinary contract. See: *Hayes v. Michigan Central R. R.*, 111 U.S. 228, 4 S.Ct. 369, 28 L.Ed. 410; Annot., 38 A.L.R. 403, 504, 536.

Also distinguishable from the present case are decisions holding that one injured by a defect in a city street may maintain an action against a street railroad company which contracted with the city to keep that portion of the street in repair. See: *Fowler v. Chicago Railways,* 285 Ill. 196, 120 N.E. 635; *Phinney v. Boston Elevated Railway,* 201 Mass. 286, 87 N.E. 490. In such case, as above noted, the city-promisee is, itself, subject to suit for negligent failure to maintain the street in a reasonably safe condition. If recovery were had against it by the injured party, the city could sue its promisor to recoup its loss. Thus the suit by the injured party against the promisor avoids needless circuity of action, the contract falls into the creditor-beneficiary classification and, under the rule of *Lawrence v. Fox,* 20 N.Y. 268, the action by the injured party may be maintained. In the present case, on the contrary, the injured party could not proceed against the State for the failure of the Board of Transportation to remove a dangerous condition not caused by any act of the Board.

The Restatement of Contracts § 145 states:

> "A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing to do so, unless,
>
> (a) an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences, or
>
> (b) the promisor's contract is with a municipality to render services the non-performance of which

would subject the municipality to a duty to pay damages to those injured thereby."

The above quoted "policy" adopted by the State Highway Commission, predecessor to the Board of Transportation, shows it was not the purpose of this contract to shift to the city the ultimate responsibility for maintaining this bridge.

[6] We think it clearly appears that the intention of the parties in making this contract was none other than to provide the most convenient and economical method for doing the necessary maintenance work on the highway and that the only beneficiaries contemplated were the parties to the contract themselves. Consequently, while all travelers upon Highway I-40 would derive benefit from its being maintained in good condition, such benefit is incidental to the real purpose of the contract and is not of such a nature as to entitle one injured by the breach of the contract to sue for damages.

The cases upon which the plaintiffs place their chief reliance are distinguishable. *Hotels, Inc. v. Raleigh*, 268 N.C. 535, 151 S.E. 2d 35, differs from the present case in that there, as appears more clearly in the opinion upon rehearing, 271 N.C. 224, 155 S.E. 2d 543, the complaint alleged the city had adopted the stream which overflowed as a part of its storm sewer drainage system and also alleged affirmative acts of negligence by the city, which created an obstruction of the stream and caused the overflow from which the injury to the plaintiff resulted. In *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E. 2d 551, the defendant, a contractor with the State Highway and Public Works Commission, was sued for damages from personal injury alleged to have been proximately caused by the defendant's negligence "in pursuing an affirmative course of conduct, i.e., paving a highway." There, as the Court expressly stated, the right of the plaintiff to sue the defendant for breach of the defendant's contract with the State Highway and Public Works Commission was not before the Court. *Pickett v. Railroad*, 200 N.C. 750, 158 S.E. 398, is distinguishable from the present case in that, at the time of that decision, there was no statute in existence comparable to G.S. 160A-297(a).

Assuming that the plaintiffs would be able to establish by evidence each of the alleged failures of the city to perform its contract with the Board of Transportation, the plaintiffs would not thereby establish a cause of action against the city. Con-

sequently, there was no error in the allowance of the defendant's motion for summary judgment.

Affirmed.

Chief Justice BOBBITT not sitting.

Justice HIGGINS concurs in result.

Justice SHARP concurring:

I concur in the majority opinion upon the following premise: Under the applicable statutes, the City's agreement to maintain State Highway system streets within the City in accordance with the Board's requirement and under the control of its division engineer made the City the Board's employee. The contract, specifically authorized by statute, did not transfer to the City the responsibility for the maintenance, repair, and upkeep of the streets, which G.S. 136-66.1 imposed upon the Board. Nor did it recreate in the City the liability from which G.S. 160A-297(a) specifically absolves it for injuries to persons and property resulting from defects in city streets under the Board's authority. Had the legislature intended the Board's contract with the City for street maintenance to reimpose liability on the City for injuries resulting from defects in State Highway system streets, it seems that it would have so provided. In my view, neither the City's total immunity nor the Board's liability under the Tort Claims Act was affected by the contract. Summary judgment for the defendant was, therefore, properly allowed.

From that portion of the majority opinion which discusses the rights of third party beneficiaries to a contract to maintain an action for its breach, I must disassociate myself. I do not agree that members of the traveling public are merely "incidental beneficiaries" of the contract which defendant City made with the Board. Further, it is not my intention to overrule or question *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899). I adhere to the rule of law enunciated in that case, which is deeply embedded in our jurisprudence.

Justice HUSKINS dissenting.

The majority appears to be persuaded that the complaint alleges the City *failed* to correct or remove a dangerous condi-

tion, as opposed to alleging *affirmative acts* of negligence. Reasoning that the plaintiff could not proceed against the State under the Tort Claims Act for failure of the Board of Transportation to remove a dangerous condition, the Court holds that the plaintiff could not proceed against the City which was under contract with the Board of Transportation to remove such a condition. I respectfully dissent from that view.

Prior to the Tort Claims Act, the doctrine of governmental immunity prevented suits against the State on public policy grounds. Prosser, Law of Torts § 131 (1971); Davis, Tort Liability of Governmental Units, 40 Minn. L. Rev. 751 (1956). The North Carolina Tort Claims Act, G.S. § 143-291, following the trend in other states partially abrogating the doctrine of governmental immunity, abolishes the doctrine in those claims against the State in which a State officer, employee, involuntary servant or agent has committed a negligent *act* while acting within the scope of his office, employment or agency. *See* Comment, Tort Claims Against the State, 29 N.C.L. Rev. 416 (1951). However, the doctrine is retained when a negligent omission has occurred. *See Flynn v. State Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571 (1956); Byrd, Recent Developments in North Carolina Tort Law, 48 N.C.L. Rev. 791 (1970). The State is not liable in cases of negligent omissions because the doctrine of State immunity still applies to omissions to act even though it is a negligent omission. The majority now extends this immunity to an "employee" or "independent contractor" under contract with the State when sued for negligent omissions arising out of the performance of that contract.

While a contractor with the State should and does come under the umbrella of the State's immunity when it has merely performed the contract, such contractor should be liable for its own negligence in performing the contract. *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530 (1968); *Highway Commission v. Reynolds Co.,* 272 N.C. 618, 159 S.E. 2d 198 (1968); Prosser, Law of Torts § 131 (1971). In measuring such negligence, the standard should be that of *reasonable care* by a contractor.

The majority correctly states the rule that the City is under a duty to use due care to keep *its own* streets and sidewalks in reasonably safe condition for ordinary use. *Mosseller v. Asheville,* 267 N.C. 104, 147 S.E. 2d 558 (1966); *Hunt v. High Point,* 226 N.C. 74, 36 S.E. 2d 694 (1946); *see also* G.S. § 160A-296. The due care standard applies to all highway maintenance

whether the highway is under State or local government control. It is well settled in this jurisdiction that negligence may consist of an act or omission. *Flynn v. Highway Commission, supra;* Note, Tort Claims Act—Distinction Between Nonfeasance and Misfeasance, 36 N.C.L. Rev. 352 (1958), and cases cited therein. Accordingly, the City would be negligent under certain circumstances for the failure to remove snow and ice from its streets and sidewalks. *Browder v. Winston-Salem,* 231 N.C. 400, 57 S.E. 2d 318 (1950); *Love v. Asheville,* 210 N.C. 476, 187 S.E. 562 (1936); *Hartsell v. Asheville,* 164 N.C. 193, 80 S.E. 226 (1913); *Cresler v. Asheville,* 134 N.C. 311, 46 S.E. 738 (1904); *see* Annotation, Duty of Towns and Townships as to Snow and Ice in Highways, 27 A.L.R. 1104 (1923); Ferrell, City Liability of North Carolina Cities and Towns for Personal Injuries and Property Damage Arising From the Construction, Maintenance, and Repair of Public Streets, 7 Wake Forest L. Rev. 143 (1971). Under this same standard the Board of Transportation would be negligent if it unreasonably failed to remove snow and ice from State streets and roads. However, no liability devolves upon the State and its Board of Transportation for such negligence because of immunity from liability for negligent omissions under the Tort Claims Act. The City has no such immunity in this situation—either under the common law, the statutes relied upon by the majority, or under the contract between the City and the Board of Transportation. If the City is to escape liability, its nonliability should be based upon a finding of no negligence under the circumstances, and not upon a legal theory that the City is immune from liability for negligent omissions.

The evidence on the affidavits establishes that the City voluntarily undertook the contractual duty to maintain State roads within the City limits of Winston-Salem. The State and traveling public relied, and had a right to rely, upon the City's promise to fulfill that obligation. The established rule followed by this Court is that an action in tort, founded upon a breach of contract, can be maintained by one not a party or privy to a contract when the act complained of is imminently dangerous to the lives and property of others. *Jones v. Elevator Co.,* 231 N.C. 285, 56 S.E. 2d 684 (1949). Such an action is not based upon the breach of the contract, but on the alleged negligence committed in its breach, which negligence constitutes a breach of duty imposed *by law. Jones v. Elevator Co., supra.* The rule was

articulated by Justice Sharp, speaking for this Court in *Toone v. Adams,* 262 N.C. 403, 137 S.E. 2d 132 (1964), as follows:

> " . . . The parties to a contract impose upon themselves the obligation to perform it; the law imposes upon each of them the obligation to perform it with ordinary care and they may not substitute a contractual standard for this obligation. A failure to perform a contractual obligation is never a tort unless such nonperformance is also the omission of a legal duty. . . . The contract merely furnishes the occasion, or creates the relationship which furnishes the occasion, for the tort. . . .
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> * * * *
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> The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care to protect others from harm and a violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. . . . " (citations omitted.)

See also, A.L.I., Restatement (Second) of Contracts § 145, Comment b (Rev. Ed. Tentative Drafts 1973); 2 A.L.I., Restatement (Second) of Torts § 324A (1965); 2 A.L.I., Restatement (Second) of Agency § 354 (1958).

The *legal duty* imposed upon a highway contractor with the Board of Transportation (formerly the State Highway and Public Works Commission) was stated by this Court in *Council v. Dickerson's, Inc.,* 233 N.C. 472, 64 S.E. 2d 551 (1951), as follows:

> "When the defendant undertook to perform the promised work under his contract with the State Highway and Public Works Commission, the positive legal duty devolved upon him to exercise *ordinary care* for the safety of the general public traveling over the road on which he was working. . . . " (Citations omitted.) (Emphasis added.)

As previously stated, ordinary care would encompass a duty to exercise reasonable diligence in removing ice and snow from the streets and in correcting other dangerous conditions.

The majority distinguishes *Council v. Dickerson's, Inc.* on the ground that the contractor therein was engaged in the affirmative course of conduct of "paving a highway." In my

view, undertaking to maintain State streets within the city limits is no less an "affirmative course of conduct" than "paving a highway." Here, the City, pursuant to the contract with the Board of Transportation, had engaged in the maintenance of State roads in Winston-Salem prior to the day of decedent's accident. On that day the City had an employee surveying the streets to determine whether snow and ice accumulation necessitated removal operations. It had work crews on duty at that time, and the crews actually engaged in snow and ice removal operations later that day. To say that this is nonfeasance is an unduly restrictive application of that doctrine. In *Flynn v. Highway Commission,* 244 N.C. 617, 94 S.E. 2d 571 (1956), this Court held that negligence may consist of either an act or omission. In that case plaintiff charged that the State Highway Commission failed to repair a break or hole in the road surface. If the failure to fill the hole had been mere nonfeasance, there would have been *no negligence at all* and it would have been unnecessary for the Court to consider whether liability ensued under the Tort Claims Act.

The concept of nonfeasance means the complete nonperformance of a promise, *i.e.,* not doing the thing at all. Prosser, The Law of Torts § 92 (1971). In this case the promise was to maintain State streets within the City limits. Repairing holes and removing ice, snow and debris were merely some of the obligations necessary to fulfill the promise.

The majority determines that the City had no duty or liability to the motoring public under the contract. This allows the City to contract to maintain State roads for a consideration, and then do nothing, collect the consideration, and incur no liability. The Legislature never intended to authorize such an arrangement.

The City contracted to "provide routine maintenance, upkeep and repair of the State Highway System streets within the Municipality." The majority holds that members of the traveling public, who are injured by the breach of this contract, are mere *incidental beneficiaries* and cannot maintain an action for damages against the City based on the breach. This conclusion is based upon a finding that the only beneficiaries contemplated by the parties to the contract were the parties themselves since the sole purpose of the contract was to provide the most convenient and economical method for maintaining State roads within the City limits of Winston-Salem. I think the State main-

tains its public streets and highways for the benefit of public users. *See* 10 McQuillin, Municipal Corporations § 30.39 (3rd Ed. Rev. 1966). When the State enters a contract for maintenance of State roads, people who use the roads receive the benefit.

The majority, in effect, overrules a line of cases in this jurisdiction dealing with the right of a resident of a municipality to sue a water company under contract with the municipality to provide water when the resident has been injured by the company's breach of that contract. The reasoning in this line of cases, which I think applies to the present situation, was stated by this Court in *Gorrell v. Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899), as follows:

> "It is true, the plaintiff is neither a party nor privy to the contract, but it is impossible to read the same without seeing that, in warp and woof, in thread and filling, the object is the comfort, ease and security from fire of the people, the citizens of Greensboro. This is alleged by the eleventh paragraph of the complaint, and is admitted by the demurrer. The benefit to the nominal contracting party, the city of Greensboro, as a corporation, is small in comparison, and, taken alone, would never have justified the grants, concessions, privileges, benefits and payments made to the water company. Upon the face of the contract the principal beneficiaries of the contract, in contemplation of both parties thereto, were the water company on the one hand and the individual citizens of Greensboro on the other. The citizens were to pay the taxes to fulfill the money consideration named, and furnishing the individual citizens with adequate supply of water and the protection of their property from fire was the largest duty assumed by the company. One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach. . . .
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> . . . 'The water company did not covenant to prevent occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to

a designated height in the standpipe, and if it failed or refused to comply with that undertaking, and such breach was the proximate cause of destruction of the plaintiff's property, which involves issues of fact for determination by a jury, there exists no reason for its escape from answering in damages that would not equally avail in case of any other breach of contract.' "

This decision has been expressly sustained on at least two occasions and relied on as authority numerous times. *See, e.g., Potter v. Water Company,* 253 N.C. 112, 116 S.E. 2d 374 (1960); *Powell v. Water Co.,* 171 N.C. 290, 88 S.E. 426 (1916); *Morton v. Water Co.,* 168 N.C. 582, 84 S.E. 1019 (1915); *Jones v. Water Co.,* 135 N.C. 553, 47 S.E. 615 (1906). While repeated applications of a bad rule of law do not transform it into a good rule of law, I feel that the *Gorrell* rule is the better reasoned one even though followed by a minority of jurisdictions. *See* Corbin, Liability of Water Companies for Losses by Fire, 19 Yale L. J. 425 (1910); Seavey, Reliance Upon Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913 (1951); Seavey, Mr. Justice Cardozo and the Law of Torts, 52 Harv. L. Rev. 372, 48 Yale L. J. 390, 39 Col. L. Rev. 20 (1939); Sunderland, The Liability of Water Companies for Fire Losses, 3 Mich. L. Rev. 442 (1905); Note, Torts—Liability of Water Company to Individuals For Failure to Furnish Water, 26 Temple L. Q. 214 (1953); Prosser, Law of Torts, § 93 (1971).

The majority adopts the reasoning of the New York Court of Appeals in *Moch Co. v. Rensselaer Water Co.,* 247 N.Y. 160, 159 N.E. 896 (1928), and distinguishes the *Gorrell* line of cases on grounds that those cases involved a franchise arrangement with the city, whereby the water company carried on a public utility business within the city. The theory is that a franchise imposes greater duties and obligations than an "ordinary contract."

The *Moch Company* case arose out of facts almost identical to those in *Gorrell.* The contract in that case could also be characterized as a franchise agreement. However, the majority adopts the reasoning of the New York Court as more appropriate for application to this case than the prior reasoning of this Court on the same issue. I disagree. I do not think a contract to supply water to a city imposes greater duties and obligations than a contract to maintain State roads within the same city.

It should be noted that the majority rule, followed by the New York Court, is based upon a fear of placing a catastrophic

burden on a defendant in the event a large portion of a city is lost due to fire and water pressure failure. Prosser, Law of Torts § 93 (1971). This policy was pointed out by the New York Court in *Moch Company* when it noted that "the field of obligation would be expanded beyond reasonable limits" by the contrary rule. This fear is unwarranted in the present situation. Cities have long been liable without catastrophic results for negligent acts and omissions when maintaining their own streets, and for negligent acts in maintaining State streets. Likewise, the State has been liable for many years under the Tort Claims Act for its negligent acts in maintaining State roadways and has not incurred any catastrophic burdens.

Finally, it is argued, and apparently assumed by the majority, that G.S. 160A-297(a) absolves the City of liability for negligent omissions committed while maintaining State streets and bridges. That statute provides that a City is *not responsible* for maintaining State highways and *not liable* for damages arising from any failure to do so. This simply means that the City is not liable for failing to do that which it had no responsibility to do in the first place. However, once the City contracts with the State under G.S. 136-66.1(3) and assumes the responsibility for maintaining State streets and bridges within its jurisdiction, it is then subject to the general principles of tort and contract law applicable to that responsibility.

The majority opinion correctly observes that the possible issues on this motion have been restricted by the parties and lower courts to the sole question of whether a City is liable for a negligent omission while maintaining State streets and highways. My opinion, based on the foregoing reasons, is that the City should be held liable for such an omission. Therefore, defendant's motion for summary judgment should have been denied.

Denial of the motion for summary judgment would not relieve plaintiff of the burden of showing that the City breached a legal duty, and that the alleged death and injury was caused by such breach. Plaintiff would still face the hazard of directed verdict at the close of his evidence if he failed to show negligence.

For these reasons I respectfully dissent.

SAM ZIMMERMAN v. HOGG & ALLEN, PROFESSIONAL ASSOCIATION, SUCCESSOR TO GREENE, HOGG & ALLEN, PROFESSIONAL ASSOCIATION, AND GLENN L. GREENE, JR.

No. 77

(Filed 26 November 1974)

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

The party moving for summary judgment has the burden of establishing the absence of any triable issue, and the court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence. G.S. 1A-1, Rule 56.

2. **Rules of Civil Procedure § 56— motion for summary judgment — essentials of proof**

The burden on the party moving for summary judgment may be carried by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim; if the moving party meets this burden, the opposing party must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing.

3. **Rules of Civil Procedure § 56— material issue — genuine issue**

An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail; a genuine issue is one which can be maintained by substantial evidence.

4. **Corporations § 7; Principal and Agent § 5— corporate agent — apparent authority**

When a corporate agent acts within the scope of his apparent authority, and a third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent.

5. **Principal and Agent § 5— misconduct of third person — burden of bearing loss**

Where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence or by his negligent conduct made it possible for the loss to occur must bear the loss.

6. **Principal and Agent § 5— apparent authority**

Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses, and the determination of the principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had conferred upon his agent.

7. **Corporations § 7; Principal and Agent § 5— duty to know authority of agent — general agent — corporate president**

The rule that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation; in such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent.

8. **Attorney and Client § 5; Corporations § 7; Principal and Agent § 5— misappropriation of client's funds by attorney — liability of professional association**

In an action against a professional association of attorneys engaged in the practice of labor law to recover funds given by an officer of a corporate client to the senior member for investment in stock and misappropriated by the senior member, plaintiff's evidence on motion for summary judgment by defendant raised a genuine issue of material fact as to whether the senior member was acting within the scope of his apparent authority and as agent for the professional association in receiving the funds for investment where it tended to show that the charter of the professional association granted it very broad powers, the exercise of which was chiefly in the hands of the senior member, who was also the president and principal stockholder; that while the senior member was on business trips to attend to the legal business of a corporate client, he accepted funds for investment purposes from employees of the corporate client; that these corporate employees were assured that such moneys would be handled through the professional association; that such activities by the senior member had occurred over a period of several years; and that other members of the professional association had knowledge of such dealings, it being reasonable to infer from the evidence that the investment services rendered by the senior member to the employees of the corporate client were for the purpose of obtaining good will of the corporation to insure the continuance of a profitable association between the client and the professional association.

Chief Justice BOBBITT not sitting.

ON appeal pursuant to G.S. 7A-30(2), from the decision of the Court of Appeals, 22 N.C. App. 544, 207 S.E. 2d 267.

Plaintiff, an officer and employee of Holly Farms Poultry Industries, Inc. (hereafter referred to as Holly Farms), sued defendant, Hogg & Allen, Professional Association (P.A.), successor to Greene, Hogg & Allen, P.A. (hereafter referred to as Professional Association) and defendant Glenn L. Greene, Jr., individually (hereafter referred to as Greene) for breach of contract and breach of trust with regard to the handling of a certain stock purchase transaction.

Holly Farms had engaged Professional Association to represent it in labor relations and to act as labor counsel for the

corporation. Professional Association had sought to limit its practice of law to this area. The charter of the Association, however, issued under Florida law, contained no such limitation. To the contrary, it granted very broad powers to the entity, as evidenced by the following excerpt from the Charter:

> "ARTICLE II — GENERAL NATURE OF BUSINESS AND POWERS
>
> The general nature of the business to be transacted by this corporation shall be as follows:
>
> (a) To engage in every phase and aspect of the practice of law and to render professional legal services to any and all persons, firms, corporations, and other entities, and to the general public, in the State of Florida and all of [sic] otherwise, throughout the world, unless prohibited by law.
>
> (b) To invest its funds in real estate, mortgages, stocks, bonds or other types of investments, and to own real or personal property necessary for the rendering of the aforesaid professional services.
>
> (c) In general, to do all things and perform all acts necessary and proper for the accomplishment of the aforesaid purposes or necessary or incidental to the achievement of the objectives of the corporation, and to have and exercise all powers of any nature whatsoever permitted or conferred by law upon corporations in general, unless specifically prohibited by the Professional Services Corporation Act of the State of Florida, including and [sic] subsequent amendments thereto;
>
> (d) The foregoing clauses shall be construed both as objects and powers, and it is hereby expressly provided that the foregoing enumeration of special powers shall not be held to limit or restrict in any manner the powers of this corporation."

Defendant Greene, allegedly acting as agent for Professional Association, entered into a contract with plaintiff whereby Greene was to obtain for, and sell, transfer, and deliver to, plaintiff three thousand shares of the common stock of Kentucky Fried Chicken, Inc., for $24,000. When he received the money, Greene wrote the following letter to plaintiff:

"LAW OFFICES
GREENE, HOGG & ALLEN
PROFESSIONAL ASSOCIATION
SUITE 602-607
THE MUTUAL OF OMAHA BUILDING
1201 BRICKELL AVENUE
MIAMI, FLORIDA 33131
May 3, 1971

Mr. Sam Zimmerman
c/o Holly Farms Poultry Industries, Inc.
Monroe, North Carolina

Dear Sam:

This is to acknowledge receipt of your check in the amount of $24,000.00 and also receipt of Mr. Garmon's check in the amount of $3600.00. This will entitle you to 2,000 shares of Kentucky Fried Chicken, and Mr. Garmon will be entitled to 300 shares.

It now appears that the merger between Kentucky Fried Chicken and Heublein is official, and you will receive .53 of Heublein's stock for each share of Kentucky Fried Chicken stock. It will take approximately 90 to 120 days to get the Heublein stock after the merger is formally approved by the SEC.

If you have any questions concerning this matter, please let me know.

Sincerely,
s/ GLENN
Glenn L. Greene, Jr.

GLG:rw"

Although plaintiff demanded delivery of the stock, he never received it, and he demanded delivery of stock or payment of fair market value of the stock, as of the date of merger between Kentucky Fried Chicken and Heublein, which value was $22 per share.

Plaintiff alleged in his second claim for relief that Greene, acting as agent of Professional Association, had received the sums here involved to be held in trust by defendants for the purpose of purchasing Kentucky Fried Chicken stock. He further alleged that defendant Association breached this trust when, through its agent Greene, it disposed of the moneys received and so held in trust in violation of the terms of the trust agreement made by Greene.

The complaint then stated substantially identical allegations against defendant Greene individually.

In addition, the complaint contained additional claims for relief based upon a substantial identical transaction between defendants and one Garmon and alleged that plaintiff had purchased from Garmon all of his right, title, and interest in any chose in action resulting from the breach of contract or the breach of trust.

Defendant Professional Association moved for summary judgment. After considering the affidavits and exhibits submitted on this motion, Judge Rousseau rendered summary judgment in favor of defendant Professional Association. Plaintiff appealed.

On appeal to the Court of Appeals, the judgment of the Superior Court was affirmed, Judge Vaughn dissenting.

McElwee, Hall and McElwee, by W. H. McElwee and T. V. Adams, for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton, and Robinson, by Ralph M. Stockton, Jr., and James H. Kelly, Jr., for defendant-appellee, Hogg and Allen, P.A.

BRANCH, Justice.

G.S. 1A-1, Rule 56(c), in part, provides:

> " . . . The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. . . . "

In instant case the Court considered pleadings, affidavits, and depositions furnished by both parties, and, after determin-

ing that there was no genuine issue as to any material fact necessary to determine plaintiff's claim, allowed the motion of defendant Professional Association for summary judgment and dismissed the action as to that defendant.

[1, 2] In ruling on a motion for summary judgment, the Court does not resolve issues of fact but goes beyond the pleadings to determine whether there is a genuine issue of material fact. The moving party has the burden of establishing the absence of any triable issue, and the Court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence. This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing. If a genuine issue of material fact does exist, the motion for summary judgment must be denied; the motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(e), Rule 56(f); *United States v. Kansas Gas and Electric Co.*, 287 F. 2d 601 (10th Cir.); 6 J. Moore, Moore's Federal Practice § 56.15; *see also* Gordon, *The New Summary Judgment Rule in North Carolina*, 5 Wake Forest Intramural Law Review 87, 94; *William J. Kelly Co. v. Reconstruction Finance Corp.*, 172 F. 2d 865 (1st Cir.); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400; *Kessing v. Mortgage Corporation*, 278 N.C. 523, 180 S.E. 2d 823.

[3] " 'The determination of what constitutes a "genuine issue as to any material fact" is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. . . . It has been said that a genuine issue is one which can be maintained by substantial evidence. . . . ' " *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457.

The question of liability of a professional association of attorneys for investment of a client's funds by an officer or director of the professional association is one of first impression in

this jurisdiction. In fact, we find very little authority even as to a partner's liability in a general partnership engaged in the practice of law. Since plaintiff's claims are based on the premise that defendant Greene was acting as an agent for the professional association at the times complained of, we first look to the general law of agency, particularly the law of apparent authority.

Our analysis of apparent authority of a corporate agent must begin with the recognition that the *power* of an agent to bind his corporate principal is not always coterminous with his *authority* to bind the principal. Dr. Robert E. Lee, in North Carolina Law of Agency and Partnership § 44 (3rd ed.), states:

> "The authority of an agent should be carefully distinguished from the power of an agent. The expressions have been used with great carelessness. An act is within the authority of an agent if the agent is privileged to do that act by the principal; that is, if the agent's doing of the act is not a violation of the agent's duty to his principal. An act is within the power of an agent if the agent has the legal ability to bind the principal to a third person thereby, even though the act constitutes a violation of the agent's duty to the principal. The agent always has both a power and an authority, the latter being sometimes identical with, sometimes smaller, but never larger, than the former. . . . "

[4, 5] This Court has recognized this important distinction by stating two salient principles which govern the rights of third parties with regard to corporate entities, which of necessity must act through agents, *to wit:* (1) When a corporate agent acts within the scope of his apparent authority, and the third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent, and (2) " '[w]here one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence *or by his negligent conduct made it possible for the loss to occur,* must bear the loss.' " (Emphasis added.) *Railroad v. Lassiter and Co.,* 207 N.C. 408, 177 S.E. 9, quoting *Railroad v. Kitchin,* 91 N.C. 39.

[6] The rights and liabilities which exist between a principal and a third party dealing with that principal's agent may be governed by the apparent scope of the agent's authority, which

is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses; however, the determination of a principal's liability in any particular case must be determined by what authority the third person in the exercise of reasonable care was justified in believing that the principal had, under the circumstances, conferred upon his agent. *Warehouse Co. v. Bank,* 216 N.C. 246, 4 S.E. 2d 863; *Railroad v. Smitherman,* 178 N.C. 595, 101 S.E. 208.

A distinguished commentator on the law of corporations has stated the rationale behind the doctrine of apparent authority:

> "The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent with that understanding. Whether or not the agent is acting within the apparent scope of his authority must be determined by what the principal has done, not by the unratified acts and declarations of the agent. If the facts and circumstances of the particular case reveal that an ordinarily prudent man would have been put on notice that one with whom he was dealing was not acting within the apparent scope of his authority, the principal is not bound under well-settled principles of agency law. When one deals with a special agent of a corporation, or an agent who has only special authority to act for his principal, it devolves upon the person dealing with such agent to acquaint himself with the extent of the agent's authority. However, it seems that the corporation will be bound, as to third persons, by all acts of its agent which are within the apparent scope of the latter's authority without regard to whether or not the agent is a general or a special one. And persons dealing with a known agent of a corporation have a right to assume, in the absence of information to the contrary, that his agency is general. The name by which a corporate officer is designated is not at all necessarily determinative of his authority."

2 W. Fletcher, Cyclopedia of the Law of Private Corporations § 434 at 307-308 (Perm. Ed.).

This general rule of law has been applied by this Court in numerous cases. *See, e.g., Research Corporation v. Hardware*

Co., 263 N.C. 718, 140 S.E. 2d 416; *Moore v. WOOW, Inc.*, 253 N.C. 1, 116 S.E. 2d 186; *Sears Roebuck and Co. v. Banking Co.*, 191 N.C. 500, 132 S.E. 468. The fact situations of these cases, however, provide little guidance in instant case since each case turns largely upon the unique facts presented. In other words, the law of apparent authority is easy to state but difficult to apply.

Where one deals with the president of a corporation, however, the establishment of apparent authority is less difficult. Recently, in *Burlington Industries v. Foil*, 284 N.C. 740, 202 S.E. 2d 591, we summarized and reaffirmed the reach and scope of presidential authority:

> "This Court has frequently held that the president of a corporation by the very nature of his position is the head and general agent of the corporation, and accordingly he may act for the corporation in the business in which the corporation is engaged. [Citations omitted.] The authority of the president to act for the corporation is limited to those matters that are incidental to the business in which the corporation is engaged; that is, to matters that are within the corporation's ordinary course of business. [Citations omitted.]
>
> "Generally, when some act is undertaken by the president that relates to material matters that are outside the corporation's ordinary course of business, in the absence of express authorization for such act by the board of directors, the corporation is not bound. [Citations omitted.] As stated in *Brinson v. Supply Co.*, [219 N.C. 498, 14 S.E. 2d 505], '[f]or a contract executed by the officer of a corporation to be binding on the corporation it must appear that (1) it was incidental to the business of the corporation; or (2) it was expressly authorized; and (3) it was properly executed.' And in *Tuttle v. Building Corp.*, [228 N.C. 507, 46 S.E. 2d 313], it is stated:
>
> > 'In the absence of a charter or bylaw provision to the contrary, the president of the corporation is the general manager of its corporate affairs. [Citations omitted.] His contracts made in the name of the company in its general course of business and within the apparent scope of his authority are ordinarily enforceable. [Citations omitted.] But, usually, he has no

> power to bind the corporation by contract in material matters without express authority from the directors or stockholders. [Citations omitted.]' "

[7] Further, plaintiff is aided by a venerable presumption in our corporate law " . . . that a person dealing with an agent must know the extent of his authority does not apply when dealing with one who is a general agent, as the president of a corporation. In such case the burden is upon the principal to show that the other party had notice of a restriction upon the power of the general agent. . . . " *Bank v. Oil Co.*, 157 N.C. 302, 73 S.E. 93.

As Russell Robinson has so aptly stated in his North Carolina Corporation Law § 13-8 at 271 (2d ed. 1974) : ". . . The point is primarily a matter of basic agency law. As particularly applied in the corporate context, it would mean, for example, that persons dealing with the president or any other corporate officer can in good faith assume that he is empowered to exercise the customary functions of his office, unless notice is given to the contrary. . . . "

By its very nature, a professional association more nearly resembles the closely held corporation than a public corporation. Particularly within the context of a law practice, it is highly unlikely that busy attorneys will resort to all of the formalities of the corporate entity in making decisions concerning firm business and in performing the myriad small duties demanded of them. The model of the closely held corporation becomes even stronger in a situation where, as in instant case, one person acts as chief executive officer and also holds a majority of the shares in the corporation. In such a situation, the actions of the corporate entity more nearly resemble the conduct of a partnership than of a corporation. Professor F. Hodge O'Neal in his work, Close Corporations Vol. 2, § 8.05, has noted this similarity in the management of a closely held corporation and a partnership:

> "Although the same broad principles of corporation and agency law determine the powers of officers in both close and publicly held corporations, the factual differences in the patterns of operation of the two kinds of corporations lead to wide disparities in the powers the courts actually recognize in corporate officers. In a close corporation, ownership and management normally coalesce; and

the participants often conduct their enterprise internally much as if it were a partnership. The courts have seldom articulated a difference in the rules governing officers' powers in close and publicly held corporations; yet they appear in fact to have often cut through the technical legal form of close corporations to reach the results that would be reached if the enterprises were conducted as partnerships. In other words, the courts frequently, and perhaps usually, recognize in officers of a close corporation the same powers that are possessed by partners in a firm under the general rule of partnership law which makes each partner an agent of the firm for the purposes of its business and empowers each partner to bind the firm by acts apparently carried on to further the usual business of the partnership.

"The courts have rather consistently held officers in a close corporation to possess powers to bind the corporation under circumstances which would make a similar holding questionable in a publicly held corporation. . . . In view of the typical patterns of operation in close corporations, holdings of this kind can usually be reconciled with traditional doctrine by viewing an officer whose powers are questioned as in fact a general manager of the company or as having a general manager's broad powers, or by applying principles of ratification or of authority or apparent authority by acquiescence. In any event, only in rare instances have courts failed to hold a close corporation bound by *inter vivos* contracts entered into by any officer of the corporation."

All parties appear to agree that the crucial question on this appeal is whether the receipt of funds for investment purposes falls within the scope of the practice of law, and therefore within the scope of the apparent authority of Greene.

We are guided to some degree by a very few cases which have considered the liability of a *partner* when another member of the firm accepts funds for investment and then misappropriates the funds. We find two cases in this country which stand for the general proposition that the acceptance of money for investment in undesignated securities is not generally within the orderly scope of a partnership organized for the practice of law, and therefore another partner will not be charged with liability for misconduct of the person accepting the money for investment unless there be knowledge of, consent to, or ratifi-

cation of the transaction by the other partners. *Rouse v. Pollard,* 130 N.J. Eq. 204, 21 A. 2d 801; *Riley v. Larocque,* 163 Misc. 423, 297 N.Y.S. 756.

In *Blackmon v. Hale,* 1 Cal. 3d 548, 83 Cal. Rptr. 194, 463 P. 2d 418, a client entrusted funds to an attorney for the purpose of clearing a title on real estate and purchasing a note secured by a mortgage on the real estate. The attorney deposited the funds in a partnership trust account during the existence of the partnership and subsequently misappropriated the funds after the partnership was dissolved. The court held that the receipt of this money was within the ordinary course of legal business for which the other partners were accountable. In reaching its decision, the Supreme Court of California, in part, stated:

> " 'Every partner is an agent of the partnership for the purpose of its business, and the act of every partner . . . for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership.' [Citation omitted.] The apparent scope of the partnership business depends primarily on the conduct of the partnership and its partners and what they cause third persons to believe about the authority of the partners. Ostensible agency or acts within the scope of the partnership business are presumed 'where the business done by the supposed agent, so far as open to the observation of third parties, is consistent with the existence of an agency, and where, as to the transaction in question, the third party was justified in believing that an agency existed.' [Citations omitted.] The partnership will be relieved from liability for the wrongs of its partners acting individually when the third person has knowledge of the fact that he is dealing with the partner in his individual capacity. [Citations omitted.]"

Cf. Smith v. Travelers Indemnity Co., 343 F. Supp. 605 (M. D. N. C.), and *Douglas Reservoirs Water Users Ass'n. v. Maurer & Garst,* 398 P. 2d 74 (Wyo.), each of which declined to impose liability upon a partner because of misapplication of funds received, where the investment was isolated and *clearly* unrelated to the practice of law.

Because of the paucity of American case law on the question before us for decision, we briefly discuss pertinent English authority.

Willett v. Chambers, Cowp. pt. 2 814, 98 Eng. Rep. 1377, considered the question of liability of partners for misappropriation of funds received for investment by another partner. There the Court allowed recovery from the other partners on the ground that it was a customary and usual practice for attorneys to receive and lend money so as to obtain profit from the fees and charges collected for drawing the legal instruments.

Similarly, the Court held one partner liable for misappropriation of funds received by the other partners for investment on a mortgage in *Eager v. Barnes,* 31 Beav. 579, 54 Eng. Rep. 1263. There the Court, *inter alia,* stated:

> "The usual course of a solicitor's business, when there are partners in it, is for each partner to have his own clients, and separately to transact their business. Where, however, as in this instance, money is received by one member of a partnership for the express purpose of a special investment, and it is paid by him into the partnership account instead of being properly invested, and when the proceeds of that account are received by the firm, it is impossible to say that one partner is not liable for the misconduct of the other in the misapplication of the funds."

See also Annotation—Investment of Clients' Funds—Firm Liability, 136 A.L.R. 1110.

In *Central Realty, Inc. v. Hillman's Equipment Inc.,* 253 Ind. 48, 246 N.E. 2d 383, the Court, in the same procedural context as instant case, considered the authority of an officer of a corporation to bind the corporation. There the vice-president of the corporation made statements to the effect that his actions which were in suit were not within the scope of his authority as agent of the corporation. There was other evidence upon which the third party, who dealt with the officer, might have formed a belief that the officer was acting within the scope of his authority as agent of the corporation.

The Court, holding that there was a genuine issue of material fact as to whether the officer was acting as an individual or as agent of the corporation, reversed the action of the trial judge, who had allowed defendant corporation's motion for summary judgment.

In order to apply the above-stated principles of law to the facts of this case, it becomes necessary to summarize the evidence presented at the hearing on the motion for summary

judgment by movant. In support of its motion for summary judgment, movant Professional Association, in summary, presented the following evidence:

(1.) The sworn statement of defendant Glenn L. Greene, Jr., who averred that all matters in suit were "purely personal matters between myself and plaintiff. Other than that, that is all I am going to say about that." He further stated that all correspondence with plaintiff was signed by him personally, not as an attorney, and there was no agreement concerning the matter in suit between plaintiff and Professional Association.

(2.) Affidavits of Jesse H. Hogg and W. Reynolds Allen to the effect that neither the Professional Association or either of the affiants had engaged in the practice of receiving or holding money or securities for investment or profit. Affiants each stated that the law practice of the Professional Association was limited to the practice of labor law.

(3.) The deposition of Amie Ferro, personal secretary to Greene, who stated that all of the practice of the Professional Association was labor-oriented and that she knew of nothing which indicated that any attorney in the Professional Association was aware that Greene was receiving money for investment. Neither was she aware of any file or transaction indicating that any member of the Professional Association had ever represented Sam Zimmerman, Frank Rhodes, or Pruitt Garmon. She knew that Greene was selling stock to other people, but she did not know that he was receiving funds for the purpose of buying stock. She further stated that Greene handled all the finances of the firm and that no one else saw any mail until it was called to his attention. In fact, no one in the firm ever went into the "Big Chief's" office.

(4.) The deposition of Robert Louis Norton, an associate in the Professional Association, who averred that he invested money through Greene in a Kentucky Fried Chicken transaction upon the express understanding that he should not tell other members of the Professional Association about it. He did recall having a conversation at a breakfast meeting concerning this stock with Frank Rhodes.

At this point, in our opinion, movant's evidence that Greene was not acting as the agent of the Professional Association within the scope of his authority at the times complained

of carried the burden placed upon it by Rule 56(c) by showing the absence of one of the essential elements of plaintiff's claim.

Plaintiff, in order to carry the burden thereby imposed upon him to show that a material issue of fact did exist, offered the following evidence:

(1.) Affidavit of Bonnie Rhodes, in which she averred that she was the personnel director of Holly Farms and in that capacity had dealt with defendants. She stated that the letter which embodied the contract in suit was typed on the same letterhead and was signed in the same manner as letters received from Greene concerning legal matters. She further averred that Greene made all decisions involving legal matters for Holly Farms and that she had personally discussed the Kentucky Fried Chicken transactions with other employees of the Professional Association who were aware of the transaction.

(2.) Affidavit of plaintiff Sam Zimmerman, who stated that he was operations manager of Holly Farms and that to his knowledge Greene, the senior member of the Professional Association, completely controlled it, made all decisions concerning fees, and handled the bulk of Holly Farms' legal work; that in the past Greene had advised him concerning personal legal matters, particularly as to investments in a beer franchise, domestic difficulties, and the making of a will; that he had previously delivered to Greene $12,000 to invest, which had been returned together with a substantial profit; that he requested Greene to handle the Kentucky Fried Chicken transaction through the firm and Greene told him it would be so handled; and that he had discussed the Kentucky Fried Chicken transaction with other members and employees of the Professional Association in the presence of Greene. He further stated that one of the other directors and stockholders in the Professional Association, Hogg, had also volunteered to furnish legal services to him in a domestic matter. Affiant had actually discussed the transaction in suit with Hogg at a breakfast meeting.

(3.) The deposition of Frank E. Rhodes, Director of the North Carolina Division of Holly Farms, who stated that he had known Greene for several years and that prior to the transaction in suit, Greene had invested $25,000 for him for which Greene received a commission, and that Greene was supposed to get a commission for the transaction involving Kentucky Fried Chicken stock. In the latter transaction Greene had

agreed to obtain 3,000 shares of Kentucky Fried Chicken for the sum of $36,000. He forwarded a check to Greene in the amount of $36,000, and he had been reimbursed by two checks in the amount of $750 each. He further stated that he had talked with Norton, an associate in the Professional Association, about the Kentucky Fried Chicken transaction, but he could not say whether it was before or after he entered into the agreement with Greene. By an affidavit Rhodes also stated that before he delivered the money for investment, Greene told him that he could get the Kentucky Fried Chicken stock at a reduced price because a close friend who was having domestic difficulties wanted to sell to prevent his wife from getting additional stock.

The checks for the purchase of stock were made to Greene personally.

[8] It is reasonable to infer from this evidence that the investment services rendered by Greene to the employees of Holly Farms might have been for the purpose of obtaining the good will of the corporation to insure the continuance of a profitable association between the corporate client and the Professional Association. This inference would suggest a striking analogy to the practice of receiving funds for investment in order to generate fees for drawing legal instruments, a practice which has been recognized by both our courts and the English courts as being within the scope of the usual practice of law.

The evidence in this case, when construed most indulgently in plaintiff's favor, as Rule 56 requires, tends to show that the powers granted to the Professional Association by its charter were very broad powers, the exercise of which was principally in the hands of Greene; that defendant Greene, while he was on business trips to attend to the legal business of Holly Farms, accepted funds for investment purposes from employees of the corporate client; that these corporate employees were assured that such moneys would be handled through the Professional Association; that such activities by Greene, the president and principal stockholder of the Professional Association, had occurred over a period of several years; and that other employees of the Professional Association had knowledge of such dealings.

Under these particular circumstances, we are of the opinion that plaintiff's evidence was sufficient to justify a reasonable and prudent belief by plaintiff Sam Zimmerman that the

Professional Association had conferred authority upon Greene to receive the funds from him for investment while acting as its agent. Thus plaintiff's evidence raised a genuine material issue for trial as to whether Greene acted within the scope of his authority and as agent for the Professional Association at the times complained of. The issue so raised was material because without establishing agency, plaintiff could not recover, and the issue was genuine because it could be supported by substantial evidence.

Plaintiff met the burden imposed upon him by Rule 56(c), and, therefore, the trial judge erred by rendering summary judgment in favor of Hogg & Allen, P.A., successor to Greene, Hogg & Allen, P.A.

The decision of the Court of Appeals is reversed, and this cause is remanded to that Court with direction that the cause be remanded to the Superior Court of Wilkes County for proceedings consistent with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

FRANK E. RHODES v. HOGG & ALLEN, PROFESSIONAL ASSOCIATION, SUCCESSOR TO GREENE, HOGG & ALLEN, PROFESSIONAL ASSOCIATION, AND GLENN L. GREENE, JR.

No. 86

(Filed 26 November 1974)

ON appeal, pursuant to G.S. 7A-30(2), from the decision of the Court of Appeals, 22 N.C. App. 548, 207 S.E. 2d 267.

McElwee, Hall and McElwee, by W. H. McElwee and T. V. Adams, for plaintiff-appellant.

Hudson, Petree, Stockton, Stockton, and Robinson, by Ralph M. Stockton, Jr., and James H. Kelly, Jr., for defendant-appellee, Hogg and Allen, P.A.

BRANCH, Justice.

Other than the party plaintiff and the amount in controversy, the material facts in this case are the same as in the

case of *Zimmerman v. Hogg & Allen,* 286 N.C. 24, 209 S.E. 2d 795, filed this day.

For the reasons stated in that case, the decision of the Court of Appeals is reversed, and this cause is remanded to that Court with direction that the cause be remanded to the Superior Court of Wilkes County for proceedings consistent with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. JERRY MILTON CREWS AND DEBORAH LEIGH PARRISH

No. 47

(Filed 26 November 1974)

1. **Criminal Law § 84— search and seizure — objection to evidence — duty to hold voir dire**

When the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant regarding the lawfulness of the search and seizure and to make findings thereon.

2. **Criminal Law § 84— voir dire on admissibility of seized evidence — burden of going forward**

The trial court did not err on *voir dire* in placing on defendants the burden of going forward on their motions to suppress evidence seized from their apartment where defendants and the State were each afforded equal opportunity to present their case to the trial judge on *voir dire* and the court correctly placed on the State the burden of proving the admissibility of the evidence, the order of offering testimony not being a factor in determining the fairness of a *voir dire* hearing.

3. **Criminal Law § 84; Searches and Seizures § 1— amphetamines in plain view — seizure without warrant**

Where officers were legally in defendants' apartment to serve a capias on the male defendant, an officer saw on a closet shelf a clear, brown-tinted pint-size bottle with no labels containing several hundred multi-colored pills when the male defendant went to the closet to obtain his clothes, and the officer believed they were amphetamines because of the appearance of the pills and the bottle, the officer had reasonable grounds to believe that the bottle, which was in plain view, contained amphetamines and properly seized the bottle and pills without a warrant.

4. **Searches and Seizures § 3— seizure of amphetamines without warrant — statement by one defendant — probable cause for warrant**

The lawful seizure of a bottle containing amphetamines from defendants' apartment without a warrant, coupled with a question officers heard the female defendant ask the male defendant, "What about the others?", constituted probable cause for issuance of a warrant to search the apartment.

5. **Criminal Law § 146— constitutionality of statute — question not presented in trial court**

Question of the constitutionality of the statute giving the State Board of Health authority to reschedule substances under the Controlled Substances Act, G.S. 90-88, was not before the Supreme Court where that question was not presented in the superior court or in the Court of Appeals.

Chief Justice BOBBITT not sitting.

Justice SHARP dissenting.

APPEAL by defendants from the decision of the Court of Appeals, reported 22 N.C. App. 171, 205 S.E. 2d 765 (1974), which found no error in the trial before *Wood, J.*, at the 27 August 1973 Session of FORSYTH Superior Court.

On indictments proper in form, defendants were tried and convicted of possession of amphetamines, a Schedule II substance the possession of which was then a felony under the North Carolina Controlled Substances Act. G.S. 90-86 *et seq.* (1971 Cumulative Supplement). From sentences imposed, defendants appealed to the Court of Appeals. From the decision of the Court of Appeals, they appeal to this Court, pursuant to G.S. 7A-30(1).

The State's evidence tends to show that at approximately 4 a.m. on 16 May 1973 Winston-Salem Police Officers Rogers and Spillman went to 1021 Sunset Drive, Apartment G, in Winston-Salem, to serve a capias on defendant Crews for failing to appear in court in a nonsupport case. Beverly Lee Wall, who was spending the night in the apartment's living room, answered the door. The officers asked for Crews, and she answered that he was in the back bedroom. The officers proceeded there and turned on the overhead light. The two defendants were in the bed. Miss Parrish was partially in a lying and sitting position with covers on. Crews had awakened and was lying nude in the same bed. The officers informed him that they had a capias for his arrest and that he was to come with them. He put on a pair of undershorts that was lying beside the bed and proceeded

into a walk-in closet to get outer clothing. Officer Spillman followed Crews to the closet and noticed a clear, brown-tinted bottle about five inches high and two to three inches in diameter located on the front of the shelf above the clothes that were hanging in the closet. The bottle had no writing or labels on it. It appeared to Officer Spillman to contain pills of various colors. Officer Spillman took Crews, and the bottle to the police station. The bottle was found to contain several hundred amphetamines. Police officers then procured a search warrant and returned to the apartment. There they found several thousand more amphetamines in a pasteboard box under the bed in which defendants had been sleeping.

Other facts pertinent to decision are set out in the opinion.

Attorney General Robert Morgan by John R. B. Matthis, Assistant Attorney General, for the State.

McElwee, Hall & McElwee by John E. Hall for defendant appellants.

MOORE, Justice.

[2] Defendants first contend that the trial court erred on *voir dire* in placing on them the burden of going forward on their motions to suppress evidence obtained by the police officers at defendants' apartment.

Shortly after the jury was impaneled, defense counsel made a motion to suppress the amphetamines as the fruit of an unlawful search. At that time the jury was excused and a *voir dire* examination of witnesses was conducted. Defendants first introduced evidence covering some 47 pages of the record, and the State introduced evidence covering some 33 pages. After all the testimony, the trial judge made findings and admitted the evidence.

In support of their contention, defendants cite *State v. McCloud*, 276 N.C. 518, 525, 173 S.E. 2d 753, 758 (1970), where it is stated: " . . . And one who seeks to justify a warrantless search has the burden of showing that the exigencies of the situation made search without a warrant imperative. [Citations omitted.]" Defendant confuses the "burden of proof" with the "burden of going forward." The trial court in the present case, in compliance with *McCloud*, clearly and correctly stated that the State has the burden of *proving* the admissibility of

evidence, and properly differentiated this burden from the burden of *going forward,* when it said: "[T]he Court is considering that regardless of the way the evidence is put on, . . . the burden of proving is on the State at all times. . . . "

[1] When the defendant objects to the admissibility of the State's evidence on the ground that it was obtained by unlawful search, it is the duty of the trial court, in the absence of the jury, to hear the evidence of the State and of the defendant regarding the lawfulness of the search and seizure and to make findings thereon. *State v. Eppley,* 282 N.C. 249, 192 S.E. 2d 441 (1972); *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334 (1968); *State v. Myers,* 266 N.C. 581, 146 S.E. 2d 674 (1966).

[2] Here, both the State and defendants were afforded, on *voir dire,* ample opportunity to establish the facts as they believed them to be. The record shows that examination of each witness was extensive and penetrating. Our research has discovered no case holding that the order of offering testimony is a factor to be considered in determining the fairness of a *voir dire* hearing. The important requirement was met in that defendants and the State were each afforded equal opportunity to present their case to the trial judge on *voir dire.* Defendants' first assignment is therefore overruled.

[3] Defendants next assign as error the introduction of the pills seized in the apartment before defendant Crews was taken to the police station and the introduction of the pills seized pursuant to a search warrant obtained on the basis of the first seizure.

On *voir dire* Officer Spillman testified that he was at defendants' apartment for the purpose of serving a capias on defendant Crews; that he was invited in by Miss Wall and was told by her that Crews was in the back bedroom. The officers went there and found the two defendants in bed. When Crews was told that he was to accompany the officers to police headquarters, he got out of bed and went toward a closet to get his clothes. The light was on and Officer Spillman testified he looked toward the closet and saw on the shelf a clear, brown-tinted, pint-size bottle that contained several hundred multi-colored pills. As the officer picked up this bottle, Crews said, "Hey, wait a minute. Those are not mine." As Crews was walking down the hall, the officer heard defendant Parrish ask Crews, "What about the others?"

The officers then took Crews and the bottle to police headquarters, and the bottle was found to contain approximately eight hundred amphetamine tablets. A warrant was issued for Crews charging him with possession of amphetamines with intent to distribute, and a search warrant was procured for the apartment. The officers returned to Crews' apartment where they found defendant Parrish lying on the bed, with a .22 automatic rifle "jammed" with a live cartridge lying beside her. After taking the rifle, they looked in the closet for a pasteboard box that they had previously seen on the shelf, but it was not there. They found the box under the bed on which defendant Parrish was sitting. It contained several bottles of pills and some loose pills—several thousand in all—which a later examination showed to be amphetamines. Upon hearing this and other testimony, the trial court, after making findings of fact, overruled defendants' objection to the introduction of the pills into evidence. The trial court found that the officers were on the premises legally, that the bottle was in plain view, and that no search was required for its seizure. Such findings, when supported by competent evidence, are conclusive on appellate courts. *State v. Lock*, 284 N.C. 182, 200 S.E. 2d 49 (1973); *State v. Johnson*, 280 N.C. 295, 185 S.E. 2d 689 (1971); *State v. McVay* and *State v. Simmons*, 277 N.C. 410, 177 S.E. 2d 874 (1970).

"The constitutional guaranty against unreasonable searches and seizures does not apply where a search is not necessary, and where the contraband subject matter is fully disclosed and open to the eye and the hand." *State v. Harvey*, 281 N.C. 1, 11, 187 S.E. 2d 706, 713 (1972). *Accord, State v. Virgil*, 276 N.C. 217, 172 S.E. 2d 28 (1970).

Officer Spillman was legally in the apartment. He testified that he had had some training in drug detection, that he had seen amphetamine pills before, and that the pills in the bottle looked like amphetamines. He further testified that the size of the bottle, the large number of pills, and the fact that there was no prescription or label on the bottle, all led him to believe that they were amphetamines.

"When an officer's presence at the scene is lawful, . . . 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. . . . " 1 Stansbury's N. C. Evidence § 121a (Brandis Rev. 1973). *Accord, Harris v. United States*, 390

U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1967) ; *State v. Harvey, supra; State v. DuBoise,* 279 N.C. 73, 181 S.E. 2d 393 (1971).

We hold that under the facts in this case Officer Spillman had reasonable grounds to believe that the bottle, which was in plain view, contained amphetamines, and that the court properly overruled defendants' objection to the admission of the pills found in the bottle.

[4] Since the bottle contained amphetamines, this fact, coupled with defendant Parrish's statement, "What about the others?", was ample to constitute probable cause for the issuance of the search warrant under which the box of amphetamines was seized.

The assignment of error to the admission of the amphetamines is overruled.

[5] Defendants finally contend that they were deprived of equal protection under the laws by the fact that they were tried and convicted for a felony when the laws of this State made the offense for which they were charged a misdemeanor.

On 16 May 1973, amphetamines were listed as a Schedule III controlled substance in G.S. 90-91(a) (1971 Cumulative Supplement). On that date, possession of any amount of a Schedule I or Schedule II substance was a felony. G.S. 90-95(c). Possession of a Schedule III or Schedule IV substance was a misdemeanor. G.S. 90-95(d). On 17 May 1973, G.S. 90-90 and G.S. 90-91 were amended by the General Assembly so that amphetamines became a Schedule II substance. Chapter 540, Sections 5 and 6, 1973 Session Laws. The offense here occurred on 16 May 1973, on which date, under G.S. 90-91(a), amphetamines were a Schedule III substance, the possession of which was a misdemeanor. G.S. 90-95(d). If these were all the pertinent facts, defendants' contention would be correct. However, by order dated 23 March 1972, effective 24 April 1972, the State Board of Health (now Commission for Health Services), acting within its delegated authority pursuant to G.S. 90-88 (1971 Cumulative Supplement), reclassified amphetamines from a Schedule III substance to a Schedule II substance. Under the law at that time (G.S. 90-95(c)), possession of any amount of a Schedule II substance was a felony.

The State Board of Health, in rescheduling subtances under the Controlled Substances Act, was acting under detailed guide-

lines established by the General Assembly in G.S. 90-88, which in pertinent part provided:

> "Authority to control.—(a) . . . In making a determination regarding a substance, the North Carolina State Board of Health shall consider the following:
>
> (1) The actual or relative potential for abuse;
>
> (2) The scientific evidence of its pharmacological effect, if known;
>
> (3) The state of current scientific knowledge regarding the substance;
>
> (4) The history and current pattern of abuse;
>
> (5) The scope, duration, and significance of abuse;
>
> (6) The risk to the public health;
>
> (7) The potential of the substance to produce psychic or physiological dependence liability; and
>
> (8) Whether the substance is an immediate precursor of a substance already controlled under this Article.
>
> "(b) After considering the required factors, the North Carolina State Board of Health shall make findings with respect thereto and shall issue an order adding, deleting or rescheduling the substance within Schedules I through VI of this Article."

G.S. 90-88 also provided that a public hearing must be held prior to the adding, deleting or rescheduling of any controlled substance within Schedules I through VI. Prior notice of such hearing must be placed in three newspapers of State-wide circulation. The statutes then provided for notice to the public of rules amended or promulgated by the Board by filing copies in the office of the Secretary of State and with the clerks of the superior courts. G.S. 143-195; G.S. 143-198.1.

Counsel for defendants in his brief admits that the contention regarding whether the acts of defendants constitute a misdemeanor or a felony was not raised in the Superior Court or in the Court of Appeals. This Court will not decide questions which have not been presented or adjudicated in the courts below, especially questions relating to the constitutionality of a statute. As we said in *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129

(1955): ". . . [I]n 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. [Citations omitted.]" *Accord, State v. Cumber,* 280 N.C. 127, 185 S.E. 2d 141 (1971); *State v. Dorsett* and *State v. Yow,* 272 N.C. 227, 158 S.E. 2d 15 (1967). Since the question of the constitutionality of G.S. 90-88 was not before the Superior Court or the Court of Appeals, it is not properly before us. Therefore, we do not pass upon the constitutionality of this statute.

For the reasons stated, the decision of the Court of Appeals is affirmed.

Affirmed.

Chief Justice BOBBITT not sitting.

Justice SHARP dissenting:

As I see it the "plain view" doctrine is not applicable to the facts of this case, and the trial judge erred in overruling defendants' motion to suppress State's Exhibit 1, a box containing several thousand pills, and State's Exhibit 1-B, a brown glass bottle containing several hundred pills, for the reason that they were the fruits of an unconstitutional seizure. In brief summary, the State's evidence tended to establish the following facts:

About 4:00 a.m. on 16 May 1973, R. A. Spillman and D. W. Rogers, police officers of the City of Winston-Salem, for the purpose of serving an instanter capias upon defendant Crews, went to the apartment occupied by defendants. They were admitted to the apartment by a third occupant, who directed them to the room where defendants were sleeping. The officers arrested Crews and directed him to get dressed in order to go to jail. When Crews started toward the closet, the door of which was open, the officers observed a pint bottle of clear brown glass, which they could see contained several hundred pills. When Spillman reached up to take the bottle off the shelf Crews said, "Hey, wait a minute. These are not mine." There was no label or identification whatever on the outside of the bottle. On the shelf next to the bottle was a pasteboard box.

Although the officers conceded they could not know the nature of the contents they "thought they knew what it was." It came to Officer Spillman "as being some kind of contraband, possibly amphetamines." Crews and the bottle were taken to the county jail. Long, a narcotics' officer, ran preliminary tests on some of the pills in the bottle and found them to be amphetamines. He testified that he could not say the pills contained a controlled substance merely by looking at them. On the basis of this evidence Crews was arrested upon a warrant charging him with the possession of amphetamines with the intent to distribute, and a warrant authorizing the search of Crews' apartment was issued. When the officers returned to the apartment the pasteboard box, which had been on the closet shelf, was found concealed beneath a bed. It contained several thousand multicolored pills.

On 21 May 1973 a toxicologist at North Carolina Baptist Hospital analyzed the pills taken from the defendants' apartment. He found the pills in the box (Exhibit 1) and the brown bottle (Exhibit 1-B) to contain amphetamine. He testified that, without having made a chemical analysis, he could not have known that the pills contained a controlled substance; that merely by looking at the bottle of pills he would not know that "there was any law being violated."

The trial judge's finding that the officers were legally in defendants' bedroom and that the brown bottle on the closet shelf was in plain view are clearly supported by the evidence. In my view, however, neither his finding of fact that "the contraband was seen 'in plain view,' " nor his legal conclusion that the later-issued search warrant was valid, can be supported.

In plain view was only a brown bottle containing pills. The bottle itself was not contraband. Obviously it was impossible by sight to identify pills in a glass bottle, tinted brown and bearing no label, as amphetamines, or any other controlled substance. The evidence conclusively establishes that, even after opening the bottle and scrutinizing the pink pills which it was found to contain, neither Officers Spillman and Rogers nor Officer Long could say whether they contained amphetamine. A chemical analysis at the police station was required to establish that the pills were contraband. *See People v. Marshall,* 69 Cal. 2d 51, 442 P. 2d 665, 69 Cal. Rptr. 585 (1968); *Miramontes v. Superior Court for County of San Mateo,* 25 Cal. App. 3rd 877, 102 Cal. Rptr. 182 (1972).

In point with this case is *State v. Meichel,* 290 So. 2d 878 (La. 1974). In that case the officers removed a bottle of pills from the front seat of the defendant's automobile. They then searched the trunk of the vehicle and found marijuana. In rejecting the State's contention "that the plain view seizure of the pills established probable cause for a search of the automobile" the Louisiana Supreme Court said:

"A policeman does not have the right to seize any object in his view in order to examine it and determine if it is or would be evidence in a criminal prosecution. An object in open plain view may be seized only where it is readily apparent that the object is contraband or evidence. *See Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 2038, 29 L.Ed. 2d 564 (1971).

"In the instant case the testimony of the officer making the seizure is clearly to the effect that he did not know the nature of the pills until after he had picked up the bottle and examined it. He did not know at the time he saw the pills that there was a probability that they were contraband and probably evidence. This seizure does not fall within the plain view exception to the warrant requirement. As such the seizure violated defendant's constitutional rights and was illegal." *Id.* at 880.

In another recent decision, different factually, but applying the same general principles, the Supreme Court of North Dakota held that the "plain view" exception "does not apply to sealed packages the appearance of which is not indicative of their illicit contents." *State v. Matthews,* 216 N.W. 2d 90, 100 (N.D. 1974). In that case, the police had opened two sealed envelopes which they suspected contained marijuana. Their suspicions proved to be correct. However, the court nonetheless excluded this evidence. In concluding that the motion to suppress should have been granted it said: "When police assume the function of the magistrate, they act beyond the law and the evidence they obtain by so acting is excluded. In regrettable consequence, the guilty may go free, but the alternative—permitting warrantless rummaging through private property—is worse. The remedy for both evils is for the police to obey the law, not for the courts to ignore the Constitution." *Id.* at 104. With reference to the nonapplicability of the "plain view" exception to sealed packages, see *United States v. Sokolow,* 450 F. 2d 324 (5th Cir. 1971); *People v. Marshall, supra.*

In *Stanley v. Georgia,* 394 U.S. 557, 22 L.Ed. 2d 542, 89 S.Ct. 1243 (1969), under a search warrant, federal and state

agents searched defendant's home for evidence of bookmaking activities, which they did not find. However, they did find three reels of film. Using a projector and screen, which they found on the premises, they concluded that the films were obscene and seized them. The Supreme Court disposed of the case by holding that the Georgia statute under which defendant was convicted was unconstitutional insofar as it made mere private possession of obscene matter a crime. In a concurring opinion, however, Justices Stewart, Brennan and White addressed themselves to the ruling of the Georgia Supreme Court that the films had been lawfully seized—a preliminary issue which the majority opinion ignored.

In concluding that the films were inadmissible in evidence at the appellant's trial, the concurring Justices said: "This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence in plain view. For the record makes clear that the contents of the film could not be determined by mere inspection. . . . After finding them, the agent spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room. Only then did the agents return downstairs and arrest the appellant. . . . To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." *Id.* at 571-572.

In my opinion the "plain view" doctrine justifies a warrantless seizure only when it is apparent to the police that they have evidence or contraband before them. My vote, therefore, is to reverse.

WILLKINGS L. HARTLEY v. GEORGE R. BALLOU AND WIFE, MILDRED H. BALLOU

No. 91

(Filed 26 November 1974)

1. Rules of Civil Procedure § 52— trial without jury — duty of judge to find facts and state conclusions

Rule 52(a)(1) provides that, in an action tried without a jury, the court must find the facts specially and state separately its con-

clusions of law, but the rule does not require or contemplate that the court submit to itself issues of fact in the manner in which issues of fact are submitted to a jury.

2. **Rules of Civil Procedure § 15— variance between allegations and proof — complaint deemed amended**

Where there were variances between the allegations of plaintiff's complaint and the evidence upon which plaintiff sought to recover, the complaint should be deemed amended to conform to the proof. G.S. 1A-1, Rule 15(b).

3. **Sales § 6— sale of house — implied warranty — stage of construction not determinative**

Whether there is an implied warranty in a contract for the sale of a house does not depend on whether the house has been completed or whether it is in some stage of construction at the time the contract for the sale and purchase thereof is made.

4. **Sales § 6— sale of house — implied warranty of workmanlike construction and no major structural defects**

In every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held impliedly to warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

5. **Sales § 6— sale of house — implied warranty — waterproof basement — no absolute guarantee**

At the time of the execution of the contract of sale, defendant, the builder-vendor, impliedly warranted to plaintiff and his wife that the basement of the newly constructed dwelling had been sufficiently waterproofed, in accordance with the standards of workmanlike quality then prevailing in that area, to prevent water leakage under normal weather conditions; however, such implied warranty falls short of an absolute guarantee that the waterproofing was sufficient to protect the basement area from damage by water in the event of hurricanes or other extreme weather conditions.

6. **Sales §§ 6, 17— implied warranty in sale of house — sufficiency of evidence of breach**

In an action to recover damages for alleged breach of warranty, plaintiff was entitled to recover only for his inconvenience and expense incurred during the period from the initial occupancy of the dwelling by plaintiff around Christmas 1969 to the completion of extensive repairs made by defendant in January and February 1970 where there was ample evidence to support a finding that defendant breached his implied warranty by his failure initially to provide

waterproofing sufficient to protect the basement area from water damage under normal weather conditions for that area but extensive repairs were subsequently made by defendant, plaintiff was fully aware of the flooding problem and of defendant's repair efforts, and plaintiff continued to occupy the dwelling as a residence until the waterproofing repairs proved insufficient under hurricane conditions.

Justice LAKE dissents.

ON *certiorari* to review the decision of the Court of Appeals, reported in 20 N.C. App. 493, 201 S.E. 2d 712, which found "No Error" in the judgment entered by *Judge Tillery*, after trial without a jury, at the February 1973 Session of CARTERET Superior Court, argued and docketed as No. 78 at Spring Term 1974.

Plaintiff instituted this action 23 March 1972 against George R. Ballou and wife, Mildred H. Ballou, to recover damages for alleged breach of warranty.

Pursuant to their contract of 24 October 1969, defendants conveyed to plaintiff and his wife by warranty deed of 4 December 1969 the real estate in Morehead Township, Carteret County, described as Lot Six (6) in Block "A" as shown on map of River Heights Subdivision recorded in Map Book 7, page 59, Carteret County Registry. The completed dwelling thereon had been recently constructed by defendant George R. Ballou.

Plaintiff alleged that defendants, "both expressly and by implication," warranted, *inter alia*, "that the whole house was insulated"; "that the walls had been adequately waterproofed"; "that the cement floor in the basement was of sufficient quality material and workmanship as to prevent any leakage that otherwise might occur"; and that "the aforesaid warranties were made knowingly, intentionally, and fraudulently as an inducement to the trade, and in reliance upon which the plaintiff entered into the agreement, and without which reliance no trade would have been made."

With reference to what occurred subsequent to the transfer of title, plaintiff alleged: "Shortly after taking possession of the premises leakage occurred around the base of the basement walls. The waterproofing of the walls, through lack of competent workmanship and insufficiency of materials used, was not properly done. Upon complaint to defendants, defendants attempted to have remedy applied, but subsequently (on or about October 22 or 23, 1971) there was an unusually heavy

rainfall which filled the basement of the house to about 2½ feet. Upon renewal of complaint to defendants, defendants said and contended that the overflow of water in the basement was due to backing up of water from the storm sewer that was too small in size to discharge the water supply under such a rainfall as had been experienced. Again, on or about February 12, 1972, the house basement filled up to approximately 18 inches of water for the same cause. The inadequacy of the storm sewer pipe was well known to defendants, or should have been, inasmuch as the selection of the system had been at the instance and for the use and benefit of defendants, and the sufficiency of which, by implied if not express warranty, had been guaranteed to the plaintiff-purchaser at the time of the purchase of the property."

Plaintiff further alleged that, on account of defendants' breach of the alleged warranties, plaintiff sustained general and special damages as the result of leakage and flooding of water in the basement.

Answering, defendants denied all of plaintiff's above-stated allegations.

Judge Tillery's judgment recites that "it was agreed in open Court between the parties . . . that the trial judge should find the facts and answer the Issues pertaining thereto as though submitted to and answered by a Jury," and that the following were "the proper and appropriate Issues of facts":

"1. Did plaintiff and defendants enter into written contract of purchase and sale of house and lot referred to and described in the Complaint?

"2. If so, did defendants breach the contract?

"3. If so, what amount of general damage is plaintiff entitled to recover?

"4. What amount of special damage is plaintiff entitled to recover?"

Notwithstanding the quoted recital, the record shows defendants excepted to "the framing of issues three and four."

Evidence was offered by plaintiff and by defendant.

At the conclusion of all the evidence, each defendant moved for a directed verdict and dismissal of the action. The motion of

defendant Mildred H. Ballou was allowed; that of defendant George R. Ballou (referred to hereafter as defendant or as Ballou) was denied and he noted his exception.

Judge Tillery's judgment which, by consent, was signed out of term and out of the county, was filed 30 April 1973. After preliminary recitals, the judgment continues and concludes as quoted below:

"Upon consideration of the evidence presented the Court finds the following:

"FACTS

"1. It was stipulated by plaintiff and defendants and the Court so finds that the defendants were the owners of the tract of land in question on the fourth day of December 1969 and the purchase price was $34,750.00. Title was taken in the name of the plaintiff, Willkings L. Hartley, and his wife, as tenants by entirety. After acquisition of title to the premises the wife died, leaving the surviving spouse, the plaintiff, the owner in fee, subject only to any outstanding liens against the property.

"2. That the defendant, George R. Ballou, constructed the house in question for sale for use as a residence. The house was completed 30 to 60 days prior to sale. The defendant, Mildred H. Ballou, did not actually participate in the business operation of construction of the house.

"3. That the lot on which the house was constructed was in a subdivision of land that was essentially flat and adjoining Newport River and approximately 6 feet above the ordinary highwater mark, and the lot was approximately 2 blocks from the River. That the defendant, George R. Ballou, had constructed approximately 15 houses in the subdivision at that time and the plaintiff's house was the only one with a basement. There was a drainage ditch with tile adjacent to the paved road in front of the house and a drainage ditch along the back of the lot.

"4. That the house had two (2) stories, the lower of which was a basement which was excavated from the general ground level to a depth of approximately four (4) feet, and the basement area was paneled and carpeted and in general constructed as a part of the overall living area of the house.

"5. That plaintiff inspected the house in late October, 1969, prior to purchase and the basement area was dry, with no sign of any leakage.

"6. That plaintiff's wife first moved into the house around Christmas of 1969. The plaintiff at that time was at sea on a trip between Corpus Christi, Texas, and Bermuda and return in pursuit of his occupation as chief engineer on merchant vessels.

"7. That just before Christmas there was water on the floor of the basement and after plaintiff's wife moved in water was standing ¾ to 1 inch deep covering most of the floor, and all the carpet, which extended throughout the basement, was wet. There had been no water standing in the yard at that time, and prior to repairs on that occasion the water standing in the basement reached a height of 8 to 12 inches. When the wife discovered that condition in their new house, she contacted plaintiff about the matter, and plaintiff incurred $300.00 in travel expense from Corpus Christi, Texas, home and back to his ship at Norfolk, Virginia, in addition to spending $200.00 on radiograms to and from his home to his ship in connection with his wife moving into the house and discovering the flooded basement.

"8. Defendant George R. Ballou attempted to have repairs made to the basement in January and February, 1970, bv, first, building up the floor and attempting to waterproof the basement walls from the inside and, later, by digging around the perimeter of the house with the exception of the garage area on the north side, applying waterproofing material and drainage at footing, relandscaping, etc., and incurring expenses of approximately $4,000.00. The garage was built on a concrete slab on top of the ground and extended northwardly from the north wall of the basement and waterproofing could not be applied the entire length of the outside of the north wall of the basement.

"9. Following the repairs of January and February, 1970, the basement remained dry for approximately eighteen (18) months when in August, 1971, water again ran into the basement and spread from the bottom of the north wall southwardly across the floor. Moveable items of furniture were moved upstairs. The carpet was wet throughout, as was the bottom of the paneling on the walls. There was no surface water outside

above the drainage ditches. There was a hurricane in the area at that time. Within two weeks the plaintiff moved out of the house. The basement flooded again approximately one month later, also during a hurricane, with no surface water standing in the yard. In October, 1971, there was a heavy rain and the basement flooded to approximately two feet deep, and again in November. On both of these occasions water was standing in the yard outside of the house.

"10. The basement area of the house was not of sound and workmanlike construction and particularly the north wall thereof which continued to leak even after repairs were attempted in January and February of 1970. This defect was not discernible by reasonable inspection, and at the time of purchase the actual fair market value of the property, because of the latent defect in the basement, was $1,000.00 less than the apparent fair market value which was $34,750.00.

"11. As a direct result of the various floodings the motor in the circulating fan in the basement was replaced, the washer was ruined and worthless, the dryer was damaged, and the heating elements in the water heater were replaced, at a cost to plaintiff of $1,000.00; on each flooding occasion it was necessary to clean up and scrub out the basement at a cost to plaintiff of $250.00; plaintiff had to have the basement pumped out on three or four occasions at a cost of $80.00; and it was necessary to run the heating and air-conditioning units for long periods following floodings to dry out the house at a cost of $210.00 to plaintiff.

"The Court makes the following conclusions of law:

"That there was an implied warranty by the defendant to the plaintiff that the house as constructed and purchased was fit and suitable for its intended purpose as a residence and that due to the latent defect in the condition of the basement there was breach of the implied warranty resulting in a breach of contract, and that the plaintiff is entitled to recover general and special damages therefor.

"That the Issues heretofore appearing are answered:

"1. Yes; 2. Yes; 3. $1,000.00; 4. $2,040.00.

"WHEREPON, IT IS

"ORDERED, ADJUDGED AND DECREED: (1) That the plaintiff have and recover nothing of the defendant Mildred H. Ballou

but that he have and recover of the defendant George R. Ballou (2) general damages in the sum of One Thousand Dollars ($1,000.00) and (3) special damages in the sum total of Two Thousand and Forty Dollars ($2,040.00) representing $1,000.00 for repairs to appliances and heating units, $250.00 for cleaning up and painting, $300.00 for air travel and expenses, $80.00 for pumping out water, $200.00 for wireless messages, and $210.00 for extra heating and air-conditioning, with interest from date as to both general and special damages, and (4) the costs of this action, to be taxed by the Clerk."

Defendant George R. Ballou, referred to in the opinion as defendant, excepted and appealed.

Bennett and McConkey by Thomas S. Bennett and James W. Thompson III for defendant appellant.

Hamilton, Hamilton & Phillips by Luther Hamilton, Jr. for plaintiff appellee.

BOBBITT, Chief Justice.

[1] G.S. 1A-1, Rule 52(a)(1), provides: "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." The rule does not require or contemplate that the court submit to itself issues of fact in the manner in which issues of fact are submitted to a jury.

Prior to the adoption of the Rules of Civil Procedure, G.S. 1-185 in part provided: "Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately." In *Wynne v. Allen*, 245 N.C. 421, 96 S.E. 2d 422 (1957), upon waiver of jury trial, the court submitted to itself and answered issues of fact framed in a manner appropriate for submission to a jury. Justice Rodman, speaking for the Court, stated: "Issues arise on the pleadings. [Citations omitted.] To interpret and understand the issues submitted to and answered by a jury, it is proper to examine the pleadings, the evidence, and the charge of the court when there is a charge. [Citations omitted.]" *Id.* at 426, 96 S.E. 2d at 427.

When an action is "tried upon the facts without a jury," there is no charge. The mandate of Rule 52(a)(1) requires that

the trial judge "find the facts specially"; and, in lieu of giving instructions to a jury relevant to issues arising upon the pleadings, that he "state separately" his conclusions of law. The present case indicates the inconsistency and confusion that may arise when the trial judge unnecessarily frames and answers issues *in addition to* finding specific facts and stating his conclusions of law with reference thereto. The court's affirmative answers to the first and second issues, if given legal significance, were findings (1) that the parties entered into the *written* contract of 24 October 1969, and (2) that defendants breached that contract. There was no controversy with reference to whether the written contract of 24 October 1969 was entered into by the parties thereto. Too, there was no allegation, evidence or contention that defendants had breached any of the provisions of *that* contract. The answers to these issues afforded no basis for any recovery by plaintiff. They do not relate to the real issue involved herein, that is, whether the plaintiff is entitled to recover for alleged breach of implied warranty. Hence, we disregard the issues and answers thereto and consider the case on the basis of the pleadings, the evidence, the court's specific findings of fact and conclusions of law, and the judgment.

We note that the evidence does not support plaintiff's allegations in the following respects: There is no evidence that defendant *expressly* warranted "that the whole house was insulated" or "that the walls had been adequately waterproofed" or "that the cement floor in the basement was of sufficient quality material and workmanship as to prevent any leakage that otherwise might occur." There was no evidence of any express warranty or that any warranty was "made knowingly, intentionally, and fraudulently as an inducement to the trade, and in reliance upon which the plaintiff entered into the agreement, and without which reliance no trade would have been made." Moreover, there is no evidence pertaining to any lack of insulation of "the whole house." Nor does the evidence attribute the presence of water in the basement to lack "of sufficent quality material and workmanship" in respect of "the cement floor in the basement."

In particularizing his allegations, plaintiff alleged that the leakage around the base of the basement walls, which occurred shortly after he took possession, was caused by lack of competent workmanship and insufficiency of materials used in waterproofing the walls. He referred to an attempt by defend-

ants on or about 22 or 23 October 1971 to remedy this condition; and he attributed this condition to the backing of the water into his basement from an inadequate storm sewer pipe, alleging that "[t]he inadequacy of the storm sewer pipe was well known to defendants, or should have been, inasmuch as the selection of the system had been at the instance and for the use and benefit of defendants."

There was no evidence of any condition existing on or about 22 or 23 October 1971 that defendant attempted to remedy. The uncontroverted evidence tends to show, and the court found as facts, that in January and February 1970 extensive repairs were made by defendant Ballou to waterproof the basement at a cost to him of approximately $4,000.00; and that, after Ballou had done this work, the basement remained dry for approximately eighteen months.

[2] Although we call attention to these variances between the allegations of the complaint and the evidence upon which plaintiff now seeks to recover, it would seem that under Rule 15(b) the complaint should be deemed amended to conform to the proof. *Mangum v. Surles,* 281 N.C. 91, 187 S.E. 2d 697 (1972), and cases cited. However, these variances between allegations and proof tended to obscure the determinative factual issues and the proper basis for determining what damages, if any, plaintiff was entitled to recover. As stated by Justice Branch in *Roberts v. Memorial Park,* 281 N.C. 48, 59, 187 S.E. 2d 721, 727 (1972): "[T]he better practice dictates that even where pleadings are deemed amended under the theory of 'litigation by consent,' the party receiving the benefit of the rule should move for leave of court to amend, so that the pleadings will actually reflect the theory of recovery."

If plaintiff is entitled to recover, his recovery must be based upon *breach* of implied warranty. Hence, our first question is whether there was an implied warranty; and, if so, the nature and extent thereof.

Absent evidence of an express warranty, or of misrepresentation, or of any effort to divert plaintiff from a full and complete investigation, defendant relies upon *caveat emptor* as a legal defense to plaintiff's right to recover.

[3] In numerous recent decisions involving the sale of a recently constructed house by a builder-vendor to the initial purchaser thereof, the rule of *caveat emptor* has been substantially

relaxed. See *Annot.*, Liability of Builder-Vendor or other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof, 25 A.L.R. 3d 383 (1969), and supplemental decisions. In such a factual situation twenty-six states have adopted some form of implied warranty. As an exception to the rule of *caveat emptor*, some courts, in accordance with English precedents, hold "that where a house is purchased during the course of construction there is an implied warranty by the builder-vendor that it will be completed in a workmanlike manner, although continuing to take the view that there is no implied warranty with respect to the purchase of a completed house." See 25 A.L.R. 3d at 415. In our view, whether there is an implied warranty does not depend upon whether the house has been completed or whether it is in some stage of construction at the time the contract for the sale and purchase thereof is made. An implied warranty cannot be held to extend to defects which are visible or should be visible to a reasonable man upon inspection of the dwelling. *See, e.g., Driver v. Snow*, 245 N.C. 223, 225, 95 S.E. 2d 519, 520-21 (1956); *Hudgins v. Perry*, 29 N.C. 102, 104-105 (1846). *Cf.* N. C. Gen. Stat. 25-2-316(3)(b) which provides that "when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him. . . ." The determinative question here is whether the purchaser, prior to the passing of the deed or the taking of possession (whichever first occurs), had notice of the alleged defects without regard to whether such notice was obtained while the house was under construction or after the completion thereof.

On 24 October 1969, when they contracted to purchase the subject property, and thereafter until 4 December 1969 when the transaction was completed, plaintiff and his wife were free to inspect and did inspect the subject property, particularly the recently constructed dwelling thereon. Nothing had occurred or was then observable either by plaintiff or defendant bearing upon whether the waterproofing was sufficient to protect the basement area from seepage or flooding. Nothing in the evidence suggests that plaintiff was aware of any insufficiency in respect of waterproofing or that such insufficiency could be observed or determined by him upon his reasonable inspection of the completed dwelling. We note here that there was no evidence or

contention that any portion of the house other than the basement was defective in any respect.

Absent evidence of an express warranty, or of misrepresentation, or of any effort to divert plaintiff from a full and complete investigation, defendant's obligation to plaintiff was determinable on legal principles stated in *Moss v. Knitting Mills,* 190 N.C. 644, 648, 130 S.E. 635, 637 (1925), as follows: "It is the duty of the builder to perform his work in a proper and workman-like manner [citations omitted]. This means that the work shall be done in an ordinarily skillful manner, as a skilled workman should do it [citations omitted]. There is an implied agreement such skill as is customary [citation omitted] will be used. In order to meet this requirement the law exacts ordinary care and skill only. [Citations omitted.] Manner of best builders not required in absence of specifications [citation omitted]." *Accord, Cantrell v. Woodhill Enterprises, Inc.,* 273 N.C. 490, 497, 160 S.E. 2d 476, 481 (1968).

[4] In accordance with the legal principles stated in *Moss v. Knitting Mills, supra,* we hold that in every contract for the sale of a recently completed dwelling, and in every contract for the sale of a dwelling then under construction, the vendor, if he be in the business of building such dwellings, shall be held to impliedly warrant to the initial vendee that, at the time of the passing of the deed or the taking of possession by the initial vendee (whichever first occurs), the dwelling, together with all its fixtures, is sufficiently free from major structural defects, and is constructed in a workmanlike manner, so as to meet the standard of workmanlike quality then prevailing at the time and place of construction; and that this implied warranty in the contract of sale survives the passing of the deed or the taking of possession by the initial vendee.

[5] Applying these legal principles, we hold that, at the time of the execution of the contract of sale (24 October 1969), defendant, the builder-vendor, impliedly warranted to plaintiff and his wife that the basement of the newly constructed dwelling had been sufficiently waterproofed, in accordance with the standards of workmanlike quality then prevailing in that area, to prevent water leakage under normal weather conditions. However, such implied warranty falls short of an absolute guarantee that the waterproofing was sufficient to protect the basement area from damage by water in the event of hurricanes or other extreme weather conditions.

[6] The evidence discloses that, at approximately the time plaintiff's wife moved into the dwelling (Christmas 1969), water was discovered covering most of the basement floor and all of the basement carpeting to a depth of three-fourths to one inch; and that, when this initial leakage occurred, the area was experiencing weather known as a "northeaster" or a "mullet blow," which were normal conditions for the area. This discovery gave notice to plaintiff and to defendant that the basement area of the dwelling was subject to recurring water damage under normal weather conditions. There was ample evidence to support a finding that defendant breached his implied warranty by his failure initially to provide waterproofing sufficient to protect the basement area from water damage under normal weather conditions for that area. For present purposes, we assume plaintiff at that time could have maintained an action for damages for such breach, either (1) for the difference between the reasonable market value of the subject property as impliedly warranted and its reasonable market value in its actual condition, or (2) for the amount required to bring the subject property into compliance with the implied warranty. *See,* 13 Am. Jur. 2d, Building and Construction Contracts § 79 (1964); D. Dobbs, Remedies, Building Contracts, § 12.21 (1973). *Accord, Legette v. Pittman,* 268 N.C. 292, 150 S.E. 2d 420 (1966); *Robbins v. Trading Post, Inc.,* 251 N.C. 663, 111 S.E. 2d 884 (1960); *Lumber Co. v. Construction Co.,* 249 N.C. 680, 107 S.E. 2d 538 (1959). See also, *Salem Towne Apartments, Inc. v. McDaniel & Sons Roofing Co.,* 330 F. Supp. 906 (E.D.N.C. 1970).

Whatever the legal rights and obligations of the respective parties, extensive efforts were made by defendant at a cost of approximately $4,000.00 to protect the basement area of the dwelling from seepage or flooding. This work was done during January and February 1970, at which time the dwelling, except the basement portion thereof, was occupied by plaintiff as a residence. There was evidence tending to show that plaintiff at that time was fully aware of the problem and was fully advised of the extensive efforts undertaken by defendant at his own expense to provide suitable waterproofing for the basement area; and that, with knowledge of these facts, plaintiff continued in possession until the waterproofing proved insufficient under hurricane conditions.

The court found as facts: "Following the repairs of January and February, 1970, the basement remained dry for approxi-

mately eighteen (18) months when in August, 1971, water again ran into the basement and spread from the bottom of the north wall southwardly across the floor. . . . There was no surface water outside above the drainage ditches. There was a hurricane [Doria] in the area at that time. . . . The basement flooded again approximately one month later, also during a hurricane [Ginger], with no surface water standing in the yard. In October, 1971, there was a heavy rain and the basement flooded to approximately two feet deep, and again in November. On both of these occasions water was standing in the yard outside of the house."

In his testimony, Ballou attributed what proved to be the insufficiency of these waterproofing efforts (1) to hurricane conditions and (2) to failure of the drainage ditches in the development to contain the increased flow of water caused by additional buildings in the development and the construction of a mobile home park adjacent thereto. The quoted findings of fact indicate that the waterproofing efforts of defendant in January and February 1970 proved sufficient except during hurricanes and on occasions when water was standing in the yard outside of the house.

Plaintiff's testimony tends to show that he sold the subject property to C. H. Bennett, the developer of the River Heights Subdivision, on 23 February 1972 for $27,629.19. As an incident to the sale by plaintiff to Bennett, a supplemental written agreement was entered into, in which "each party hereto promises and agrees not to bring any legal action against the other by reason of drainage or flooding on the premises." The inference is permissible that in February of 1972 plaintiff considered that his property had been damaged on account of insufficient drainage and that he considered Bennett was responsible for this condition. With reference to this supplemental written agreement, plaintiff testified: "It was signed in order for him to buy the house by his request. Its purpose was so I wouldn't sue him for any drainage flooding that had occurred. That is what I read in it." Plaintiff's transaction with Bennett had been completed prior to 23 March 1972, the date plaintiff instituted this action against the Ballous.

We note that the complaint ignores entirely the extensive efforts made by Ballou in January and February 1970 and the fact that the basement was one hundred percent dry for eighteen months after Ballou had completed this work. We further note

the findings of fact and legal conclusion do not disclose that the court took into consideration when awarding damages the occupancy of the dwelling by plaintiff from December 1969 until September 1971, which includes the period of eighteen months when the basement area of the dwelling was completely dry.

The judgment of the court below is based upon the legal premise that there was an implied warranty in the nature of an absolute guarantee that all portions of the dwelling were fit and suitable for uninterrupted use for residential purposes and that *the presence* of water in the basement in December of 1969, and later in August of 1971, and thereafter, constituted a breach of warranty for which plaintiff was entitled to recover damages. In this connection, we note the damages awarded include $1,000.00, referred to as the difference between the apparent fair market value of the subject property and its actual fair market value with the defect. As of what date this difference was determined is not disclosed. The remaining $2,040.00 of the amount awarded plaintiff includes $1,540.00 for damage to fixtures and expenses incurred in consequence of the flooding during the hurricanes Doria and Ginger in 1971.

Although we approve relaxation of the rule of *caveat emptor* in respect of defects of which the purchaser is unaware and cannot discover by a reasonable inspection, and the substitution therefor of implied warranty as defined herein, the situation was quite different in January and February of 1970. Plaintiff was then fully aware of the problem created by water in the basement and of the extensive efforts then made to provide suitable and sufficient waterproofing. Assuming, *arguendo*, plaintiff could have then rejected defendant's efforts as insufficient, and could have maintained an action for rescission or for damages measured by the difference between the fair market value as waranted and its actual fair market value as of that date, plaintiff failed to do so. On the contrary, with knowledge of the problem and of defendant's efforts to remedy the problem, plaintiff accepted the subject property and continued to reside therein.

Upon the present record, plaintiff was entitled to recover only for his inconvenience and expense, if any, as a result of defendant's breach of implied warranty as defined herein, that is, inconvenience and expense incurred during the period from the initial occupancy by plaintiff to the completion of defendant's efforts in January and February of 1970. He was not

entitled to recover for damages which occurred subsequent to the extensive repairs made by defendant in January and February of 1970.

We note there is no allegation, evidence or contention that defendant, in January or February 1970, made any express warranty with reference to the effectiveness of the extensive waterproofing efforts then made.

We hold that it appears upon the face of the judgment that the court below acted under a misapprehension of the applicable law. On account of the confusion caused by the variances between plaintiff's allegations and his proof, and the difficulties confronting the Court resulting therefrom, we deem it appropriate, in the exercise of our general supervisory jurisdiction, to set aside the court's findings of fact and conclusion of law and vacate the judgment, to the end that there may be a trial *de novo* consistent with legal principles stated herein.

Accordingly, the judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals for the entry of a judgment setting aside the findings of fact and conclusion of law and vacating the judgment of the trial court, and remanding the cause to the trial court for trial *de novo*.

Reversed and remanded.

Justice LAKE dissents.

IN THE MATTER OF: THE APPEAL OF MR. JAMES G. MARTIN, CHAIRMAN OF THE MECKLENBURG COUNTY BOARD OF COMMISSIONERS, FROM A DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW EXEMPTING FROM TAX CERTAIN PROPERTY BELONGING TO ROSS LABORATORIES AND STORED IN THE PUBLIC WAREHOUSE IN CHARLOTTE AS OF JANUARY 1, 1971

No. 83

(Filed 26 November 1974)

1. **Statutes § 4— action to test validity — standing to bring**

Only those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.

2. **Counties § 1— creation and taxing power from General Assembly**

The counties of N. C. were created by the General Assembly as governmental agencies of the State and they derive their taxing power from the General Assembly.

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

Mecklenburg County could not accept the benefits of the taxing power conferred upon it by G.S. 105-281 (now G.S. 105-275) and at the same time reject on constitutional grounds the statutory classification of property which was exempt from taxation.

4. **Constitutional Law § 4— constitutionality of statute — standing to raise**

A person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute.

5. **Taxation § 2— classification — reasonableness**

The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products; while the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and if it bears a substantial relation to the object of the legislation.

6. **Taxation § 2— classification of property — constitutional provision**

The interest of Mecklenburg County in collecting tax revenues under the taxing power of G.S. 105-281 (now G.S. 105-275) is not within the zone of interest intended to be protected by Section 2 of Article V of the State Constitution which provides that the General Assembly alone has the power to classify property for taxation and that no class shall be taxed except by a uniform rule.

7. **Taxation § 23— standing to question constitutionality and interpretation of statute**

Although it lacked the requisite standing to question the constitutionality of a taxing statute, Mecklenburg County was not precluded from questioning the interpretation of the statute.

8. **Taxation § 23— construction of statute — exemption statute strictly construed**

When the meaning of a tax statute is doubtful, it should be construed against the State and in favor of the taxpayer unless a contrary legislative intent appears; on the other hand, statutes providing exemption from taxation are strictly construed.

9. **Taxation § 25— ad valorem taxes — goods in warehouse exempted**

The General Assembly intended to exempt from taxation the property specified in paragraph three of G.S. 105-281 (now G.S. 105-275) when it was placed in a public warehouse *for any length of time.*

10. Taxation § 25— ad valorem taxes — goods in warehouse exempted — name of consignee not required on bill of lading

It was not the intent of the legislature to require that goods placed in a public warehouse for transshipment to in-state or out-of-state destinations have designated on the original bill of lading the name of the ultimate consignee of the goods in order for the goods to be exempt from taxation.

11. Taxation § 25— ad valorem taxes — goods in warehouse exempted — public warehouse status

The General Assembly in G.S. 105-281 intended to deny public warehouse status to the owned or leased premises of the ultimate consignee of goods, and designation of the intermediate warehouse destination of the shipment on the original bill of lading did not destroy the warehouse's status as a public warehouse and thereby remove the goods from tax-exempt status.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the Court of Appeals to review its decision, 22 N.C. App. 225, 206 S.E. 2d 334 (1974), reversing judgment of *Hasty, J.*, 16 April 1973 Schedule A Session, MECKLENBURG Superior Court.

Facts necessary to understand the questions involved on this appeal appear in the numbered paragraphs below.

1. Abbott Laboratories, Inc. is an Illinois corporation with its principal office at North Chicago, Illinois. Ross Laboratories is a division of Abbott Laboratories, Inc. and is operated as a separate entity with its principal office at Columbus, Ohio. Together they constitute the "taxpayer" involved in this litigation.

2. At various times during the latter part of 1970 and throughout the calendar year 1971 the taxpayer shipped to Carolina Transfer and Storage Company, in carload lots by common carrier, various types and kinds of products manufactured at plants in Ohio, South Dakota and Michigan. These products were packed in standard size cases at the plants where manufactured and the cases were sealed. The cases are so constructed that when they are sealed and stacked they interlock so that straps, wires or other bindings are not required for storage or shipment. The taxpayer transshipped from its inventory at Carolina Transfer and Storage Company only in case lots and in the same sealed cases which remained unbroken while in storage. Transshipment was made by Carolina Transfer and Storage Company to the consignees of the taxpayer when and as directed by the taxpayer.

3. Each shipment made by taxpayer to Carolina Transfer and Storage Company was evidenced by an invoice and bill of lading requiring delivery of the merchandise to Carolina Transfer and Storage Company, Charlotte, North Carolina; and each such bill of lading bore either the words "for transshipment" or the word "transshipment" incribed on its face either in the space identifying Carolina Transfer and Storage Company as consignee or in the space for identity of the delivering carrier.

4. Carolina Transfer and Storage Company is a North Carolina corporation which operates a public bonded warehouse at Charlotte and the taxpayer neither owns nor has any financial interest in or control over said business or the premises where the same is located.

5. During the calendar year 1971 the taxpayer gave Carolina Transfer and Storage Company specific instructions from time to time as to the type of merchandise and number of cases to be transshipped and the identity of the consignee to which such transshipments were to be made. Pursuant to such instructions Carolina Transfer and Storage Company transshipped by common carrier to persons, firms and corporations both within and without the State of North Carolina varying numbers of cases of the taxpayer's products theretofore received and held by it for transshipment. Purchase orders from the ultimate consignees were not held by taxpayer or Carolina Transfer and Storage Company at the time it received the taxpayer's products at its storage warehouse.

6. As required by law, during the month of January 1971 the taxpayer reported the value of its inventory which had been shipped to Carolina Transfer and Storage Company for transshipment and which was located in said warehouse on 1 January 1971. The taxpayer then advised the Mecklenburg Tax Supervisor that taxpayer considered such inventory to be nontaxable by reason of the provisions of G.S. 105-281 (now G.S. 105-275).

7. Based upon a declared and actual valuation of $77,405.00, Mecklenburg County assessed an ad valorem tax on the inventory for the year 1971. The taxpayer appealed the assessment to the Mecklenburg Board of Equalization and Review, contending that under the provisions of G.S. 105-281 (1969) said personal property is exempt from taxation.

8. The Mecklenburg Board of Equalization and Review at its regular meeting on 25 October 1971 upheld the contentions of the taxpayer and by order dated 8 November 1971 found as a fact and concluded as a matter of law that the property of the taxpayer stored at Carolina Transfer and Storage Company was not subject to ad valorem tax in Mecklenburg County. The County gave timely notice of appeal to the State Board of Assessment (now the Property Tax Commission).

9. By order dated 4 January 1973 the State Board of Assessment, sitting as the State Board of Equalization and Review, upheld the contentions of the taxpayer by affirming the decision of the Mecklenburg County Board of Equalization and Review exempting the property from taxation. The County thereupon appealed to the superior court for judicial review as provided by G.S. 143-306, et seq., contending that the property is subject to taxation or, in the alternative, that G.S. 105-281 (1969), relied on by the taxpayer for exemption status, is unconstitutional insofar as it applies to the property in question.

10. The taxpayer voluntarily became a party to the review proceedings in the superior court and the matter was heard without a jury before Judge Hasty at the 16 April 1973 Schedule A Session of Mecklenburg Superior Court. By judgment dated 17 October 1973, Judge Hasty sustained and affirmed the decision of the State Board of Assessment, sitting as the State Board of Equalization and Review, and held specifically that (a) G.S. 105-281 (1969) is valid and constitutional, (b) the exemption of taxpayer's property from taxation as provided by G.S. 105-281 (1969) is not discriminatory in that the General Assembly is empowered to classify property for taxation and to exclude or exempt property so long as the classification is made by general law uniformly applicable throughout the State, and (c) Mecklenburg County is a governmental agency created by the General Assembly for administrative purposes, exercising only such powers and duties as are conferred upon it, and has no right as a matter of law to question the constitutionality of G.S. 105-281 (1969) under the provisions of which the property in question is exempt from taxation by the County. Mecklenburg County in apt time objected and excepted to said ruling and appealed to the Court of Appeals.

11. The Court of Appeals reversed the judgment of the superior court, holding that taxpayer's property stored in Carolina Transfer and Storage Company's warehouse was not held

"for the purpose of transshipment" within the meaning of that term as used in G.S. 105-281 (1969) and hence the exemption provisions of that statute are inapplicable. The constitutional question was not reached, and whether Mecklenburg County has standing to question the constitutionality of the statute was not discussed. We allowed the taxpayer's petition for certiorari to review that decision.

Boyle, Alexander & Hord by B. Irvin Boyle, Attorneys for Ross Laboratories, Appellant.

Ruff, Bond, Cobb, Wade & McNair by Hamlin L. Wade, Attorneys for Mecklenburg County, Appellee.

HUSKINS, Justice.

Mecklenburg County contends that Chapter 1185 of the 1967 Session Laws, amending G.S. 105-281 (1965), which classifies certain personal property stored in public warehouses as nontaxable, is unconstitutional in that it violates Article V, Section 2 of the North Carolina Constitution. The taxpayer contends that Mecklenburg County has no standing to question the constitutionality of the statute. We first determine whether the County has standing to raise the constitutional question.

The text of the law in question, later codified as the third paragraph of G.S. 105-281 (1969 Cum. Supp.), in effect at the time this action arose, reads as follows:

> "§ 105-281. *Property subject to taxation.*—All property, real and personal, within the jurisdiction of the State, not especially exempted, shall be subject to taxation.
>
> Cotton, tobacco, other farm products, goods, wares, and merchandise which are held or stored for shipment to any foreign country, or held or stored at a seaport terminal awaiting further shipment after being imported from a foreign country through any seaport terminal in North Carolina, except any such products, goods, wares, and merchandise which have been so stored for more than twelve months on the date as of which property is assessed for taxation, are hereby designated a special class of personal property and shall not be assessed for taxation. It is hereby declared to be the policy of this State to use its system of property taxation in such manner, through the classification of the aforementioned property, as to encourage the

development of the ports of North Carolina. For purposes of this section and of this subchapter, the term 'property, real and personal,' as used in the first paragraph of this section, shall not include the property hereinabove in this paragraph so specially classified.

Personal property of nonresidents of the State in their original package or fungible goods in bulk, belonging to a nonresident of the State, shipped into this State and placed in a public warehouse for the purpose of transshipment to an out-of-state or within the State destination and so designated on the original bill of lading, or personal property of residents of the State in their original package and fungible goods in bulk, belonging to a resident of the State, placed in a public warehouse for the purpose of transshipment to an out-of-state destination and so designated on the original bill of lading, shall be, while so in the original package, or as fungible goods in bulk, in such warehouse, and they are hereby designated a special class of personal property and shall not be assessed for taxation. No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this section despite any licensing as such. It is hereby declared to be the policy of this State to use its system of property taxation in such manner, through the classification of the aforementioned property, to encourage the development of the State of North Carolina as a distribution center. For purposes of this section and this subchapter, the term 'property, real and personal,' as used in the first paragraph of this section, shall not include the property hereinabove in this paragraph so specially classified."

[1] The general rule with respect to those eligible to question the validity of a statute was stated by Justice Sharp, writing for the Court, in *Stanley, Edwards, Henderson v. Dept. of Conservation & Development,* 284 N.C. 15, 199 S.E. 2d 641 (1973), as follows:

"Under our decisions '[o]nly those persons may call into question the validity of a statute who have been injuriously affected thereby in their persons, property or constitutional rights.' *Canteen Service v. Johnson,* 256 N.C. 155, 166, 123 S.E. 2d 582, 589 (1962). *See also Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d

401 (1969); *In Re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 411 (1963); *Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408 (1961); *James v. Denny,* 214 N.C. 470, 199 S.E. 617 (1938). The rationale of this rule is that only one with a genuine grievance, one personally injured by a statute, can be trusted to battle the issue. 'The "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentations of issues upon which the court so largely depends for illumination of difficult constitutional questions."' *Flast v. Cohen,* 392 U.S. 83, 99, 20 L.Ed. 2d 947, 961, 88 S.Ct. 1942, 1952 (1968)."

Even though the County's tax revenues are diminished by the tax exempt classification in the third paragraph of G.S. 105-281 (1969 Cum. Supp.), the taxpayer urges that the County, as a creature of the Legislature, has no standing to question, on constitutional grounds, the validity of tax legislation enacted by the General Assembly. *Cf. Brown v. Comrs. of Richmond County,* 223 N.C. 744, 28 S.E. 2d 104 (1943).

We held in *State v. Mems,* 281 N.C. 658, 190 S.E. 2d 164 (1972), that the State had standing to challenge the constitutionality of former G.S. 7A-457(a) which prevented an indigent defendant from waiving counsel at any critical stage of a capital case. Mecklenburg County contends that *Mems* is authority for the County's standing in this case. Not so. *Mems* was a criminal proceeding in which the State's right to introduce otherwise competent and vitally important evidence and its right to carry out the judgment it had obtained against the defendant in the trial court were defeated by a statutory classification of persons singled out by the Legislature for special treatment when there was no reasonable relation between the classification and the objective the statute sought to accomplish. Moreover, in the factual context of *Mems,* the State, and only the State, acting through the Attorney General, a constitutional officer under the executive branch of government, was in a position to raise the constitutional question. This distinguishes *Mems.* In the case before us other taxpayers adversely affected have standing to raise the constitutional issue Mecklenburg seeks to raise. Thus *Mems* is not authority for the County's position.

The question whether a state subdivision has standing to contest the constitutionality of a State statute has produced con-

flicting decisions in other jurisdictions. *C. Hewitt and Sons Co. v. Keller,* 223 Iowa 1372, 275 N.W. 94 (1937); *King County v. Port of Seattle,* 37 Wash. 2d 338, 223 P. 2d 834 (1950); 16 C.J.S., Constitutional Law, § 76 (1956). But the prevailing view is that a subdivision of the State does not have standing to raise such a constitutional question. *Baltimore County v. Churchill, Ltd.,* 271 Md. 1, 313 A. 2d 829 (1974). Likewise, a majority of jurisdictions which have considered whether a city or county may challenge a tax statute on constitutional grounds answer in the negative. *Board of Review v. Southern Bell Tel. & Tel. Co.,* 200 Ala. 532, 76 So. 858 (1917); *City of Sebring v. Wolf,* 105 Fla. 516, 141 So. 736 (1932); *C. Hewitt and Sons Co. v. Keller, supra; Baltimore County v. Churchill, Ltd., supra; City of Buffalo v. State Board of Equalization and Assessment,* 26 App. Div. 2d 213, 272 N.Y.S. 2d 168 (1966); *Chesterfield County v. State Hwy. Dept.,* 191 S.C. 19, 3 S.E. 2d 686 (1939); *State ex rel. Hansen v. Salter,* 190 Wash. 703, 70 P. 2d 1056 (1937); *Marshfield v. Cameron,* 24 Wis. 2d 56, 127 N.W. 2d 809 (1964). *Contra, State ex rel. Tulane Homestead Ass'n v. Montgomery,* 185 La. 777, 171 So. 28 (1936); *Clearfield Bituminous Coal Corp. v. Thomas,* 336 Pa. 572, 9 A. 2d 727 (1939). Although these decisions do not articulate a well defined rule of law, much of their reasoning in persuasive.

[2] The counties of North Carolina were created by the General Assembly as governmental agencies of the State. N. C. Const. Art. VII, § 1; *Saluda v. Polk County,* 207 N.C. 180, 176 S.E. 298 (1934); *State ex rel. O'Neal v. Jennette,* 190 N.C. 96, 129 S.E. 184 (1925). The counties have no inherent taxing power. *Hajoca Corp. v. Clayton, Comr. of Revenue,* 277 N.C. 560, 178 S.E. 2d 481 (1971); *Murphy v. Webb,* 156 N.C. 402, 72 S.E. 460 (1911). The power of taxation must be exercised by the legislative branch. *Hajoca Corp. v. Clayton, Comr. of Revenue, supra; Saluda v. Polk County, supra.* Thus Mecklenburg County derives its power to tax from the Legislature and cannot complain that the enabling legislation is lacking in breadth.

[3] As a general rule, "one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens." 16 Am. Jur. 2d, Constitutional Law, § 135 (1964); *see Utilities Comm. v. Electric Membership Corp.,* 276 N.C. 108, 171 S.E. 2d 406 (1970); *City of Durham v. Bates,* 273 N.C. 336, 160 S.E. 2d 60 (1968); *Ramsey v. Veterans Commission,* 261 N.C. 645, 135 S.E. 2d 659 (1964); *Convent v. Winston-Salem,* 243

N.C. 316, 90 S.E. 2d 879 (1956). When Mecklenburg County sought to assess the property of the taxpayer in this case, G.S. 105-281 (1969 Cum. Supp.) included both the general taxing power which the County was exercising and the nontaxable classification it now seeks to attack on constitutional grounds. Such an attack is prohibited by the quoted rule. The County may not accept the benefits of the taxing power conferred upon it by the statute and at the same time reject on constitutional grounds the statutory classification of property which "shall not be assessed for taxation."

[4] Finally, the County is precluded from challenging the constitutionality of G.S. 105-281 (1969 Cum. Supp.) on yet another ground: It is not a member of the class subject to the alleged discrimination. *State v. Trantham,* 230 N.C. 641, 55 S.E. 2d 198 (1949); *State v. Sims,* 213 N.C. 590, 197 S.E. 176 (1938). *See also Stone v. City of Wichita,* 145 Kan. 377, 65 P. 2d 595 (1937). The general rule is that "a person who is seeking to raise the question as to the validity of a discriminatory statute has no standing for that purpose unless he belongs to the class which is prejudiced by the statute." 16 Am. Jur. 2d, Constitutional Law, § 123 (1964). One recognized exception to this rule allows an affected party to allege discrimination when no member of a class subject to the alleged discrimination is in a position to raise the constitutional question. *Quong Ham Wah Co. v. Industrial Acc. Com.,* 184 Cal. 26, 192 P. 1021 (1920), *writ dismissed,* 255 U.S. 445, 65 L.Ed. 723, 41 S.Ct. 373 (1921); *cf. State v. Mems, supra.* The taxpayers of this State who are members of the class and subject to the alleged discrimination here asserted by Mecklenburg County are under no such disability. *Stanley, Edwards, Henderson v. Dept. of Conservation & Development, supra.*

[5] Article V, Section 2 of the Constitution of North Carolina provides, *inter alia,* that the General Assembly alone has the power to classify property for taxation and that *no class shall be taxed except by a uniform rule.* Even so, this constitutional provision does not prohibit reasonable flexibility and variety appropriate to reasonable schemes of State taxation. "The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores of Ohio v. Bowers,* 358

U.S. 522, 3 L.Ed. 2d 480, 79 S.Ct. 437 (1959) (resident-nonresident classifications in tax statute). While the General Assembly may not establish a classification that is arbitrary or capricious, a classification is constitutional if founded upon a reasonable distinction or difference and bears a substantial relation to the object of the legislation. *Ohio Oil Co. v. Conway,* 281 U.S. 146, 74 L.Ed. 775, 50 S.Ct. 310 (1930); *cf. State ex rel. Bernhard Stern & Sons v. Bodden,* 165 Wis. 75, 160 N.W. 1077 (1917) (public warehouse-private warehouse classifications in tax statute).

[6] Under our Constitution uniformity in taxation relates to equality in the burden on the State's taxpayers. *Hajoca Corp. v. Clayton, Comr. of Revenue, supra.* The interest of Mecklenburg County in collecting tax revenues under the taxing power of G.S. 105-281 (1969 Cum. Supp.) is not within the zone of interest intended to be protected by Article V, Section 2 of our State Constitution. *See Data Processing Service v. Camp,* 397 U.S. 150, 25 L.Ed. 2d 184, 90 S.Ct. 827 (1970). Accordingly, Mecklenburg County cannot contend that the provisions of G.S. 105-281 (1969 Cum. Supp.) violate principles of uniformity.

Applying the foregoing principles, we hold that Mecklenburg County does not have standing to challenge the nontaxable classification of property contained in the third paragraph of G.S. 105-281 (1969 Cum. Supp.). Therefore, the constitutional question is not properly before us. Hence, we neither reach nor decide it. *State v. Fredell,* 283 N.C. 242, 195 S.E. 2d 300 (1973); *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401 (1969); *Carringer v. Alverson,* 254 N.C. 204, 118 S.E. 2d 408 (1961).

[7] Although lacking the requisite standing to question the constitutionality of G.S. 105-281 (1969 Cum. Supp.), the County is not precluded from questioning the interpretation of the statute. *In re Appeal of Harris,* 273 N.C. 20, 159 S.E. 2d 539 (1968); *In re Assessment of Sales Tax,* 259 N.C. 589, 131 S.E. 2d 441 (1963); *Waterford v. Connecticut State Board of Education,* 148 Conn. 238, 169 A. 2d 891 (1961). The taxpayer's contention that the property in question is tax exempt was upheld successively by the Mecklenburg Board of Equalization and Review, the State Board of Assessment, and Mecklenburg Superior Court. The County's interpretation of the statute, construing the term "transshipment" to mean "a mere temporary break in the shipment of goods" gained acceptance for the first time in the Court

of Appeals. That court held the goods were subject to taxation because they were not held "for the purpose of transshipment" within the meaning of G.S. 105-281 (1969 Cum. Supp.). The taxpayer contends that holding was erroneous and we agree.

In construing and interpreting the language of G.S. 105-281 (1969 Cum. Supp.), we are guided by the primary rule of construction that the intent of the Legislature controls. 73 Am. Jur. 2d, Statutes, § 145 (1974); *Pipeline Co. v. Clayton, Comr. of Revenue,* 275 N.C. 215, 166 S.E. 2d 671 (1969); *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968); *In re Watson,* 273 N.C. 629, 161 S.E. 2d 1 (1968); *Freeland v. Orange County,* 273 N.C. 452, 160 S.E. 2d 282 (1968). Where the language of a statute is clear and unambiguous its plain and definite meaning controls and judicial construction is not necessary. *Davis v. Granite Corp.,* 259 N.C. 672, 131 S.E. 2d 335 (1963). But if the language is ambiguous and the meaning in doubt, judicial construction is required to ascertain the legislative intent. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797 (1948).

[8] When the meaning of a tax statute is doubtful, it should be construed against the State and in favor of the taxpayer unless a contrary legislative intent appears. *Pipeline Co. v. Clayton, Comr. of Revenue, supra; Sabine v. Gill, Comr. of Revenue,* 229 N.C. 599, 51 S.E. 2d 1 (1948). On the other hand, statutes providing exemption from taxation are strictly construed. "Taxation is the rule; exemption the exception." *Odd Fellows v. Swain,* 217 N. C. 632, 9 S.E. 2d 365 (1940); *accord, In re Dickinson,* 281 N.C. 552, 189 S.E. 2d 141 (1972); *Sale v. Johnson, Comr. of Revenue,* 258 N.C. 749, 129 S.E. 2d 465 (1963).

G.S. 105-281 (1969 Cum. Supp.) expressly states that it is "the policy of this State to use its system of property taxation in such manner, through the classification of the aforementioned property, to encourage the development of the State of North Carolina as a distribution center." The phrase, "for the purpose of transshipment" must be construed in light of this policy.

Ordinarily, words of a statute will be given their natural, approved, and recognized meaning. *Cab Co. v. Charlotte,* 234 N.C. 572, 68 S.E. 2d 433 (1951). However, when technical terms or terms of art are used in a statute they are presumed to have been used with their technical meaning in mind, absent a legis-

lative intent to the contrary. *Henry v. Leather Co.*, 234 N.C. 126, 66 S.E. 2d 693 (1951). We find nothing to indicate that the word "transship" has a special or technical meaning. *Cf. Smith, Kirkpatrick & Co. v. Colombian S. S. Co.*, 88 F. 2d 392 (5th Cir. 1937); *Larsen v. Insurance Co. of North America*, 252 F. Supp. 458 (W.D. Wash. 1965), *aff'd.* 362 F. 2d 261 (9th Cir. 1966). Therefore, we give the word its natural, approved and recognized meaning.

Among the accepted definitions of "transship" are the following: "Taking the cargo out of one ship and loading it in another." Black's Law Dictionary (rev. 4th ed. 1968). "To transfer from one conveyance or line to another." Funk and Wagnalls, Standard College Dictionary (1963). "To transfer for further transportation from one ship or conveyance to another." Webster's Third New International Dictionary (unabr. 1964).

[9] The above definitions place no time limit on the act of transshipping. The General Assembly provided that goods shall not be assessed for taxation when, among other requirements, they are "shipped into this State and *placed in a public warehouse* for the purpose of transshipment to an out-of-state or within the State destination." (emphasis added.) The fact that the property must be placed in a public warehouse before it can acquire nontaxable status connotes a break in transit not limited in duration by the statute. Apparently the General Assembly chose not to limit nontaxable status to property *temporarily* halted in shipment because such restrictions would be inimical to the expressed policy of the State. We hold the General Assembly intended to exempt from taxation the property specified in paragraph three of G.S. 105-281 (1969 Cum. Supp.) when it was placed in a public warehouse *for any length of time*. This view is strengthened by the fact that a time limit of twelve months was imposed on the storage period for the special class of personal property declared nontaxable in paragraph two of G.S. 105-281 (1969 Cum. Supp.). Hence the absence of a time limitation in paragraph three was not an oversight.

[10] The County construes the language of G.S. 105-281 (1969 Cum. Supp.), requiring the exempted property to be "placed in a public warehouse for the purpose of transshipment to an out-of-state or within the State destination *and so designated on the original bill of lading*" (emphasis added), to mean that the name of the ultimate consignee must be designated on the original bill of lading. We find this construction illogical. The pro-

posed interpretation would result in a trap for the unwary taxpayer and severely hamper legislative policy expressed in the statute. Moreover, if the ultimate consignee is known to the consignor at the time the goods are shipped into this State and placed in a public warehouse, no logical reason occurs to us why the taxpayer would not ship the goods direct. Why place them in a warehouse? We hold, for obvious reasons, that such was not the legislative intent.

[11] Finally, the County argues that since Carolina Transfer and Storage Company is named consignee on the bills of lading, its premises do not qualify as a public warehouse within the meaning of G.S. 105-281 (1969 Cum. Supp.) which provides, *inter alia:* "No portion of a premises owned or leased by a consignor or consignee, or a subsidiary of a consignor or consignee, shall be deemed to be a public warehouse within the meaning of this section despite any licensing as such." The County's construction of the quoted portion of the statute is, in our opinion, contrary to legislative intent. To say the warehouse destination of the shipment cannot be shown on the original bill of lading without destroying the recipient's status as a public warehouse accords the statute an absurd meaning and produces an absurd result. Statutory rules of construction require the Court to consider the language used in the statute, the mischiefs sought to be avoided, and the remedies intended to be applied. *Young v. Whitehall Co.*, 229 N.C. 360, 49 S.E. 2d 797 (1948); *Hunt v. Eure*, 188 N.C. 716, 125 S.E. 484 (1924); *Alexander v. Johnston*, 171 N.C. 468, 88 S.E. 785 (1916). Furthermore, if possible, "the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966). Applying these principles to the third paragraph of G.S. 105-281 (1969 Cum. Supp.), we hold the General Assembly intended to deny public warehouse status to the owned or leased premises of the *ultimate* consignee (or its subsidiary). Carolina Transfer and Storage Company, if a consignee at all, is an intermediate consignee designated as such by necessity for the mere purpose of receiving the shipment and warehousing it.

The burden is on the taxpayer to show that it comes within the exemption or exception. *Canteen Service v. Johnson, Comr. of Revenue*, 256 N.C. 155, 123 S.E. 2d 582 (1962); *Sabine v. Gill, Comr. of Revenue*, 229 N.C. 599, 51 S.E. 2d 1 (1948). We hold on this record that the taxpayer has carried its burden and is entitled to the nontaxable classification claimed under G.S. 105-281 (1969 Cum. Supp.).

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court of Mecklenburg County for reinstatement of the judgment in favor of the taxpayer.

Reversed.

Chief Justice BOBBITT not sitting.

LEON KAPLAN AND WIFE, RENEE M. KAPLAN, TRADING AS TINY TOWN v. CITY OF WINSTON-SALEM

No. 27

(Filed 26 November 1974)

1. **Damages § 4— injury to personalty — measure of damages**

The measure of damages for injury to personal property is the difference between the market value immediately before and immediately after the injury.

2. **Damages § 16— stock of merchandise — instructions on damages**

The trial court in its instructions stated to the jury the correct rule to govern their determination of the amount of damages in an action against a city to recover for damage done to a stock of merchandise by the infiltration of dust and dirt as a result of sidewalk reconstruction work.

Chief Justice BOBBITT not sitting.

Justice SHARP dissenting.

Justice BRANCH joins in the dissenting opinion.

ON *certiorari* to the Court of Appeals to review its decision filed April 3, 1974 (21 N.C. App. 168, 203 S.E. 2d 653) granting a new trial in this civil action tried in the Superior Court of FORSYTH County at the May 7, 1973 Session before *Collier, J.*

The plaintiffs instituted the action to recover damages to their stock of merchandise caused by the negligent and careless manner in which the agents of the City of Winston-Salem, by the use of air hammers and pressure tools, broke through the concrete sidewalk, causing the dust and debris to filter into the vault under the sidewalk, thence into the three stories of the building in which the goods were stored.

The complaint alleged:

"V. That the agents or employees of the defendant performed the work they were doing in a careless and negligent manner without taking any precautions to prevent the old sidewalk from caving into a vault under said sidewalk, the presence of which vault was known to agents or employees of the defendant. The improper use of the machinery being used by the agents or employees of the defendant, or the failure of the agents or employees of the defendant to support the old sidewalk, or both caused the old sidewalk to drop into the vault with the result that the entire premises was filled with dust, dirt, and debris.

* * * * *

"VI. 2. They failed to take proper precautions to avoid the caving in of the sidewalk after inspecting the foundation under said sidewalk when they knew or should have known that said sidewalk was unsupported and would cave in when air hammers or other power machinery were used on it."

The complaint further alleged that the defendant failed to take proper precautions against the spill of dirt and debris into the plaintiffs' building:

"IX. That the merchandise located on the premises had a fair market value prior to the damage of Sixty-Six Thousand Six Hundred Eighty-Four and 07/100 Dollars ($66,684.07). The fair market value of said merchandise after the damage was Eighteen Thousand Three Hundred Thirty-Five Dollars ($18,335.00). Therefore, said merchandise was damaged in the amount of at least Forty-Eight Thousand Dollars ($48,000.00). The plaintiffs suffered a loss of profits as a result of the store being closed entirely for three (3) days in the amount of Nine Hundred Dollars ($900.00). In addition, the plaintiffs were required to pay a total of Six Hundred Fifty-Eight Dollars ($658.00) in connection with cleaning and repairing the premises to restore its usefulness as a retail storeroom."

The defendant, by answer, denied negligence, liability and damages. Both parties introduced evidence.

The jury answered the issue of damages in favor of the plaintiffs awarding $21,752.00. From the judgment entered on

the verdict, the defendant appealed. The Court of Appeals, finding error in the charge on the issue of damages, ordered a new trial on all issues.

Hudson, Petree, Stockton, Stockton & Robinson by Norwood Robinson and George L. Little, Jr. for plaintiff appellants.

Deal, Hutchins and Minor by William K. Davis and Thomas R. Crawford for defendant Appellee.

HIGGINS, Justice.

The Court of Appeals ordered a new trial on all issues on the assigned ground that the trial court's instructions permitted the jury to consider the retail value of the damaged merchandise in fixing the amount of damages the plaintiffs were entitled to recover. While the court in the charge recited to the jury the respective contentions and claims of the parties respecting the amount of damages resulting from the defendant's acts of negligence and thereafter discussed the various claims of damages, the court gave the jury this mandate:

> "In the event you have reached this issue and find by the greater weight of the evidence that the plaintiffs are entitled to recover of the defendant for damages to the plaintiffs' merchandise, I instruct you that you will take into consideration the description of and the evidence of the damages to the merchandise which the witnesses have given you. You may consider for the purpose of illustrating the testimony of the witnesses the pictures that you have seen of the merchandise and you will award to the plaintiffs, if you award anything on this issue, the amount which you find represents the difference in the reasonable market value of the merchandise before and after it was damaged. The reasonable market value of any article being the amount which, the owner wanting to sell but not having to, would accept for it and the amount which a buyer who wanted the article but didn't have to have it would pay for it in a free, fair trade in which there is no compulsion on either side. In this case, that amount may be anywhere from one cent to forty-nine thousand nine hundred and seven dollars and seven cents.
>
> "Now, in a case of this type involving the stock of merchandise, you may, in arriving at the fair market value of the items, take into consideration the replacement cost

of the items which would be the wholesale price of the goods. You may consider but are not bound by the retail prices of the damaged items because that price would include profits which may or may not be realized and therefore would be a speculative value. In considering the cost of the merchandise to the plaintiff, you may also consider reasonable delivery charges and unpacking expenses involved in the goods or merchandise reaching the stage at which they were at the time that this damage was done to it. In other words, you will try by your verdict to put the plaintiffs in the same position they were in prior to the damage to their merchandise insofar as money can do so. If you reach this issue and decide the plaintiffs are entitled to recover anything as a result of the actionable negligence of the defendant, you will award them the amount you find will fully compensate them for their loss according to the rules I have given you with regard to damages in this kind of a case and you will base your verdict on the evidence in the case."

[1] According to the decided cases in North Carolina, "The measure of damages for injury to personal property is the difference between the market value immediately before the injury and the market value immediately after the injury . . ." 3 Strong N. C. Index 2d, Damages, § 4, p. 171. *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116. Where the injury is less than total destruction, the measure of damages is the difference between the market value of the article immediately before and immediately after the injury. *Light Co. v. Paul,* 261 N.C. 710, 136 S.E. 2d 103; *Construction Co. v. R. R.,* 185 N.C. 43, 116 S.E. 3.

[2] After comparison and review of the pleadings, the evidence, and the contentions of the parties, we are of the opinion the trial court stated to the jury the correct rule to govern their determination of the amount of damages. In the light of the pleadings, the evidence, the contentions of the parties, and the answers to the issues, we are of the opinion that the jury could not have misunderstood the instructions to the defendant's prejudice.

The decision of the Court of Appeals is reversed. The cause will be remanded to the Superior Court of Forsyth County with the direction that the original judgment entered therein be restored as the final judgment of the court.

Reversed.

Chief Justice BOBBITT not sitting.

Justice SHARP dissenting:

Plaintiffs, retail merchants, instituted this action against defendant City to recover the damage done to the stock of merchandise (toys) by the infiltration of dust and dirt on 10 October 1966 as an incident to sidewalk reconstruction in the vicinity of plaintiffs' retail store. Plaintiffs alleged they were entitled to recover the difference between the market value of the merchandise immediately before and after the damage, loss of profits for three days, and the actual cost of cleaning. Plaintiffs' prayer for relief is damages in the amount of $49,907.07. The jury found that plaintiffs had been damaged by the negligence of defendant in the sum of $21,752.00.

From judgment entered upon the verdict defendant appealed to the Court of Appeals assigning as error (1) the judge's refusal to direct a verdict in favor of defendant on the ground that (a) the City was guilty of no negligence, (b) plaintiffs were guilty of contributory negligence, or (c) the City had no liability because of its governmental immunity; (2) the judge's refusal to submit an issue of plaintiffs' contributory negligence to the jury; (3) the admission in evidence of the retail value of the merchandise, that is, the price at which the merchandise had been marked for sale; and (4) the court's charge on the measure of damages.

The Court of Appeals held that the trial judge was correct in overruling defendant's motion for a directed verdict and in refusing to submit the issue of contributory negligence. However, it ordered a trial *de novo* for errors in the charge on the measure of damages.

The majority opinion of this Court approves the judge's charge upon the measure of damages, reverses the decision of the Court of Appeals ordering a new trial, and orders the reinstatement of the judgment of the Superior Court. To this disposition of the case I dissent on the ground that the judge's charge upon the measure of damages (defendant's assignment of error No. 7) is prejudicial error which entitles defendant to a new trial upon that issue only.

In brief summary plaintiffs' evidence with reference to damages tended to show:

In October 1966 the retail price of every item in plaintiffs' store was subject to a fair trade contract, "the fair trade law," and plaintiffs sold it at the price placed upon it at the factory. The wholesale distributor ordinarily gave plaintiffs a 40% discount from the marked price, but on specials the markup could be 50%. Immediately before plaintiffs' stock of goods was covered by cement dust and debris from the destruction of the old sidewalks, the merchandise had a total retail value, as shown by the price tags, of $66,685.07. As itemized by the witness, the retail value of the merchandise in the basement was $8,651.95; on the first floor, $26,405.31; and on the second floor, $31,627.81. Immediately afterward, the damage to the value of the merchandise in the basement was "85% of the retail value"; on the first floor, "75% of the retail value"; and on the second floor, "66-⅔% of the retail value." Translating these percentages into dollars and cents, immediately after the damage the merchandise was worth $18,335.07, a diminution in value of $48,350.07. (Defendant's objections to the foregoing evidence are also brought forward in assignment of error No. 7.)

Plaintiffs' evidence also tended to show that in cleaning up the store and attempting to salvage their merchandise they expended $100 for storage space, $184 for extra help, $325 for paint, $12 for floor cleaning, $37 for cleaning supplies, $65 for photographs, and $154 for advertising a sale—a total of $877. Plaintiffs offered no evidence of lost profits.

Although the challenged portion of the judge's charge with reference to damages is set out in the majority opinion, for convenience, it is repeated here with some emphasis added.

". . . [Y]ou will award to the plaintiffs, if you award anything on this issue, the amount which you find represents the difference in *the reasonable market value* of the merchandise before and after it was damaged. The reasonable market value of any article being the amount which, the owner wanting to sell but not have to, would accept for it and the amount which a buyer who wanted the article but didn't have to have it would pay for it in a free, fair trade in which there is no compulsion on either side. *In this case that amount may be anywhere from one cent to forty-nine thousand, nine hundred and seven dollars and seven cents.*

"Now, in a case of this type involving the stock of merchandise you may, in arriving at the fair market value of the items, take into consideration the replacement cost of the items which would be the wholesale price of the goods. *You may consider but are not bound by the retail prices of the damaged items* because that price would include profits which may or may not be realized and therefore would be a speculative value. In considering the cost of the merchandise to the plaintiff, you may also consider reasonable delivery charges and unpacking expenses involved in the goods or merchandise reaching the stage at which they were at any time that this damage was done to it. In other words, you will try by your verdict to put the plaintiffs in the same position they were in prior to the damage to their merchandise insofar as money can do so. If you reach this issue and decide the plaintiffs are entitled to recover anything as a result of the actionable negligence of the defendant, you will award them the amount you find will fully compensate them for their loss according to the rules I have given you with regard to damages in this kind of a case and you will base your verdict on the evidence in the case."

The foregoing instructions are, in my view, both inadequate and erroneous.

Ordinarily the measure of damages for injury to personal property is the retail value of the property immediately before the damage and immediately thereafter. "But that rule does not apply where the property involved is part of a stock in trade of a business concern." *Whaley v. Crutchfield,* 226 Ark. 921, 926, 294 S.W. 2d 775, 779 (1956). The authorities agree that the value of a stock of goods held for retail sale is the wholesale or replacement cost, "without the profit of resale which enters into the retail value." 1 Sedgwick on Damages, § 248a (9th ed., 1912); *Dubiner's Bootery, Inc. v. General Outdoor Advertising Co.,* 200 N.Y. S. 2d 757 (1960); *Wehle v. Haviland et al,* 69 N.Y. 448 (1877); *Lubin v. Iowa City,* 257 Iowa 383, 131 N.W. 2d 765 (1964); *Skaggs Drug Centers, Inc. v. City of Idaho Falls,* 90 Idaho 1, 407 P. 2d 695 (1965).

The rule, which seems to have been almost universally adopted, is well stated in 4 Sutherland, Law of Damages, § 1098 (1916) as follows:

"The retail price of property held for sale is not the standard by which its value is to be determined. Where a quantity

of merchandise is sued for, the retail price would be unjust, for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and probable amount of bad debts, and adds to all these a percentage of profit. This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought to replace the property taken; added to this, no doubt, should be the expense necessarily incurred in getting the property so purchased to the place where the trespass was committed. This would make the damages depend upon the value of the property taken at the place where the wrong was done. The rule is thus expressed in some cases, with the addition that the estimate is to be made as of the time the right of action accrued, and compensation for the time required to obtain other property to replace that destroyed." *Accord,* McCormick on Damages, § 44 (1935); Dobbs, Remedies, § 5.10 (1973); *Sears v. Lydon,* 5 Idaho 358, 49 P. 122 (1897).

A case which parallels this one is *Millison v. Ades of Lexington, Inc.,* 262 Md. 319, 277 A. 2d 579 (MDCA 1971), in which the plaintiff sued to recover for damage to a stock of merchandise ruined by water. As here, the trial judge, over objection, admitted in evidence a compilation of the value of the merchandise based on the retail selling price (price tag) of each item. He then charged the jury that the measure of damages was "the fair market value of the goods" on the date they were damaged and the cost of labor occasioned by the loss, less any salvaged value recovered upon a sale of the damaged goods.

In awarding a new trial upon the issue of damages only, the Maryland Court said, "It is obvious in this case that in the admission of evidence and in his instruction to the jury the trial judge equated 'fair market value of the goods on the date they were destroyed or lost' with the retail selling price as of that date. This was an erroneous conclusion." *Id.* at 323, 277 A. 2d at 582.

* * *

"Ades is entitled to recover the reasonable cost of replacing the goods on the shelf. This reasonable cost would include the wholesale cost at the time of the loss, plus any reasonable transportation charges that might be involved and the reasonable value of the labor involved in placing the goods on the shelf . . .

[and] the reasonable value of the labor involved in tabulating the loss and removing the damaged merchandise. . . . On the retrial of damages Ades must spell out with some particularity the net salvage value of the goods after the loss which will be properly deductible from the value otherwise determined. It must also spell out its efforts to mitigate damages. We do not state these criteria as an exclusive measure of damages, but as guidelines to assist the parties and the trial court at the new trial on the issue of damages." *Id.* at 327, 277 A. 2d at 584. *Accord, Chicago Title & Trust Co. v. W. T. Grant Co.*, 2 Ill. App. 3d 483, 275 N.E. 2d 670 (1971). (Proper measure of damages for harm to merchandise due to roof leakage was wholesale price, and not retail price, less salvage value.)

In his charge on the measure of damages Judge Collier should have instructed the jury that the retail price was not the standard for determining the value of plaintiffs' merchandise prior to its damage; that the standard was the replacement or wholesale cost of the goods at the time and place of the injury. Instead he told the jury they could consider both the wholesale and the retail price of the damaged items but were not bound by either; that they could fix plaintiffs' damages "anywhere from one cent to forty-nine thousand, nine hundred and seven dollars and seven cents."

Taking the evidence in the light most favorable to the plaintiffs, and assuming the entire wholesale cost of the merchandise to have been 60% of the retail price (although the evidence is that some of the items had a 50% markup), the court's maximum figure of $49,907.07 exceeded the wholesale cost of the entire stock of goods by $9,869.07! (The markup, 40% of the retail price of $66,685.07, is $26,674.03. The difference between this figure and the retail price is $40,011.00, the wholesale price.) It is my view that plaintiffs should have been required to prove the wholesale or replacement cost of the merchandise without reference to the retail price and that, as here used, such evidence was prejudicial. The court did not instruct the jury that it could consider the retail price of the damaged merchandise only as a basis from which to figure the replacement cost, the limit of defendant's liability for the damaged merchandise itself. *See Lubin v. Iowa City, supra.* On the contrary, as Judge Brock pointed out in his opinion for the Court of Appeals, "The jury was permitted to consider evidence of damage to the retail value of the merchandise without limits upon its applicability. This was error prejudicial to defendant."

In my view, upon the evidence in this case, the jury should have been instructed substantially as follows: For any portion of plaintiffs' stock of goods which was totally destroyed they are entitled to recover the wholesale or replacement cost at the time and place of the loss. For that part of the merchandise which was damaged but not totally destroyed, plaintiffs are entitled to recover the difference between the replacement or wholesale cost of the property immediately before the damage and the fair market or salvage value of the property immediately after the damage. In addition, plaintiffs are entitled to recover the reasonable cost of the labor which was required to clean and restock the store. In determining the fair market value of the damaged merchandise the jury may take into consideration, among other things, any amounts reasonably expended to salvage and sell the damaged property.

For the reasons stated herein I vote to modify and affirm the decision of the Court of Appeals by remanding this case to the Superior Court for a retrial upon the issue of damages alone.

Justice BRANCH joins in this opinion.

NORFOLK AND WESTERN RAILWAY COMPANY v. WERNER INDUSTRIES, INC.

No. 6

(Filed 26 November 1974)

1. **Indemnity § 2— indemnity for nonnegligent acts or omissions — validity of agreement**

Indemnity provision in which a contractor agreed to indemnify a railway for any liability which the railway incurred for property damage or personal injury caused by or resulting from any acts or omissions of the contractor or its employees, whether the acts or omissions were negligent or not, is not against public policy when the contract is private and not connected with the public service of a public service corporation.

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

A party moving for summary judgment has the burden of establishing the lack of any triable issue of fact by the record properly before the court even when such party does not have the burden of proof at trial.

3. **Rules of Civil Procedure § 56— motion for summary judgment — showing of lack of triable issue — burden of opposing party**

When a movant for summary judgment carries the burden of showing the lack of a genuine issue of material fact, the burden shifts to the opposing party to show that there is a genuine issue for trial as required under Rule 56(e) or to provide an excuse for not doing so under Rule 56(f).

4. **Indemnity § 3— action on indemnity agreement — genuine issue of material fact — credibility of defendant's employee**

In a railway's action to recover, under defendant contractor's agreement to indemnify the railway for any liability which the railway incurred for property damage or personal injury caused by "any acts or omissions, negligent or otherwise," of defendant or its employees, a sum which the railway paid to defendant's employee for injuries suffered when the employee was struck by an unloading ramp while working at the railway's automobile unloading facility, defendant movant for summary judgment carried the burden of showing the lack of a genuine issue of material fact where the affidavit of defendant's employee established that the injury was due to a malfunction of an electrical switch on the ramp, the repair and maintenance of which was the responsibility of the railway, and that the accident was thus not caused by an act or omission of defendant contractor or its employee; however, affidavits presented by the railway which contradict the employee's assertion that the accident resulted from a faulty switch and permit the inference that the employee has falsified the cause of his injury raise an issue of credibility sufficient to defeat defendant's motion for summary judgment and advance the case to trial.

Chief Justice BOBBITT not sitting.

Justice LAKE did not participate in the hearing or decision of this case.

ON *certiorari* to review the decision of the Court of Appeals, 21 N.C. App. 116, 203 S.E. 2d 321, upholding judgment of *McConnell, J.*, 9 July 1973 Session, FORSYTH Superior Court.

This is a civil action to recover $6,027.00 under the terms of an indemnity agreement between Norfolk and Western Railway Company (Norfolk) and Werner Industries, Inc. (Werner).

Norfolk alleged in its complaint, in pertinent part, that:

1. On or about 1 November 1969 Norfolk and Werner entered into an indemnity agreement, a copy of which is attached to the complaint as Exhibit A and incorporated by reference, providing that Werner's employees were to unload motor vehicles from Norfolk rail cars and perform specified functions incident thereto in return for payment as specified in the agreement.

2. Paragraph 7 of that agreement reads as follows:

"7. Contractor agrees to indemnify and save harmless Norfolk from and on account of injury to any person or persons, including death, as well as damage to or loss of property, or claims in connection therewith, caused by or resulting from any acts or omissions, negligent or otherwise, of Contractor or any of Contractor's Trucker's agents, servants or employees in the performance of the services herein undertaken; and any injury to Trucker's agents, servants or employees, including death, occurring on premises of Railway, when such injury or death is not the result of acts or omissions of Trucker, and whether or not such agent, servant, or employee is performing services covered under this agreement at time of such injury or death."

The word "contractor" as used in the indemnity agreement means Werner Industries, Inc.

3. On or about 15 February 1971 Jerry S. Boyles, an employee of Werner, was injured while working at Norfolk's automobile unloading facility. Said facility is owned by Norfolk but under the terms of the agreement Werner is responsible for the actual unloading of the automobiles.

4. On 3 May 1971 Boyles sued Norfolk in the Superior Court of Surry County for $20,000.00 damages for the injuries he suffered as a result of the accident.

5. After protracted settlement negotiations with Werner in which Norfolk requested indemnification under the terms of the agreement, all without success, Norfolk effected a settlement with Boyles in the amount of $6,027.00. Boyles executed a release and his action was dismissed with prejudice. Norfolk has repeatedly demanded that Werner indemnify it but Werner has willfully and wrongfully refused to do so.

Norfolk says that by reason of the matters alleged it is entitled to judgment against Werner for $6,027.00, with interest and costs, to indemnify the plaintiff for the amount expended in settling the claim of Jerry S. Boyles.

In its answer, Werner admits execution of the agreement with the indemnity provisions contained in Paragraph 7 but denies that Werner has incurred any liability thereunder.

Defendant asserts:

1. The indemnity provision contained in Paragraph 7 of the agreement between plaintiff and defendant indemnifies plaintiff *only* "from and on account of injury to any person or persons . . . caused by or resulting from any acts or omissions, negligent or otherwise," of Werner.

2. Boyles was an employee of Werner and the injury to Boyles "was caused solely by the negligence of the plaintiff Railway and not the defendant Contractor. When Boyles filed action for personal injuries against the plaintiff herein, he alleged that his injuries were caused by the negligence of the Railway in failing to maintain in a proper state of repair a certain unloading ramp which was operated by an electrical control device and in failing to warn Boyles that said device was not functioning properly." Boyles' complaint and Norfolk's answer reveal that no defense or contributory negligence on the part of Boyles was pleaded by the Railway; and no acts of Werner, negligent or otherwise, were pleaded by the Railway as the cause of Boyles' injuries.

3. The indemnity provision upon which Norfolk grounds this action does not purport to indemnify Norfolk for loss occasioned by its own negligence.

4. The provision for indemnity was drafted by Norfolk and is meaningless, uncertain, ambiguous, and unenforceable because it fails to define the term "Contractor's Trucker's agents, servants or employees" or the term "Trucker's agents, servants or employees."

Werner moved for summary judgment under Rule 56 of the Rules of Civil Procedure with supporting affidavit of Jerry S. Boyles and Norfolk's answers to certain interrogatories concerning Norfolk's ownership and responsibility for the repair and maintenance of the unloading ramp. Norfolk filed opposing affidavits of W. D. Mason, Jr., Byron D. Williams and L. L. Callahan, Jr. Upon consideration of the pleadings, affidavits, answers to interrogatories, the briefs and arguments of counsel, the trial judge, being of the opinion that there was no genuine issue of any material fact, allowed the motion and entered summary judgment for Werner. Norfolk appea'ed and the Court of Appeals affirmed, Baley, J., dissenting. Norfolk petitioned for review under G.S. 7A-30(2), and we allowed certiorari.

Craige, Brawley by C. Thomas Ross for plaintiff appellant.

Womble, Carlyle, Sandridge & Rice by William F. Womble, Jr., and Allan R. Gitter for defendant appellee.

HUSKINS, Justice.

The sole question presented by this appeal is whether the Court of Appeals erred in affirming the trial court's order granting summary judgment in favor of defendant.

Principles applicable to summary judgment under Rule 56 of the Rules of Civil Procedure are discussed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and have been applied in various cases by this Court, including *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972); *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *McNair v. Boyette*, 282 N.C. 230, 192 S.E. 2d 457 (1972).

Rendition of summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c). The record in this appeal consists of pleadings and exhibits, answers to interrogatories, affidavits, and counter-affidavits.

[1] In granting summary judgment for Werner the trial court found that there were no genuine issues of material fact. Before the propriety of that finding can be considered, we must construe the relevant portion of the indemnity provision upon which plaintiff bases its claim. It reads as follows:

> "7. Contractor [Werner] agrees to indemnify and save harmless Norfolk from and on account of injury to any person or persons, including death, as well as damage to or loss of property, or claims in connection therewith, caused by or resulting from any acts or omissions, negligent or otherwise, of Contractor or any of Contractor's Trucker's agents, servants or employees in the performance of the services herein undertaken. . . ."

The language is unambiguous and should be given its ordinary meaning. *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 127 S.E. 2d 539 (1962). Under the terms of this indemnity provision, Werner agreed to indemnify Norfolk for any liability which Norfolk incurred for property damage or personal injury caused by or resulting from any acts or omissions of Werner or Werner's employees, whether the acts or omissions were negligent or not. Such an indemnity provision is not against public policy when the contract is private and not connected with the public service of a public service corporation. *Gibbs v. Light Co.*, 265 N.C. 459, 144 S.E. 2d 393 (1965).

In order for Norfolk to recover under the indemnity agreement at trial it must prove that the injury of Jerry Boyles was caused by or resulted from an act or omission of Werner. Boyles was an employee of Werner and acting within the scope of his employment at the time of his injury. Thus, in the context of Werner's agreement to indemnify Norfolk, any act or omission of Boyles, negligent or otherwise, which was a proximate cause of his injury was the act or omission of Werner.

[2] The first determination to be made in considering the propriety of summary judgment is whether Werner, as the party moving for summary judgment, has met the burden placed upon it under Rule 56(c). The movant's burden was stated in *Page v. Sloan, supra,* as follows:

> "Our Rule 56 and its federal counterpart are practically the same. Authoritative decisions both state and federal, interpreting and applying Rule 56, hold that the party moving for summary judgment has the burden of 'clearly establishing the lack of any triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded.' 6 Moore's Federal Practice (2d ed. 1971) § 56.15[8], at 2439; *Singleton v. Stewart, supra.* Rendition of summary judgment is, by the rule itself, conditioned upon a showing by the movant (1) that there is no genuine issue as to any material fact, and (2) that the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(b); *Kessing v. Mortgage Corp., supra.*"

The movant must meet this burden even when he does not have the burden of proof at trial. *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972).

The phrase "no genuine issue as to any material fact" is the heart of the summary judgment procedure and the test applied in reviewing the propriety of a trial court's ruling on a summary judgment motion. 10 Wright & Miller, Federal Practice and Procedure: Civil §§ 2716 and 2725 (1973). In *McNair v. Boyette, supra,* this Court articulated the test in these words:

> "The determination of what constitutes a 'genuine issue as to any material fact' is often difficult. It has been said that an issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail. A question of fact which is immaterial does not preclude summary judgment. It has been said that a genuine issue is one which can be maintained by substantial evidence. Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted. . . ." (Citations omitted.)

Application of the foregoing rules to the evidentiary material demonstrates that this is not an appropriate case for summary judgment.

In support of its motion for summary judgment, Werner offered the affidavit of Jerry Boyles reading as follows:

> "The undersigned, Jerry Styers Boyles, being duly sworn, deposes and says:
>
> 1. That on February 15, 1970, he was an employee of Werner Industries, Inc., employed on the 'third shift' (11:30 p.m. to 7:30 a.m.) at an automobile unloading and storage area of Norfolk and Western Railway Company (hereinafter referred to as 'Norfolk'), at Walkertown, North Carolina.
>
> 2. That at the end of eleven sets of tracks Norfolk had three large unloading ramps mounted on rails and movable, by use of an electric control device, from one track to another. And, that each of the three ramps weighed several tons and was mounted on steel wheels, with the lower portion, or frame, being approximately six to eight inches above the ground.
>
> 3. That on the date of my injury the said unloading facility had been open for approximately four days, from

February 10, 1970. During that time I had operated unloading ramps at the Walkertown facility, including the moving of them from track to track, without difficulty. Every ramp I operated stopped as soon as the control switch was released, and would not coast or roll. It was my experience that movement of each ramp was totally dependent upon power from the electric motor on each.

4. That the control switches were mounted so that the operator had to stand in front of the unloading machines and to move them toward himself. It would have been hazardous to walk backwards down the track in front of one of the machines. The standard procedure was for the operator to walk in front of the machine, with his back to it, holding the control switch behind himself and releasing the control switch when the desired position was reached.

5. That on February 15, 1970, at approximately 12:30 p.m., I operated one of the mechanical unloading ramps, moving it from one track to another. That mechanical unloading ramp appeared older than the other two. When the ramp reached the position I wanted it in, I released the switch and continued walking away from it. On this occasion the switch malfunctioned causing the ramp to continue moving, catching the back of my right heel under the frame, and it continued to roll forward, breaking my right foot under it before it stopped.

6. But for the malfunction of the control switch, the accident would not have occurred. I had no warning whatsoever from Norfolk of the possible malfunction of their mechanical unloading ramp, or that such malfunction was a hazard to guard against. Norfolk provided the ramps and all maintenance and repair for them. Werner Industries, Inc., did not do anything, or fail to do anything, which caused or contributed to my injury.

7. That since the accident a piece of metal has been welded by Norfolk to the leading frame member of each of the unloading ramps, in a downward position, which acts as a guard, and the particular machine which malfunctioned, causing my injury, has been taken out of service by Norfolk."

Werner then offered Norfolk's answers under oath to certain interrogatories wherein Norfolk stated that it was the

owner and responsible for the repair and maintenance of the unloading ramp under which Boyles' foot was caught and broken. Norfolk's answers further disclose that the ramp was installed by it in February 1970 and that no repairs were made thereafter to said ramp, either before or after the accident in which Boyles was injured. Norfolk further states that prior to Boyles' injury no problem or defect in the electric control mechanism of this particular ramp was ever reported to any employee of Norfolk.

[3, 4] The affidavit of Jerry Boyles, taken as true, establishes that the injury was due to a malfunction in the switch, the repair and maintenance of which was the responsibility of Norfolk. In that event, the accident was not caused by an act or omission of either Boyles or Werner. This showing negates Norfolk's claim that the accident resulted from an act or omission of Werner and initially carries the burden placed upon movant under Rule 56(c). The burden consequently shifts to plaintiff, who opposed the motion for summary judgment, to show "that there is a genuine issue for trial" as required under Rule 56(e), or to provide an excuse for not doing so under Rule 56(f). G.S. 1A-1, Rule 56(e); 6 Moore's Federal Practice § 56.15[3] (1974).

To meet the burden thrust upon it by Rule 56(e), Norfolk offered the affidavits of W. D. Mason, Jr., and Byron D. Williams (the affidavit of L. L. Callahan, Jr., is not pertinent to this case) which read as follows:

> "The undersigned, W. D. Mason, Jr., being duly sworn, deposes and says:
>
> 'I am employed by the Norfolk and Western Railway Company as a design engineer and have been with the Railway Company since 1950. On February 18, 1970, I was advised by Mr. Jay W. Ricketts, Manager of Werner Industries, Inc., that one of his employees had been injured while operating an unloading ramp at the new auto unloading facility.
>
> 'I requested that Mr. B. D. Williams, Superintendent of Davis H. Elliot Company, Inc., accompany me to make an inspection of the unloading ramp operation.
>
> 'Mr. Williams operated the unloading ramp several times in both directions. The ramp appeared to drift very

little after the switch was released. It may have drifted two to three inches when the switch was released. This is normal operation and there was nothing unusual about the operation of this ramp. To my knowledge, no repairs were needed on the ramp. It appeared to be operating properly.' "

* * * *

"The undersigned, Byron D. Williams, being duly sworn, deposes and says:

'I am employed by the Davis H. Elliot Company, Inc. as a superintendent and presently work at the Norfolk and Western Railway Company's auto unloading facility at Walkertown, North Carolina.

'In February of 1970, several days after Jerry Styers Boyles had been injured at the facility, I was asked by Mr. Mason of the Norfolk and Western Railway Company to inspect the operation of the unloading ramp which had been involved in the accident.

'At that time, I operated the switch which moved the ramp. I did this several times in both directions. When the switch was released, the ramp would drift about two to three inches before stopping. This is normal operation and not unusual. I could find nothing wrong with the electrical operation of the ramp.' "

Facts asserted by the party answering a summary judgment motion must be accepted as true. *Schoolfield v. Collins, supra.* When so considered, Norfolk's affidavits contradict Boyles' assertion that the accident resulted from a faulty switch and permit the inference that Boyles has falsified the cause of his injury. This raises an issue of credibility sufficient to defeat defendant's motion for summary judgment and advance the case to trial. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 88 L.Ed. 967, 64 S.Ct. 724 (1944); *Eisbach v. Jo-Carroll Electric Cooperative, Inc.*, 440 F. 2d 1171 (7th Cir. 1971); 6 Moore's Federal Practice § 56.15[3] and § 56.15[4] (1974); 10 Wright & Miller, Federal Practice and Procedure: Civil § 2726 (1973); *see* Louis, A Survey of Decisions Under the New North Carolina Rules of Civil Procedure, 50 N.C.L. Rev. 729, 735-46 (1972).

In our opinion various inferences arise from the evidentiary materials now in the record. Boyles was the only witness to his accident and is the only person knowledgeable of its cause. Fur-

thermore, he is an employee of defendant and an interested witness. We hold on these facts that Norfolk should have the opportunity to impeach Boyles at trial. *Sartor v. Arkansas Natural Gas Corp., supra; Colby v. Klune,* 178 F. 2d 872 (2d Cir. 1949); *Lee v. Shor,* 10 N.C. App. 231, 178 S.E. 2d 101 (1970).

For the reasons stated the decision of the Court of Appeals affirming entry of summary judgment in favor of defendant is

Reversed.

Chief Justice BOBBITT not sitting.

Justice LAKE did not participate in the hearing or decision of this case.

SHERMAN T. ROCK AND HARVEY T. HAMILTON, JR. v. G. WARD BALLOU AND RALPH G. STYRON

No. 69

(Filed 26 November 1974)

1. **Trial § 58— trial without jury — findings of fact required of trial court**

When the parties waive a jury trial, the court must make findings of fact sufficient to support its judgment and upon its failure to find material facts, the matter must be remanded for such findings.

2. **Trial § 58— findings of fact by trial court — conclusiveness on appeal**

Findings of fact made by the court and supported by competent evidence are conclusive, even though there be evidence in the record which would have supported contrary findings.

3. **Attorney and Client § 7— attorney's fees — contract made during attorney-client relationship**

That portion of the opinion in *Stern v. Hyman,* 182 N.C. 422, which held that a contract between an attorney and his client, made while the attorney-client relationship was in existence, fixing the attorney's compensation, is void as a matter of law and the attorney may recover for services rendered on the basis of *quantum meruit* only is overruled.

4. **Attorney and Client § 7— fee contract made during attorney-client relationship — requirements for validity**

A contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown

to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee, and the burden of proof is on the attorney to show the reasonableness and the fairness of the contract; the rule is applicable whether the contract is for a fixed fee or for a contingent fee.

5. **Attorney and Client § 7— contingent fee contract — requirements for validity**

A contract for a contingent fee, whether made during the existence of the attorney-client relationship or prior to its inception, must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client.

6. **Attorney and Client § 7; Trial § 58— contingent fee contract — sufficiency of evidence — failure of trial court to make findings**

In an action brought by plaintiff attorneys to recover a sum allegedly due them for legal services performed pursuant to a contract therefor, evidence was sufficient to support, but not to compel, a finding of fact that the contract as to the attorney's fee was reasonable, was fairly and freely made, with full knowledge by the defendants of its effect and of all the material circumstances relating to the reasonableness of the fee, that it was made in good faith, without suppression or reserve of fact or of apprehended difficulties, and that it was made without undue influence of any sort or degree, and the trial court properly denied defendants' motion to dismiss at the close of all the evidence; however, the matter must be remanded to the superior court for findings of fact, since these were not made by the trial court.

Chief Justice BOBBITT not sitting.

Justice SHARP concurring.

ON *certiorari* to the Court of Appeals to review its decision, reported in 22 N.C. App. 51, 205 S.E. 2d 540, in which, on appeal of the defendants from *Cowper, J.*, at the 30 July 1973 Session of CARTERET, a new trial was ordered.

The plaintiffs are attorneys. They brought this action for the recovery of $10,560, alleged to be due them for legal services performed pursuant to a contract therefor. The defendant Ballou filed answer denying that he ever employed either of the plaintiffs as his attorney and denying any indebtedness to either of them. The defendant Styron filed answer denying that he had ever employed the plaintiff Rock, admitting that he had employed the plaintiff Hamilton as his attorney but alleging that he had fully paid Hamilton for his services and expenses incurred.

The matter was heard by Cowper, J., without a jury, and the following findings of fact, summarized, were made by the court:

2. The plaintiffs are licensed attorneys.

3. In 1966, the defendant Styron employed the plaintiff Hamilton to prepare certain deeds and other documents relating to the purchase by Styron of a certain tract of land in Carteret County.

4. In February 1968, both defendants, having a prospective purchaser for the property on condition that Styron was able to convey a good and marketable title, requested the plaintiff Hamilton to examine the title to the property and to determine whether it was marketable.

5. The plaintiff Hamilton employed the plaintiff Rock to help him make the title examination. They concluded that the title was not marketable.

6. The plaintiff Hamilton advised both defendants that, in his opinion, a Torrens proceeding would be necessary to make the title marketable.

7. The defendants and the plaintiff Hamilton agreed that he would institute such proceeding for a contingent fee of twenty-five per cent of the net profit from the sale of the land. This agreement was made during March or April of 1968.

8. On 29 July 1968, the defendants and the plaintiff Hamilton renegotiated the fee agreement and fixed the fee which Hamilton was to receive at twenty per cent of the profit on the sale of the land, the defendants to advance the costs of the proceeding up to $1,000.

9. At the time of the agreement with the plaintiff Hamilton as to the fee, both defendants were aware that the plaintiff Rock was handling the title work for Hamilton and they dealt with Rock in the preparation of documents relating to the proceeding.

10. On 29 July 1968, the plaintiffs proceeded with the obtaining of surveys and, on 9 April 1969, instituted the Torrens proceeding.

11. The plaintiffs successfully concluded the said proceeding and a decree of registration was issued by the clerk and

approved by the judge of the Superior Court and was filed on 27 March 1970, the title being registered in the name of the defendant Styron and his wife.

12. On 1 April 1970, the defendant Ballou closed the sale of the land to one Johnson for $52,800.

13. Despite demands by the plaintiffs, the defendants have failed to make any accounting of the expenses and profits relating to the sale.

14. The defendants divided the proceeds of the sale equally between them.

16. The net profit on the sale was $35,530.28.

17. The defendants advanced the costs of the Torrens proceeding.

Upon these findings of fact, the court concluded as follows (summarized):

1. Both of the defendants entered into a binding contract with the plaintiff Hamilton whereby he was to receive as his fee for the Torrens proceeding twenty per cent of the net profits from the sale of the land.

2. Both defendants acquiesced in and ratified the employment of the plaintiff Rock.

3. The defendants were equal partners in the sale of the land.

4. The defendants are jointly and severally liable to the plaintiffs in the sum of $7,106.06.

5. The plaintiffs completely performed their contract with the defendants.

6. The defendants, being partners in the transaction, are jointly and severally liable to the plaintiffs in the above amount.

Upon these findings and conclusions, the court adjudged that the plaintiffs have and recover of the defendants, jointly and severally, $7,106.06.

Upon appeal to it by the defendants, the Court of Appeals granted a new trial and remanded the matter to the Superior Court for findings as to whether the contract is reasonable and as to whether it was fairly and freely made with full knowledge

by the defendants of its effect and of all the material circumstances relating to the reasonableness of the fee.

The defendants petitioned for certiorari on the ground that their motion for involuntary dismissal of the case should have been allowed.

Wheatly & Mason, P.A., by L. Patten Mason for plaintiffs.

Henderon, Baxter & Davidson by David S. Henderson and B. Hunt Baxter, Jr., for defendants.

LAKE, Justice.

[1, 2] When, as in the present case, the parties waive a jury trial, the court must make findings of fact sufficient to support its judgment and upon its failure to find material facts, the matter must be remanded for such findings. *Jamison v. Charlotte*, 239 N.C. 423, 79 S.E. 2d 797 (1953); Strong, N. C. Index 2d, Trial, § 58. Findings of fact made by the court and supported by competent evidence are conclusive, even though there be evidence in the record which would have supported contrary findings. *Goldsboro v. Railroad*, 246 N.C. 101, 97 S.E. 2d 486 (1957); Strong, N. C. Index 2d, Trial, § 58. The record before us contains evidence sufficient to support the findings of fact made by the trial judge.

It appears upon the record before us that the defendants, having an offer for a sale of land, upon the condition that a marketable title could be conveyed to the prospective purchaser, employed the plaintiff Hamilton to determine whether such title could be conveyed. Upon his report that a marketable title could not be conveyed without the institution and completion of a Torrens proceeding, which might or might not be successful, the parties had several conferences. Thereupon, they agreed that the proceeding would be instituted and the defendants would pay for the legal services rendered therein a contingent fee of twenty-five per cent (subsequently reduced to twenty per cent) of the profit realized upon the sale of the land. For the purposes of the present action, it is immaterial whether this contract was made by the defendants with both of the plaintiffs, or with Hamilton alone and assigned in part by him to Rock. The contract as to the fee was made while the relationship of attorney and client existed between the parties to the contract.

[3, 4] In *Stern v. Hyman*, 182 N.C. 422, 109 S.E. 79, 19 A.L.R. 844 (1921), this Court held that a contract between an attorney

and his client, made while the attorney-client relationship was in existence, fixing the attorney's compensation, is void as a matter of law and the attorney may recover for services rendered on the basis of quantum meruit only. As we noted in *Randolph v. Schuyler*, 284 N.C. 496, 201 S.E. 2d 833 (1974), this portion of the decision in *Stern v. Hyman, supra,* is not in accord with the rule generally prevailing in other jurisdictions. To this extent, *Stern v. Hyman, supra,* is hereby overruled. The correct rule, as stated in *Randolph v. Schuyler, supra,* at p. 504, is as follows:

> "A contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary."

This rule is applicable whether the contract is for a fixed fee or for a contingent fee.

[5] The rule governing a contract for a contingent fee, whether made during the existence of the attorney-client relationship or prior to its inception, is thus stated by this Court in *Casket Co. v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 19 A.L.R. 391 (1921):

> "A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client."

The contract upon which the plaintiffs sue is one for a contingent fee and was made during the existence of the attorney-client relationship. The right of the plaintiffs thereunder is, therefore, subject to both of the above stated rules.

[6] The contract related to services to be rendered by the plaintiffs in a matter falling within the scope of a business in which both defendants were experienced. Both of them were aware of the general nature of and the necessity for the pro-

posed proceeding. The evidence in the record is sufficient to support, but not to compel, a finding of fact that the contract as to the attorney's fee was reasonable, was fairly and freely made, with full knowledge by the defendants of its effect and of all the material circumstances relating to the reasonableness of the fee, that it was made in good faith, without suppression or reserve of fact or of apprehended difficulties, and that it was made without undue influence of any sort or degree.

It is not a prerequisite to such a finding that other attorneys be called as witnesses to testify as to the reasonableness of the fee. Neither is it a prerequisite to such a finding that the attorney introduce in evidence a detailed, itemized statement of the time spent by him in rendering the service, though, ordinarily, he would be well advised to do so. In the present instance, the reasonableness of the fee sought to be recovered is to be determined not by the jury but by the judge who is frequently called upon to determine the reasonableness of fees to be paid to attorneys for their services.

Since the evidence in the record is sufficient to permit the court to make findings favorable to the plaintiffs upon the material questions of fact above mentioned, the contention of the defendants that the action should have been dismissed at the close of all the evidence is without merit. However, since the trial court did not make findings upon these questions, the matter must be remanded to the Superior Court for findings thereon and the entry of a proper judgment supported by such findings.

While the matter must be remanded to the Superior Court for its findings upon the above mentioned questions of fact, a complete new trial, which appears to be contemplated by the judgment of the Court of Appeals, is not necessary. No error of law is shown in the findings of fact heretofore made. These are conclusive. The matter must be remanded to the Superior Court solely for findings as to the above mentioned questions of fact, which findings the Superior Court may make upon the present record, together with such further evidence as the Superior Court may deem necessary to enable it to make such findings, and thereupon to enter its judgment. To this extent only, the judgment of the Court of Appeals is modified.

Modified and affirmed.

Chief Justice BOBBITT not sitting.

Justice SHARP concurring:

With the result in this case I am in accord. The contract between plaintiffs-attorneys and defendants, their clients, is one for a contingent fee, and the rule as stated in *Casket Company v. Wheeler,* 182 N.C. 459, 467, 109 S.E. 378, 383, 19 A.L.R. 391 (1921) applies. I cannot agree, however, that the case of *Stern v. Hyman,* 182 N.C. 422, 109 S.E. 79, 19 A.L.R. 844 (1921), which the majority opinion purports to overrule, has any application whatever to this case.

In *Stern,* the plaintiffs, attorneys, sought to recover $5,050 in fees for adjusting the defendants' fire loss on a stock of goods insured with several companies. The plaintiffs contended that they had recovered $25,250 for defendants; that after defendants had employed them, and pending the adjustment, defendants had agreed to pay them 20% of the amount recovered. The defendants denied that plaintiffs had collected $25,250 for them. They contended (1) that the only contract they had made with the plaintiffs was to pay them $200 for making proofs of loss and assisting in adjusting the same; and (2) that if there were any contract for 20% of the recovery, "it was made during the time that plaintiffs were acting in pursuance of their employment and was void, and that plaintiffs were entitled only to reasonable compensation for their services to be assessed by the jury." This Court upheld the defendants' contention.

The rule laid down in *Stern v. Hyman* is that once the relation of attorney and client has been established with reference to a particular transaction, matter, or litigation, any contract made thereafter between the two which purports to bind the client to pay the attorney increased compensation for completing or continuing the work he had undertaken to perform is void as a matter of law. Chief Justice Clark stated the rule as follows: "While the relationship exists an attorney cannot bind his client in any manner to make him *greater* compensation for his services than he would have the right to demand if no contract had been made, during the existence of the relationship." *Id.* at 424, 109 S.E. at 80. (Emphasis added.)

In the case we here consider, defendants first employed plaintiff Hamilton to examine the title to a 1,600-acre tract of land to determine whether it was marketable. A cursory examination of the public records was sufficient to convince plaintiffs that the title was not marketable "and that the only chance of

getting any title was to Torrenize it." When plaintiffs made this report to defendants at that time (February 1968) they had performed the services for which they had then been employed.

The question which arose immediately thereafter was whether a proceeding under the Torrens law (G.S. 43-1 *et seq.)* would produce a marketable title and, if so, how much it would cost. Defendants, of course, "didn't want to get into the cost of it if they couldn't have assurance of a good title," and plaintiffs "couldn't give them any assurance." Sometime in March or April of 1968, however, "the plaintiff, Hamilton, agreed with defendants to institute Torrens proceedings and handle them on a contingency fee basis of 25% of the net profit from the sale of the land. Thereafter, on 29 July 1968, Hamilton and defendants renegotiated the fee arrangement. Hamilton agreed to reduce the contingent fee to 20% of the profit from the sale of the land, and defendants agreed to advance costs up to $1,000.

The attorney-client relationship between plaintiffs and defendants with reference to the subject matter of this suit began when plaintiffs agreed to institute Torrens proceedings for a contingent fee of 25% of the net profit from the sale of the land involved. No previous contract with reference to plaintiffs' compensation for instituting and conducting the Torrens proceedings had been made. Thereafter, according to the judge's finding of fact, made upon supporting evidence, on 29 July 1968 the contingent-fee contract was changed to *decrease* the attorneys' compensation from 25% to 20% of defendants' net profit from the sale of the land. The decision in *Stern* voids only a contract granting an attorney greater compensation "while the relationship exists."

It may be that the rule of *Stern v. Hyman* is unnecessarily harsh; that the "generally accepted view" quoted in *Randolph v. Schuyler,* 284 N.C. 496, 504, 201 S.E. 2d 833, 837-838, is the better rule; and that *Stern v. Hyman* should be overruled when an occasion calls for it. I express no opinion on that question. I merely point out that *Stern v. Hyman* is not pertinent to decision here and that we should neither contrive an attorney-client relationship where none existed in order to overrule it, nor should we purport to overrule it by *obiter dicta.*

BARBARA JEAN FOY v. THOMAS EDWARD BREMSON, GROVER C. BISSETTE AND LESTER GODWIN

No. 90

(Filed 26 November 1974)

1. **Automobiles § 72; Negligence § 4— sudden emergency — defendant's negligence as proximate cause**

One cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligence or wrongful act.

2. **Automobiles § 72; Negligence § 4— sudden emergency — negligence as cause — absence of negligence after emergency**

The fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency.

3. **Automobiles § 72— sudden emergency — defendant's negligence as contributing cause**

In an action to recover damages for personal injuries sustained when plaintiff was struck by defendant's automobile at night after it had collided with a chain between two trucks, plaintiff's evidence was sufficient to permit a jury finding that negligence on the part of defendant was one of the proximate causes of the emergency with which he was confronted immediately prior to the collision where it tended to show that a truck with its rear wheel lodged in a ditch and its back parallel to the highway was to the right of the southbound lane in which defendant was traveling, that its headlights were shining across a field and its taillights and "markers" were burning, that a second truck was parked in the northbound lane with its headlights on dim shining north and with five yellow lights on the cab and a flasher light on each fender burning, that a log chain was connected to both trucks and was stretched across the southbound lane, and that a person on or near the highway north of the trucks attempted to warn defendant by means of a flashlight that he was approaching a zone of danger, but that the defendant failed to decrease his speed before striking the chain.

4. **Automobiles § 90— instructions — sudden emergency — defendant's negligence as contributing cause**

The trial court's charge on sudden emergency was erroneous in failing to instruct the jury that the sudden emergency rule would not be available to defendant in the event his prior negligence contributed to the creation of the emergency as a proximate cause thereof.

5. **Automobiles § 90; Negligence § 42— sudden emergency — instructions — burden of proof**

The trial court erred in placing upon defendant the burden of establishing by the greater weight of the evidence that he was confronted by a sudden emergency.

ON *certiorari*, granted on petition of defendant Bremson, to review the decision of the Court of Appeals reported in 20 N.C. App. 440, 201 S.E. 2d 708, docketed and argued as No. 70 at Spring Term 1974.

Plaintiff's action is to recover damages for personal injuries she sustained on the night of 26 November 1971 when struck by an automobile. She alleged her injuries were proximately caused by the joint and concurrent negligence of defendants Bremson, Bissette and Godwin. Defendants Bissette and Godwin filed a joint answer in which they denied negligence, pleaded contributory negligence, and conditionally alleged a cross-claim against defendant Bremson for contribution. In his answer to the complaint, defendant Bremson denied negligence and pleaded contributory negligence. In his separate answer to the cross-claim of defendants Bissette and Godwin for contribution, defendant Bremson denied negligence on his part; and, in the same pleading, alleged a cross-claim against defendants Bissette and Godwin for damages on account of personal injuries and property damage he sustained on account of their actionable negligence.

All of these actions arose out of a three-vehicle collision that occurred at or about 11:30 p.m. on the night of 26 November 1971 on N. C. Highway No. 222 about eight (8) miles northwest (referred to hereafter as north) of the town of Kenly. The collision involved a 1967 Ford grain truck owned by defendant Godwin; a 1968 Chevrolet grain truck also owned by defendant Godwin; and a 1968 Chevrolet automobile owned and operated by defendant Bremson.

The evidence *offered by plaintiff* as to what occurred prior to and at the time of the collision consists of her testimony, the testimony of defendants Bissette and Godwin, and the testimony of Donnie Lee Boykin. *Uncontroverted* testimony of these witnesses tends to show the facts narrated below.

At or about 10:30 p.m. on the night of 26 November 1971 defendants Bissette and Godwin and plaintiff (a divorcee who lived with Bissette and served as his housekeeper-cook and who also occasionally worked for Godwin) started out in two trucks, a *pickup* truck driven by Bissette and a 1967 Ford grain truck operated by Godwin, to pick up some corn grain Bissette had harvested and left with Godwin's combine in an open field adjacent to N. C. Highway No. 222 between Middlesex and

Kenly. This open field was to the west of No. 222 and was accessible only by means of a narrow, angular driveway. The entrance to the driveway crossed a drainage ditch by means of a covered drainpipe. The right rear wheel of the Ford grain truck fell into the ditch and became lodged therein when Godwin was attempting to make a *right* turn from No. 222 into the entrance to the field. Unable to free the vehicle by means of its own power, Bissette and Godwin attached a chain to the truck and to the combine and tried to "frontally" pull the truck out of the ditch and into the open field. This procedure failed to dislodge the truck. Thereupon, Godwin instructed Bissette to take the *pickup* truck and to return to Godwin's nearby home in order to get Godwin's 1968 Chevrolet grain truck. Bissette carried out Godwin's instructions. Upon his return Bissette parked the Chevrolet grain truck on No. 222 headed north toward Middlesex and directly opposite the driveway where the Ford truck was stuck.

After Bissette's return with the Chevrolet truck, Bissette, Godwin and Boykin began the process of attaching a twenty-foot "log chain" to the Ford truck. After it had been fastened to the Ford truck, the log chain was stretched across the adjacent portion of the highway to be attached to the Chevrolet truck.

Bissette then took the end of the log chain and began the process of hooking it to the Chevrolet truck. Plaintiff held a large lantern-type flashlight for Bissette while he crawled under the Chevrolet truck to attach the chain. After Bissette attached the chain, plaintiff began walking down the road south toward Kenly to signal any vehicles that might approach the scene from that direction. Approximately one hour had elapsed from the time the Ford truck had become stuck in the ditch. Bremson's passenger car did not appear until after the log chain had been attached to both trucks.

The evidence offered by plaintiff included testimony tending to show the following:

The back of the Ford truck was "straight parallel with the highway." The headlights on the Ford truck were "shining across the field." The "taillights" and "markers" on the Ford truck were burning. Boykin testified that he could see the lights "on the Ford truck in the ditch" when standing "several hundred feet down the road toward Middlesex."

Godwin's home was north (toward Middlesex) from the scene of collision. When returning with the Chevrolet grain truck, Bissette drove south, beyond the Ford truck, turned around and then headed north toward Middlesex. Bissette stopped opposite the Ford truck, parking the Chevrolet entirely on its right side of No. 222. The headlights (driving lights) of the Chevrolet were on dim. Five yellow clearance lights, on top of the cab, were burning. Four yellow "emergency flasher lights" were "blinking," one on the top of each fender.

The log chain had been fastened to both vehicles and was stretched across the lane for southbound traffic prior to the collision. Its highest point above the pavement was approximately three feet at the Chevrolet and from eighteen inches to two feet at the Ford. The middle of the chain "was almost to the highway or lying on the highway." The Bremson car "did break the log chain."

Prior to the collision, Bissette had "let the chain down" for three southbound cars to pass "on their side of the road." Boykin had proceeded north toward Middlesex to flag down southbound traffic. He had reached a point variously estimated from a minimum of seventy-five to a maximum of several hundred feet. He had a Sylvania safety cell flashlight equipped with a red blinker device to effectuate such warning. When first observed, the Bremson car was approximately one-half mile up the road traveling south from Middlesex toward Kenly. Boykin was in the middle of the road, waving the light. It did not appear to Boykin that any effort was being made to slow down or stop the Bremson car. Boykin got out of the road and hollered to the others to get out of the road. It appeared to Godwin that the Bremson car first slowed down and later came on faster.

After the collision, the Bremson car was stopped about "one or two car lengths in the Kenly direction" from the Ford truck. Plaintiff was "about two car lengths further down toward Kenly with reference to the Bremson car." Plaintiff testified that she was "approximately ten to twelve feet from the Ford vehicle at the time this happened."

Having testified when called as witnesses for plaintiff, defendants Bissette and Godwin did not offer evidence. The evidence offered by defendant Bremson consisted primarily of his own testimony which, in the material respects set forth below,

was in conflict with evidence offered by plaintiff and tended to show the following:

Although a Raleigh resident, he had traveled this particular stretch of No. 222 on previous occasions. When traveling south on this segment of No. 222 he saw a vehicle facing him with its "bright lights on" apparently in the lane for northbound traffic. These lights began to bother him when he "was four or five hundred feet back down toward Middlesex." He then slowed down to "between thirty-five and forty" miles per hour and continued at that speed. He could not recall having seen "any other lights around besides the headlights." He could not tell that the lighted vehicle he was approaching was a truck until "he was right on top of it, pretty close to it." When almost opposite the truck, he was able to observe for the first time that the left tire was across the center line in his lane of travel. To avoid colliding with it he swerved to the right. All of a sudden, at this point, he was able to see the true situation there, that is, the Ford truck in the ditch and the people thereabouts, at which time he put on his brakes. However, by this time it was too late to avoid a collision and he collided with both trucks and thereafter struck plaintiff.

He did not see anybody in the road or adjacent thereto with a flashlight or any other type of warning device at any time prior to the collision.

When the collision occurred, plaintiff was on the paved portion of the highway, somewhere between and to the rear (south) of the two Godwin trucks, with her back toward the oncoming Bremson vehicle. Following the collision, the Bremson car came to rest approximately five to ten feet past the point where the two Godwin trucks were located. Plaintiff was lying on the right side of the paved portion of the highway in the direction of Kenly approximately two car lengths from Bremson's vehicle.

The investigating highway patrolman, a witness offered by plaintiff, testified that there was no physical evidence at the scene that would indicate that Bremson had applied his brakes in an effort to avoid the collision. The patrolman testified as follows: "There were vehicles at the scene when I arrived. There was a 1969 [sic] Ford truck in the, partially in the, driveway where I have marked private drive. There was a 1968 Chevrolet approximately in the middle of the road, headed, the front of the 1968 Chevrolet was headed, toward Middlesex, and, about in the

middle of the road. The 1969 [sic] Ford truck was partially in the road. The back overhang of the truck was approximately eighteen inches to two foot on the road, on the traveled portion of the road." He further testified that he "found the right rear wheel of the [Ford] truck in the ditch."

All motions for directed verdicts having been denied, the issues submitted, and the jury's answers are as follows:

"1. Was the plaintiff injured and damaged by the negligence of the defendant, Bremson?

"ANSWER: No

"2. Was the plaintiff injured and damaged by the negligence of the defendant, Bissette?

"ANSWER: Yes

"3. Was the defendant, Bissette, at the time of the collision acting as the agent of the defendant, Godwin?

"ANSWER: Yes

"4. Was the plaintiff injured and damaged by the negligence of the defendant, Godwin?

"ANSWER: Yes

"5. Did the plaintiff, by her own negligence, contribute to her injuries and damages?

"ANSWER: No

"6. What amount of damages, if any, is the plaintiff entitled to recover?

"ANSWER: $100,000.00

"7. Was the defendant, Bremson, injured and damaged by the negligence of the defendant, Bissette?

"ANSWER: Yes

"8. Was the defendant, Bremson, injured and damaged by the negligence of the defendant, Godwin?

"ANSWER: Yes

"9. Did the defendant, Bremson, by his own negligence contribute to his injuries and damages?

"ANSWER: No

"10. What amount of damages, if any, is the defendant, Bremson, entitled to recover?

"(a) For personal injury?

ANSWER: $2,500.00

"(b) for property damage?

ANSWER: $1,500.00."

Upon return of the verdict, defendants Bissette and Godwin, pursuant to G.S. 1A-1, Rule 50(b), moved to set the verdict aside and for judgments notwithstanding the verdict. These motions were denied. Thereafter these defendants, pursuant to Rule 59, moved for a new trial. These motions were also denied.

Plaintiff also moved for a new trial pursuant to Rule 59 in her action against defendant Bremson. This motion was denied. Plaintiff then gave notice of her election to appeal the decision as it related to her claim for relief against defendant Bremson.

Defendants Godwin and Bissette also appealed, alleging the trial court had committed reversible error in failing to grant their motions for directed verdicts as against plaintiff's claim and as against defendant Bremson's cross-claim; in erroneously charging or in failing to charge the jury as to which party had the burden of proof on each issue submitted; and in permitting the introduction of substantial amounts of incompetent evidence.

The Court of Appeals ordered a new trial *on all issues* on the specific ground that "[t]he trial court failed to give instructions as to the burden of proof on any of the issues."

Defendant Bremson then petitioned this Court for a writ of *certiorari* which was granted on 5 March 1974. None of the other parties to this action have petitioned this Court for review of the decision below.

Teague, Johnson, Patterson, Dilthey & Clay by Robert M. Clay and Dan M. Hartzog for defendant appellant Bremson.

Narron, Holdford, Babb & Harrison by William H. Holdford for plaintiff appellee.

Battle, Winslow, Scott & Wiley by Robert L. Spencer for defendant appellees Bissette and Godwin.

BOBBITT, Chief Justice.

In her appeal to the Court of Appeals, plaintiff set forth *one* assignment of error, to wit: "The court erred in its charge on Issue No. 1 as to the DOCTRINE OF SUDDEN emergency for that it failed to charge that the sudden emergency doctrine would not be available to defendant Bremson if they should find that by his own negligence, he brought about or *contributed to the emergency.*" (Our italics.)

The Court of Appeals did not discuss this assignment. It awarded a new trial on *all* issues for error in the court's instructions relating to burden of proof.

In our opinion, the court's instructions with reference to Issue No. 1 properly and sufficiently placed upon plaintiff the burden of satisfying the jury by the greater weight of the evidence that negligence on the part of Bremson was a proximate cause of her injuries. However, any failure to place this burden on plaintiff would not be prejudicial to her. She did not assign as error, nor does she contend, that there was error in the court's charge with reference to *burden of proof* in respect of Issue No. 1.

The jury having answered the first issue "No," this ended plaintiff's case against Bremson in the absence of reversible error in respect of the court's instruction on the first issue with reference to the rule applicable under circumstances when a motorist is confronted by a sudden emergency. Therefore, the only question before this Court is that presented by defendant Bremson's petition for *certiorari*, namely, whether plaintiff is entitled to a new trial against defendant Bremson on account of the portion of the charge she assigned as error.

Under the decision of the Court of Appeals there must be a new trial of all issues arising on the pleadings as between plaintiff and defendants Bissette and Godwin, and on the alleged cross-claim of defendants Bissette and Godwin against defendant Bremson *for contribution*, and in respect of the alleged cross-claim of defendant Bremson against defendants Bissette and Godwin for damages on account of personal injuries and property damage sustained by him.

Plaintiff's assignment of error is based on her exception (No. 52) to the following portion of the court's charge:

"(In going back to the first issue, there's something I should have charged you as to the defendant Bremson, which I

will charge you now. The defendant is relying—that is, back to the first issue, 'Was the plaintiff injured and damaged by the negligence of the defendant, Bremson?' The defendant Bremson is relying on what is sometimes called the doctrine of a sudden emergency. That is, that that is a part of the theory of negligence as to what a reasonable and prudent man would do, but specifically the law does not require a man who is confronted with a sudden emergency to exercise any more than the care that an ordinary and prudent person would exercise in a situation. So, you mustn't look here in the cold light of reason as we might do it here in the courtroom, but you must look, put yourself as reasonable men in the shoes of the defendant Bremson on the highway at that time. So, that if you find that *he hadn't brought on* this accident by his own negligence, if he was suddenly confronted with an emergency, his duty is to exercise only the care that an ordinarily prudent person would exercise in the same situation. If at that moment his choice and manner of action might have been followed by an ordinarily prudent person under the same conditions, he does all that the law requires of him, although in the light of after events, it appears that some different action would have been better and safer.

"So, I do instruct you there as to the doctrine of sudden emergency. You wouldn't judge the defendant Bremson in the light as we might do it in the cool thought sitting here in the courtroom, but judge him as you would judge a reasonable man to act who was confronted with a sudden emergency, if you're satisfied by the greater weight of the evidence that he was confronted by a sudden emergency.)" (Our italics.)

In his original charge on the first issue, the court gave no instruction with reference to the rule applicable under circumstances when a motorist is confronted by a sudden emergency. The quoted instruction was given immediately after completion of the court's instructions with reference to the *fourth* issue and immediately preceding the court's instructions with reference to the *fifth* issue. It was not applied or considered with reference to any specific factual situation.

"[A]n automobile driver who, by the negligence of another and not by his own negligence, is suddenly placed in an emergency and compelled to act instantly to avoid a collision or injury, is not guilty of negligence if he makes such a choice as a person of ordinary prudence placed in such a position might make, even though he made neither the wisest choice nor the

one that would have been required in the exercise of ordinary care except for the emergency." 57 Am. Jur. 2d, Negligence § 91 (1971). *See also,* 7 Am. Jur. 2d, Automobiles and Highway Traffic §§ 359, 360 (1963); 60A C.J.S., Motor Vehicles § 257 (1965). *Accord, Brunson v. Gainey,* 245 N.C. 152, 157, 95 S.E. 2d 514, 518 (1956); *Bullock v. Williams,* 212 N.C. 113, 117, 193 S.E. 170, 172 (1937).

[1] One cannot escape liability for acts otherwise negligent because done under the stress of an emergency if such emergency was caused, wholly or in material part, by his own negligence or wrongful act. *Cockman v. Powers,* 248 N.C. 403, 407, 103 S.E. 2d 710, 713 (1958); *Brunson v. Gainey, supra,* at 156, 95 S.E. 2d at 517; 57 Am. Jur. 2d, Negligence § 93 (1971); 65 C.J.S., Negligence § 17(e) (1966).

We note that the court gave the instruction quoted above rather than an instruction requested by defendant Bremson "that a person who creates the emergency or contributes to the creation of the emergency cannot take advantage of the doctrine of sudden emergency." However, the merit of plaintiff's assignment depends upon the correctness of the instruction given without regard to the correctness of the instruction requested by defendant Bremson but not given by the court.

[2] "[T]he fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency." 57 Am. Jur. 2d, Negligence § 93 (1973). *See, e.g., Rodgers v. Carter,* 266 N.C. 564, 568, 146 S.E. 2d 806, 810 (1966); *Brunson v. Gainey, supra,* at 156-57, 95 S.E. 2d at 517-18. "One cannot, by his negligent conduct, permit an emergency to arise and then excuse himself on the ground that he was called upon to act in an emergency." *Brunson v. Gainey, supra,* at 156, 95 S.E. 2d at 517.

In *Rodgers v. Carter,* 266 N.C. 564, 568-69, 146 S.E. 2d 806, 810 (1966), Justice Lake quotes with approval the following statement from the American Law Institute's Restatement of the Law of Torts, 2d Ed., § 296, *viz:*

"'(1) In determining whether conduct is negligent toward another, the fact that the actor is confronted with a sudden emergency which requires rapid decision is a factor in determining the reasonable character of his choice of action.

" '(2) The fact that the actor is not negligent after the emergency has arisen does not preclude his liability for his tortious conduct which has produced the emergency.

* * *

" 'Where the emergency itself has been created by the actor's own negligence or other tortious conduct, the fact that he has then behaved in a manner entirely reasonable in the light of the situation with which he is confronted does not insulate his liability for his prior conduct. Such liability is not precluded by the fact that he has acted reasonably in the crisis which he has himself brought about. It is not his reasonable conduct in the emergency which makes him liable, but his prior tortious conduct creating the emergency.' "

Our decisions in *Rodgers v. Carter, supra,* and in *Brunson v. Gainey, supra,* are in accord with this statement. See also, *Annot.,* Disabled Vehicles—Personal Injuries, 27 A.L.R. 3d 12, 312 (1969), and numerous cases cited therein.

Decision depends upon the application of these well settled legal principles to the evidence in this particular case.

Obviously, the evidence does not show that the emergency situation confronting Bremson was "brought on" *solely* by his own negligence. There are conflicts in the evidence with reference to whether any part of the Chevrolet truck was in Bremson's lane of travel. Too, diverse inferences may be drawn as to whether any part of the Ford truck extended into Bremson's lane of travel. Whatever the jury may have found with reference to these questions, uncontroverted evidence tends to show that the log chain had been connected to both trucks and was stretched across the lane for southbound travel during Bremson's approach to the scene of collision.

Bremson's evidence tends to show that, as he approached the scene of collision, he observed nothing except the "bright lights" of a vehicle in the lane for northbound travel; and that, in the absence of notice to the contrary, he assumed this vehicle was *entirely* in its proper lane. His evidence tends to show he did not see any part of the Ford truck and, in the absence of notice to the contrary, he assumed his lane of travel was clear. Too, his evidence tends to show that he saw no person on or near the highway north of the trucks warning him by means of a flashlight or otherwise that he was approaching a zone of danger. Thus, when the evidence is considered in the light most

favorable to Bremson, he had no reason to anticipate that he was approaching a zone of danger and therefore did not become aware of the emergency created by the obstruction of his lane of travel until immediately prior to the collision. Assuming the jury so found, there was nothing Bremson could do at that moment to avoid striking one or both trucks and directly or indirectly striking the chain.

[3] The crucial question in respect of the applicability of the sudden emergency rule is whether Bremson, when approaching the scene of the collision, saw or by the exercise of due care should have seen that he was approaching a zone of danger, and whether his failure to decrease his speed and bring his car under control without first ascertaining the nature of the highway conditions ahead of him, constituted negligence on his part which *contributed to* the creation of the emergency thereafter confronting him. With reference thereto, when the evidence against defendant Bremson is considered in the light most favorable to the plaintiff, it was sufficient to permit, but not compel, a jury finding that negligence on the part of Bremson was one of the proximate causes of the emergency with which he was confronted immediately prior to the collision. In this connection, the evidence for consideration by the jury includes the testimony with reference to the lights on the Chevrolet truck, the lights on the Ford truck, and the evidence relating to Boykin's attempt to warn southbound motorists by a flashlight.

[4] The error in the portion of the charge challenged by plaintiff's assignment is aggravated by the fact that the court gave no instruction purporting to draw into focus for decision by the jury the factual bases for determining whether the sudden emergency rule was available to Bremson. We hold that the portion of the charge to which plaintiff excepted was erroneous by reason of the court's failure to instruct the jury that the sudden emergency rule would not be available to Bremson in the event his prior negligence contributed to the creation of the emergency as a proximate cause thereof. As in *Rodgers v. Thompson,* 256 N.C. 265, 123 S.E. 2d 785 (1962), where a new trial was ordered on account of error in the charge, the following statement by Justice (later Chief Justice) Parker is appropriate here, *viz:* "The court in its charge on conduct in emergencies did not state to the jury that the doctrine does not apply if the peril or emergency was caused or contributed to by plaintiff's negligence or was occasioned by concurrent negli-

gence of the plaintiff and defendants." *Id.* at 275, 123 S.E. 2d at 791.

[5] Although unrelated to the basis of decision herein, we note that the second paragraph of the portion of the charge to which Exception No. 52 is addressed placed upon Bremson the burden of establishing by the greater weight of the evidence that he was confronted by a sudden emergency. This portion of the instruction was erroneous and prejudicial to Bremson. The sudden emergency rule is a mere application of the rule of the prudent man. It raises no separate issue with reference to the burden of proof. See, *Annot.*, Sudden Emergency Instructions, 80 A.L.R. 2d 5, 30 (1961). The burden of proof rested upon plaintiff to satisfy the jury by the greater weight of the evidence that negligence on the part of defendant Bremson proximately caused her injuries. Instructions with reference to the rule applicable when a motorist is confronted by a sudden emergency should be given whenever the evidence discloses a factual situation appropriate for such instructions. *Rodgers v. Carter, supra,* at 568, 146 S.E. 2d at 810.

Although defendants Bissette and Godwin did not petition for *certiorari,* they request this Court in the exercise of its general supervisory jurisdiction to consider their contentions that the trial judge erred in denying their motions for directed verdicts in respect of plaintiff's claim and in respect of defendant Bremson's cross-action. Suffice to say, we do not deem this a situation that calls for the exercise of our supervisory jurisdiction.

The foregoing leads to this conclusion: Decision of the Court of Appeals awarding a new trial on all issues is affirmed. However, in respect of the issues arising on the pleadings in plaintiff's action against defendant Bremson, the new trial is awarded for error in the court's instructions in connection with Issue No. I with reference to the doctrine of sudden emergency, not for error in respect of the burden of proof with reference to the issues as between plaintiff and defendant Bremson. With this modification in respect of the ground of decision, the decision of the Court of Appeals is affirmed.

Modified and affirmed.

THE POOLE & KENT CORPORATION v. C. E. THURSTON & SONS, INC.

No. 5

(Filed 26 November 1974)

1. **Master and Servant § 15— Right to Work Law**

North Carolina, acting under its police power, has established that the public policy is to protect a workman's right to obtain and hold a job without regard to membership or lack of it in a labor union.

2. **Contracts § 1— existing laws as part of contract**

Valid laws existing at the time and place a contract is entered into and at the place where it is to be performed are read into and become a part of the contract unless a clear intent to the contrary is disclosed by the contract.

3. **Contracts § 21; Master and Servant § 15— subcontract clause requiring union workers — Right to Work Law**

Subcontract provision requiring the subcontractor to use labor "of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" could not be enforced against the subcontractor on the ground that the subcontractor's employees were not operating under a union contract because such enforcement would violate the Right to Work Laws, and the contractor's cancellation of the subcontract for such reason constituted a breach of contract. G.S. 95-79; G.S. 95-80; G.S. 95-81.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed March 6, 1974 (21 N.C. App. 1, 203 S.E. 2d 74) affirming the judgment by *Gambill, J.*, entered at the June 5, 1972 Session, Superior Court of FORSYTH County: (1) dismissing the plaintiff's cause of action; and (2) adjudging that the defendant recover from the plaintiff such damages as it may have sustained by reason of the plaintiff's wrongful breach of the contract between the parties.

This case had its genesis in this factual background: In the late 1960's North Carolina Baptist Hospitals, Inc., a North Carolina corporation (Hospitals) entered into a contract with Robert E. McKee General Contractor, Inc., a Texas corporation (McKee) under the terms of which McKee contracted to construct an addition to the Baptist Hospital in Winston-Salem for an agreed price of $16,000,000.00. On March 6, 1969, McKee entered into a contract with the plaintiff Poole & Kent Corporation, a Maryland corporation (Poole & Kent) by the terms of

which Poole & Kent agreed to do all the mechanical installation work on the project for the sum of $4,500,000.00. On March 27, 1969, Poole & Kent entered into a contract with C. E. Thurston & Sons, Inc., a Virginia corporation (Thurston) by which Thurston agreed to furnish all materials and perform all labor incident to insulating the mechanical work installed by Poole & Kent at an agreed price of $285,000.00. McKee was the general contractor. Poole & Kent, as subcontractor, agreed to do the mechanical work on the construction. Thurston, as a second tier subcontractor, agreed to do the insulation on all Poole & Kent's mechanical work. The contract for the insulation contained this provision:

> "(12) At all times Subcontractor shall provide competent supervision, a sufficient number of skilled workmen, and adequate and proper materials to maintain the progress required by Contractor. All labor used throughout the work shall be acceptable to the Contractor and of a standing or affiliation that will permit the work to be carried on harmoniously and without delay, and that will in no case or under any circumstances cause any disturbance or delay to the progress of the building, structure of facilities or any other work being carried on by the Contractor, Owner and/or General Contractor. Attendance by an authorized representative of Subcontractor at progress meetings, when requested, is an obligation under this agreement."

At the time Poole & Kent and Thurston entered into their contract, Thurston and its employees were parties to a collective bargaining agreement with a local Asbestos Workers Union, an affiliate of the American Federation of Labor. On May 1, 1969, the bargaining agreement expired and was never renegotiated.

After the bargaining agreement expired, Thurston, apparently with his original work force, continued with its insulation work. However, Thurston was given an exclusive entrance for the use of its employees in going to and from the job so that Thurston's workers would not interfere with the workers of other contractors on other parts of the job.

As Thurston proceeded with its insulation work, certain members of the local Asbestos Workers Union began picketing Thurston's entrance to the hospital project. As a result, the em-

ployees of Poole & Kent and other subcontractors refused to report for work and indicated their continued refusal until Thurston renewed its contract with the Asbestos Workers Union or was removed from the job.

On December 13, 1970, Poole & Kent notified Thurston by telegram that the defendant's labor force was in violation of Section 12 of the contract and that noncompliance would cause immediate termination of the contract. Thurston replied: "Contents of your telegram . . . not sufficient reason to cancel our contract. Therefore we will man the job today per our contractual obligation." Thurston sent its personnel to the project. On December 15, 1970, Poole & Kent instituted this action in the Superior Court of Forsyth County against Thurston alleging as its cause of action a breach of contract dated March 27, 1969. Using the complaint as an affidavit, Poole & Kent obtained from the court a temporary restraining order enjoining Thurston from continuing its work force on the job and ordering the removal of its equipment and material. The complaint alleged that Thurston had breached its contract with Poole & Kent by using an unacceptable work force (non-union men) and that the plaintiff recover damages for the breach. The court issued the restraining order which thereafter kept Thurston's men off the job.

On April 26, 1971, Thurston filed answer and counterclaim denying it had breached its contract with Poole & Kent, alleging that Poole & Kent had wrongfully breached its contract with Thurston and had wrongfully procured the injunction and wrongfully removed Thurston and its employees from the project to Thurston's damage in the amount of $95,000.00. Poole & Kent filed a reply denying Thurston's counterclaim.

Poole & Kent filed a written motion for summary judgment. The parties waived a jury trial and consented that the judge should hear the evidence, find pertinent facts and enter judgment. At the pre-trial conference the parties stipulated that the employment contract between the Asbestos Workers Union and Thurston in effect at the date of the contract had expired by mutual consent of the parties.

At a pre-trial conference held May 22, 1972, the parties listed a number of prospective witnesses, made many stipulations, and identified many exhibits for the consideration of the court in its fact finding function (a jury having been waived).

The record discloses that the plaintiff, Poole & Kent, moved for (a) partial summary judgment; (b) a separate trial of the damage issue; and (c) for compulsory reference.

The plaintiff submitted these issues for determination by the court: (a) Did defendant (Thurston) breach its contract with the plaintiff (Poole & Kent) as alleged in the complaint; (b) what amount of damages, if any, is the plaintiff entitled to recover. The defendant submitted these issues: (a) Did the plaintiff (Poole & Kent) breach its contract with the defendant (Thurston) as alleged in the defendant's counterclaim; (b) what damages, if any, is defendant entitled to recover.

The court made these findings of fact:

"9. On November 27, 1970, plaintiff caused the following telegram to be sent to defendant:

'It has been brought to our attention that the men which you have working on the hospital additions and alterations for the North Carolina Baptist Hospitals, Inc., project are not working under the terms of a union collective bargaining agreement.

'If this situation causes disruption of our work on the aforementioned project, it will be necessary to take immediate steps to remedy same.'

* * * * * *

"11. At various times prior to December 10, 1970, representatives of various labor unions advised representatives of Robert E. McKee, General Contractor, Incorporated and plaintiff to have the defendant removed from the construction project because its employees were not members of the local union of the Asbestos Workers Union. These union representatives went on to say that unless union members were used to perform the work of the defendant, the construction project would be shut down by the unions.

* * * * * *

"13. At all times material, the defendant paid wages and fringe benefits to its employees on the said construction project in accordance with the schedule of wages and benefits specified in its agreement of subcontract with plaintiff.

* * * * * *

"16. At all times material, defendant provided competent supervision, a sufficient number of skilled workmen, and adequate and proper materials to maintain the progress required by plaintiff on the said construction project.

"17. The defendant did not follow a policy of refusing to hire employees who belonged to a labor union. On the contrary, the evidence showed that the defendant hired employees to work on the said construction project irrespective of their membership or non-membership in a labor union.

* * * * * *

"20. On December 13, 1970, plaintiff caused the following telegram to be sent to the defendant:

> 'Your present labor force is in violation of paragraph 12 of standard terms of our agreement. You are therefore directed not to send such personnel to the job tomorrow. Any non-compliance with this directive will cause immediate termination of contract.'

* * * * * *

"23. Defendant continued to work and on December 15, 1970, plaintiff obtained an ex parte injunction in the General Court of Justice, Superior Court Division of North Carolina, enjoining and restraining defendant's employees from remaining on or returning to the job site. In compliance with said order, defendant's employees left the job site and have not returned.

* * * * * *

"25. On February 11, 1971, plaintiff wrote to defendant (plaintiff's Exhibit 9):

> 'Under the provisions of Item 4 (Standard Terms and Conditions) of our Contract with you dated March 27, 1960 [sic], to perform work on the above referenced structure, you are hereby notified that said Contract is hereby cancelled.'

* * * * * *

"28. Defendant is entitled to recover its damages, including any loss of profits, it suffered as a result of the plaintiff's illegal actions in removing the defendant from the project and cancelling its agreement of subcontract."

The court drew these conclusions of law:

"1. The defendant at all times complied with the terms of its agreement of subcontract with the plaintiff until it was prohibited from further compliance by the plaintiff.

"2. The plaintiff wrongfully terminated its agreement of subcontract with the defendant.

"3. The defendant is entitled to recover damages from the plaintiff for breach of contract, the amount of which shall be ascertained at a subsequent trial.

"4. The plaintiff is entitled to recover nothing of the defendant."

Upon the basis of the findings of fact and the conclusions of law drawn from them, the court entered judgment: (1) The plaintiff recover nothing from the defendant; (2) the defendant recover from the plaintiff such amount as the defendant shall at a subsequent trial prove it had been damaged by the wrongful breach of contract by the plaintiff. The parties stipulated that the plaintiff's liability to the defendant be determined at a later time. Neither party contended the appeal was fragmentary or premature.

The court answered the issues as indicated. Left for future determination, according to the stipulations, was the amount of damages the defendant is entitled to recover from the plaintiff.

The plaintiff appealed to the North Carolina Court of Appeals. That court affirmed the judgment of the superior court. Our writ of certiorari brought the case here for our further review.

Randolph and Randolph by Clyde C. Randolph, Jr., for plaintiff appellant.

Hudson, Petree, Stockton, Stockton and Robinson by Norwood Robinson; Thompson, Ogletree and Deakins by Guy F. Driver, Jr., for defendant appellee.

HIGGINS, Justice.

The record before us discloses that the procedures in the trial court were regular, the evidence was sufficient to support the findings of fact, and the findings were sufficient to support the conclusions of law and the judgment.

The Court of Appeals, after its careful review, correctly concluded the judgment of the superior court should be affirmed. Judge Parker's opinion is so complete and well documented that little need be said here except that we approve.

Although the material facts in the case are not in dispute, nevertheless in view of the important questions of law involved, some discussion by this Court seems not altogether out of place.

At the time the parties entered into the contract which is the subject of this dispute, Thurston, a Virginia corporation, was party to a labor agreement with the Asbestos Workers Local Union No. 72. That agreement expired on May 1, 1969. On competent evidence, the trial court found: "[T]hat the Asbestos Workers Union did not sign collective bargaining agreements with contractors, such as the defendant, who did not maintain a permanent place of business within the local union's geographic jurisdiction." The defendant, a Virginia corporation which maintained its home office at Roanoke, Virginia, did not maintain a permanent place of business within North Carolina or within the geographic jurisdiction of the local Asbestos Workers Union.

The court found upon competent evidence that the defendant (Thurston) at all times "provided competent supervision, a sufficient number of skilled workmen, and adequate and proper materials to maintain the progress required by plaintiff on the said construction project." (Finding of Fact No. 16.) The court also found upon competent evidence that "the defendant hired employees to work on the said construction project irrespective of their membership or non-membership in a labor union." (Finding of Fact No. 17.)

The complaint and the picketing protest against Thurston were initiated by the Asbestos Workers Union solely because Thurston did not operate under a union contract with its employees. And yet the Union had refused to enter into such contract unless the defendant established and maintained a permanent business office in the jurisdiction of Asbestos Workers Local Union No. 72. Thurston did not accede to the Union's demand that it move its headquarters from Roanoke, Virginia, or that it set up additional headquarters in the Winston-Salem area. Thurston claims, therefore, that the responsibility for its failure to renew its contract with the local union, was the Union's unreasonable demand that Thurston establish perma-

nent headquarters in Winston-Salem, which at no time did Thurston agree to do.

The trial court properly concluded the Union was alone responsible for the failure of Thurston and the Union to renew the contract. The record fails to disclose any right on the part of the Asbestos Workers Union, or any other agency, to require that Thurston move its headquarters to Winston-Salem. The record discloses that Thurston, in the absence of a contract, continued to pay union wages and provide fringe benefits to all members of its labor force regardless of membership or lack of it in a labor union.

At the time the critical events in this case occurred, North Carolina Statutes G.S. 95-79, G.S. 95-80 and G.S. 95-81 were in effect.

> "§ 95-79. *Certain agreements declared illegal.*—Any agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against the public policy and an illegal combination or conspiracy in restraint of trade or commerce in the State of North Carolina.
>
> § 95-80. *Membership in labor organization as condition of employment prohibited.*—No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.
>
> "§ 95-81. *Nonmembership as condition of employment prohibited.*—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

These statutes have been held by this Court to constitute the public policy of North Carolina with respect to the right to work. *Aircraft Co. v. Union,* 247 N.C. 620, 101 S.E. 2d 800; *Willard v. Huffman,* 247 N.C. 523, 101 S.E. 2d 373, citing as

authority many cases including decisions of the Supreme Court of the United States.

[1] The foregoing statutes, stripped to their nakedness, disclose that North Carolina, acting under its police power, has established that the public policy is to protect a workman's right to obtain and hold a job without regard to membership or lack of it in a labor union.

[2] Valid laws existing at the time and place a contract is entered into and at the place where it is to be performed, are read into and become a part of a contract unless a clear intent to the contrary is disclosed by the contract. "It is a general rule that contracting parties are presumed to contract in reference to the existing law; indeed, they are presumed to have in mind all the existing laws relating to the contract. . . ." 17 Am. Jur. 2d, Contracts, § 257, page 654; *Farmers and Merchants Bank of Monroe v. Federal Reserve Bank of Richmond*, 262 U.S. 649; *Adair v. Burial Assoc.*, 284 N.C. 534, 201 S.E. 2d 905; *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E. 2d 453; *Spearman v. Burial Assn.*, 225 N.C. 185, 33 S.E. 2d 895; *Bateman v. Sterrett*, 201 N.C. 59, 159 S.E. 14.

The foregoing North Carolina Statutes are presumed to have been within the contemplation of the parties to this action when they entered into the contract of March 27, 1969.

[3] As the trial court concluded, the legal responsibility for the breach of the contract of March 27, 1969, should be charged to Poole & Kent for the unwarranted cancellation of the contract upon the sole ground Thurston's force was not operating under a union contract. Poole & Kent gave notice the contract was cancelled. Also it applied for and obtained from the court a temporary order removing Thurston's men, material and equipment from the project.

We conclude the decision of the North Carolina Court of Appeals is amply supported by the record. That decision should be and is now

Affirmed.

Chief Justice BOBBITT not sitting.

HUGH A. RAGSDALE, SR. v. SHERMAN KENNEDY, BILL CLEVE, AND WILLIAM B. BROWN

No. 76

(Filed 26 November 1974)

1. **Pleadings § 38; Rules of Civil Procedure § 12— motion for judgment on pleadings**

A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain; when the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. G.S. 1A-1, Rule 12(c).

2. **Pleadings § 38; Rules of Civil Procedure § 12— judgment on pleadings — burden of proof**

Judgment on the pleadings is a summary procedure and the judgment is final; therefore, the movant is held to a strict standard and must show that no material issue of fact exists and that he is clearly entitled to judgment.

3. **Pleadings § 38; Rules of Civil Procedure § 12— motion for judgment on pleadings — consideration of allegations**

Upon motion for judgment on the pleadings, all well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false.

4. **Pleadings § 38; Rules of Civil Procedure § 12— motion for judgment on pleadings — consideration of nonmovant's pleadings**

All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion for judgment on the pleadings.

5. **Corporations § 13; Fraud § 9— sale of corporate stock — misrepresentations that corporation was "gold mine" and "going concern" — sufficiency of allegations of fraud**

In an action by the former president and general manager of a corporation to recover on a promissory note given by defendant corporate directors for the purchase of stock in the corporation, defendants stated a counterclaim of fraud sufficient to overcome plaintiff's motion for judgment on the pleadings where they alleged that plaintiff ran the corporation without holding any meetings of the board of directors and without interference from defendants, and that plaintiff falsely represented to defendants that the business was a "gold mine" and a "going concern" when he knew that the corporation's cash funds had decreased by $20,000 since he became president, that $20,000 had been borrowed for the corporation, that a corporate demand note was delinquent, and that the corporate working capital was so depleted and corporate income so inadequate that the corporation could not pay its normal operating expenses.

6. **Fraud § 1— elements of fraud**

The essential elements of actionable fraud are: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.

7. **Fraud § 3— subsisting or ascertainable fact**

To constitute fraud, a subsisting or ascertainable fact as distinguished from a matter of opinion or representation relating to future prospects must be misrepresented.

8. **Fraud § 3— definite and specific misrepresentation**

Generally, a misrepresentation must be definite and specific to constitute fraud, but the specificity required depends upon the tendency of the statement to deceive under the circumstances.

9. **Corporations § 13; Fraud § 3— seller of corporate stock — describing business as "gold mine" — duty to disclose financial circumstances**

When the president and general manager of a corporation undertook to describe the business as a "gold mine" and a "going concern" to prospective purchasers of his stock in the corporation, he incurred the concomitant duty to make full disclosure of any extenuating financial circumstances which counteracted his positive assertions concerning the condition of the corporation.

10. **Fraud § 3; Vendor and Purchaser § 6— seller's duty to disclose defects to buyer**

When the circumstances make it the duty of the seller to apprise the buyer of defects in the subject matter of the sale known to the seller but not to the buyer, suppression of the defects constitutes fraud.

Chief Justice BOBBITT not sitting.

DEFENDANTS appealed from decision of the Court of Appeals, 22 N.C. App. 509, 207 S.E. 2d 301 (1974), upholding judgment of *Cowper, J.*, 11 February 1974 Session, ONSLOW Superior Court.

Plaintiff brought this action to recover judgment on a promissory note in the sum of $20,000.00 plus interest and reasonable attorney's fees according to the terms of the note.

Plaintiff's complaint contains four numbered allegations as follows:

> "(1) That on or about November 22, 1972, defendants executed and delivered to plaintiff a promissory note, whereby defendants promised to pay to plaintiff or order 60 days from date, the sum of Twenty Thousand Dollars ($20,000.00), with interest thereon at the rate of six and one-half (6½) percent per annum; a copy of said note is hereto attached as Exhibit 'A.'

(2) That defendants have paid nothing on the principal amount of said note, and have paid interest through March 7th, 1973.

(3) That said note provides, that, in addition to the outstanding balance, the holder shall be entitled to recover reasonable attorney's fees to the extent permitted by applicable law.

(4) That said defendants, jointly and severally, owe to the plaintiff the amount of said note, to wit, Twenty Thousand Dollars, ($20,000.00), and interest from March 7th, 1973, at six and one-half (6½) percent per annum, and attorney's fees in the amount of Three Thousand Dollars ($3,000.00)."

A copy of the note designated Exhibit "A" was attached to the complaint and reads as follows:

"November 22, 1972 $20,000.00

60 days after date, for value received, we promise to pay Hugh A. Ragsdale, Sr., or order at his . . . where borrowed Twenty Thousand and 00/100 Dollars

Interest rate before maturity 6½% per annum; after maturity, at highest rate permitted by applicable law not exceeding 12% per annum. All parties to this note, including the makers, endorsers, sureties and guarantors, and whether bound by this or by separate instrument or agreement, hereby waive presentment for payment, demand, protest, notice of non-payment or dishonor and of protest, and any and all other notices and demands whatsoever, and hereby consent that at any time, or from time to time, payment of any sum payable under this note may be extended without notice, whether for a definite or indefinite time, in the event any such party to this note defaults in the payment of any obligation due any creditor, then, at the option of the holder hereof, this note together with accrued interest and all other loan charges thereon shall become immediately due and payable. Any credit life insurance securing the payment of this note was effected solely at the option of the undersigned insured. In the event the indebtedness evidenced hereby is collected by or through an attorney, the holder shall be entitled to recover reason-

able attorney's fees to the extent permitted by applicable law.

Given under the hand and seal of each party hereto.

s/ SHERMAN KENNEDY (SEAL)
s/ BILL CLEVE (SEAL)
s/ WILLIAM B. BROWN (SEAL)

Due: January 22, 1973"

The defendants, answering the complaint, asserted four defenses which are quoted below:

"FIRST DEFENSE: The complaint fails to state a claim against defendants upon which relief can be granted.

SECOND DEFENSE: 1. Defendants admit the allegations contained in paragraphs (1), (2) and (3) of the complaint.

2. Defendants deny each and every other allegation contained in the complaint.

THIRD DEFENSE: Further answering the complaint and as a defense and set off the defendants allege and say:

1. Onslow Livestock Corporation, a North Carolina corporation, was formed in October of 1970, with an original capitalization of 45,000 shares. Raymond Smith was the President and General Manager of the business until ill health forced him to resign in December of 1970. At that time Jack Hinson became President and General Manager and managed the business until he sold his stock interest on June 6, 1972. At that time plaintiff became President and General Manager and managed the business until November 22, 1972, when he sold his stock interest to the defendants.

2. Defendant Brown had been a stockholder since the incorporation of the business, and a board member. On June 6, 1972 defendants Kennedy and Cleve became stockholders and board members.

3. During the period June 6, 1972 to November 22, 1972 the plaintiff, as President and General Manager of Onslow Livestock Corporation, ran the business of the corporation without holding any monthly Board of Directors meetings, which had been the procedure prior thereto, and without interference by defendant stockholders.

4. In November 1972, prior to the date of purchase and sale of plaintiff's interest in the corporation, plaintiff had told the defendants Brown and Kennedy that the business was a 'gold mine.'

5. That on or about November 22, 1972 defendants purchased from plaintiff for $60,000.00 the following: (a) 12,500 shares of $1.00 par value common stock of Onslow Livestock Corporation, (b) plus corporation notes with face value of $29,000.00, with accrued interest at 7%, dated at various times, and payable at various dates; for $40,000.00 cash and the $20,000.00 note plaintiff is suing to collect.

6. That at the time the plaintiff sold his interest in the corporation he was the President and General Manager of the corporation and held a fiduciary relationship to the defendants; and owed them the duty to fully inform them of the condition of the corporation and not to conceal any material facts.

7. That the plaintiff knew or, by proper supervision and management of the affairs of the corporation, should have known that during the period that he was President and General Manager of the corporation (from June 6, 1972, to November 22, 1972), the financial condition of the corporation had worsened in that:

(a) the cash and cash on deposit of the corporation had decreased by approximately twenty thousand dollars,

(b) he had borrowed for the corporation an additional $15,000.00 from the corporation's bank,

(c) the liability of the corporation had increased in that:

1. from a sight draft paying basis for purchases from Ralston-Purina Company the corporation had become indebted on an open account basis to Ralston Purina Company in the amount of $10,000.00,

2. the corporation had become overdrawn in its purchases of corn from Lawrence Warehouse Systems and owed the bank $3,910.00 for the overdraft,

3. the demand note due to the bank had become delinquent because the monthly payment of interest had not been made when due;

(d) the working capital of the corporation had become depleted, and there were not enough funds on hand, or to come in hand through the normal course of business, to pay the normal operating expenses of the business.

8. That the plaintiff, at the time of the sale of his interest in the corporation to the defendants, did not inform the defendants of the above material facts and other facts necessary to give the defendants a true picture of the condition of the corporation.

9. Soon after the sale and purchase of the interest of the plaintiff in the corporation the bank called its demand note, further reducing the working capital of the corporation, and resulted in a forced sale of the assets of the corporation.

10. That the defendants relied on the representation of the plaintiff that the business of the corporation was a 'gold mine' and on his representation, by concealment of material facts, that they would be buying stock in a 'going concern' corporation.

11. That the defendants were in fact deceived as to the condition of the corporation and the value of the stock of the corporation.

12. That the defendants were damaged by the false representation and concealment of material facts by the plaintiff by at least the amount that the plaintiff is suing for.

FOURTH DEFENSE: Defendants allege and say that it is through error, oversight, and mutual mistake of fact, that the provisions in the note they signed, copy of which is attached to the complaint, relating to payment of attorney fees, were not stricken through, the same as the printed name of the payee."

Plaintiff's motion for judgment on the pleadings was allowed and judgment rendered that plaintiff have and recover of the defendants, jointly and severally, the sum of $20,000.00,

plus interest thereon from 7 March 1973 until paid, plus attorney's fees in the sum of $3,000.00, plus costs. Defendants appealed to the Court of Appeals and that court affirmed the judgment with Baley, J., dissenting. Defendants thereupon appealed to the Supreme Court as of right pursuant to the provisions of G.S. 7A-30(2).

Warlick, Milsted & Dotson by Alex Warlick, Jr., Attorney for plaintiff appellee.

Zennie L. Riggs, attorney for defendant appellants.

HUSKINS, Justice.

The sole question for decision is whether the Court of Appeals erred in affirming judgment on the pleadings in favor of the plaintiff.

Judgment on the pleadings was granted in this case on the ground that defendants' answer failed to state a valid defense. In reviewing that action by the trial court, the Court of Appeals held, and properly so, that defendants' "first defense," "second defense" and "fourth defense" raise no material issues of fact. We therefore put them aside.

The Court of Appeals treated defendants' "third defense" as a counterclaim pursuant to Rule 8(c) of the Rules of Civil Procedure which provides, *inter alia:* "When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, on terms, if justice so requires, shall treat the pleading as if there had been a proper designation." We concur in the view that defendants' allegations of fraud are in the nature of a counterclaim even though designated a defense. *See Hutchins v. Davis,* 230 N.C. 67, 52 S.E. 2d 210 (1949). So treated, we must now determine whether defendants have stated a claim of fraud sufficient to overcome plaintiff's motion for judgment on the pleadings.

Motion for judgment on the pleadings is authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure. G.S. 1A-1, Rule 12(c) (1969). The motion operates substantially the same as under the code system before adoption of the new rules of civil procedure. *See Powell v. Powell,* 271 N.C. 420, 156 S.E. 2d 691 (1967); *Reidsville v. Burton,* 269 N.C. 206, 152 S.E. 2d 147 (1967); *Edwards v. Edwards,* 261 N.C. 445, 135 S.E. 2d 18 (1964); 6 Strong, North Carolina Index 2d, Pleadings, § 38 (1968).

[1] North Carolina's Rule 12(c) is identical to its federal counterpart. The rule's function is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. When the pleadings do not resolve all the factual issues, judgment on the pleadings is generally inappropriate. 5 Wright and Miller, Federal Practice and Procedure, § 1367 (1969).

[2] Judgment on the pleadings is a summary procedure and the judgment is final. *See* James, Civil Procedure § 6.17 (1965). Therefore, each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits. The movant is held to a strict standard and must show that no material issue of facts exists and that he is clearly entitled to judgment. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 479 F. 2d 478 (6th Cir. 1973).

[3, 4] The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. *Beal v. Missouri Pac. R. R. Corp.*, 312 U.S. 45, 85 L.Ed. 577, 61 S.Ct. 418 (1941); *Austad v. United States*, 386 F. 2d 147 (9th Cir. 1967); *see* 2A Moore's Federal Practice, § 12.15 (1974); 5 Wright and Miller, Federal Practice and Procedure, § 1368 (1969). All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion. *Kohen v. H. S. Crocker Company*, 260 F. 2d 790 (5th Cir. 1958); *Duhame v. United States*, 119 F. Supp. 192 (Ct. Cl. 1954); *Hargis Canneries, Inc. v. United States*, 60 F. Supp. 729 (W.D. Ark. 1945). We consider the case before us in light of these principles.

[5] The "third defense," viewed in the light most favorable to defendants, alleges that on 22 November 1972, for a consideration of $60,000.00, defendants purchased from plaintiff 12,500 shares of common stock of Onslow Livestock Corporation plus corporation notes with a face value of $29,000.00. Defendants paid plaintiff $40,000.00 in cash and executed the $20,000.00 note plaintiff now sues to collect. At the time of the transaction

plaintiff was president and general manager of the Onslow Livestock Corporation and, from 6 June 1972 to 22 November 1972, ran the corporation without holding any meetings of the board of directors and without interference from defendants. Defendant Brown had been a stockholder since incorporation and was a member of the board of directors when the transaction took place. The other defendants became stockholders and board members on 6 June 1972.

The "third defense" further alleges that in the negotiations and discussions preceding the transaction plaintiff falsely represented that the business was a "gold mine" and a "going concern," and that he concealed material financial facts concerning the corporation's liquidity and indebtedness. More specifically, the pleading alleges that plaintiff failed to disclose that during the period from 6 June 1972 to 22 November 1972 the corporation's cash funds decreased by $20,000.00; that plaintiff had borrowed for the corporation an additional $15,000.00; that the corporation's open account with Ralston-Purina Company increased by $10,000.00; that the corporation incurred a liability of $3,910.00 on a bank overdraft; that a corporate demand note had become delinquent because the interest had not been paid when due; and that the corporate working capital was so depleted and corporate income so inadequate that the corporation could not pay its normal operating expenses. The financial deterioration of the corporation resulted in a forced sale of corporate assets soon after the transaction giving rise to the $20,000.00 note sued upon. As a result, defendants were damaged "by at least the amount that the plaintiff is suing for," *i.e.*, $20,000.00 plus interest and attorney's fees.

[6] We hold that the foregoing allegations in defendants' "third defense" raise a material issue of fact and render judgment on the pleadings inappropriate. While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party. *Johnson v. Owens,* 263 N.C. 754, 140 S.E. 2d 311 (1965); *Early v. Eley,* 243 N.C. 695, 91 S.E. 2d 919 (1956); *Vail v. Vail,* 233 N.C. 109, 63 S.E. 2d 202 (1951); *Insurance Co. v. Guilford County,* 226 N.C. 441,

38 S.E. 2d 519 (1946); *Laundry Machinery Co. v. Skinner,* 225 N.C. 285, 34 S.E. 2d 190 (1945); *Ward v. Heath,* 222 N.C. 470, 24 S.E. 2d 5 (1943); *Pritchard v. Dailey,* 168 N.C. 330, 84 S.E. 392 (1915).

[7, 8] A subsisting or ascertainable fact, as distinguished from a matter of opinion or representation relating to future prospects, must be misrepresented. *Berwer v. Insurance Co.,* 214 N.C. 554, 200 S.E. 1 (1938); *Cash Register Co. v. Townsend,* 137 N.C. 652, 50 S.E. 306 (1905). And generally, the misrepresentation must be definite and specific, *New Bern v. White,* 251 N.C. 65, 110 S.E. 2d 446 (1959), but the specificity required depends upon the tendency of the statements to deceive under the circumstances. "A vague statement that a property or business is 'profitable' or 'a money-maker' may sometimes be treated as one of fact, as where the speaker had a peculiar knowledge of the facts and knew that the property or business had lost money for several years. But where the representee knows that the representer does not have knowledge of the facts, so that a statement that a business is 'profitable' is obviously a guess or an opinion, it does not constitute actionable fraud." Annotation, False Representations as to Income, Profits, or Productivity of Property as Fraud, 27 A.L.R. 2d 14 (1953). Here, according to defendants' allegations, plaintiff as president of the corporation had peculiar knowledge of the facts and knew that the business had lost money in recent months. In our judgment the representations alleged in defendants' "third defense" present a jury question as to whether plaintiff's positive representations that the corporation was a "gold mine" and a "going concern" were intended and received as mere expressions of opinion or as statements of a material fact. *Machine Co. v. Feezer,* 152 N.C. 516, 67 S.E. 1004 (1910); 37 C.J.S., Fraud, § 124 (1943).

[9] It is a permissible inference that plaintiff knew of the worsening condition of the corporation while defendants did not know. When plaintiff undertook to describe the business as a "gold mine" and a "going concern" he incurred a concomitant duty to make a full disclosure of any extenuating financial circumstances which counteracted his positive assertions concerning the condition of the corporation. The rule is that even though a vendor may have no duty to speak under the circumstances, nevertheless if he does assume to speak he must make a full and fair disclosure as to the matters he discusses. *Low v. Wheeler,* 207 Cal. App. 2d 477, 24 Cal. Rptr. 538 (1962); *Franchey v.*

Hannes, 152 Conn. 372, 207 A. 2d 268 (1965); *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 28 A.L.R. 3d 1405 (Fla. App. 1968); *Shepherd v. Woodson*, 328 S.W. 2d 1 (Mo. 1959); *State ex rel. Nebraska State Bar Association v. Richards*, 165 Neb. 80, 84 N.W. 2d 136 (1957); *Krause v. Eugene Dodge, Inc.*, 265 Ore. 487, 509 P. 2d 1199 (1973); 37 Am. Jur. 2d, Fraud and Deceit, § 146 (1968); *cf. Wicker v. Worthy*, 51 N.C. 500 (1859).

[10] Moreover, it is settled law in this jurisdiction that when the circumstances make it the duty of the seller to apprise the buyer of defects in the subject matter of the sale known to the seller but not to the buyer, suppression of the defects constitutes fraud. *Setzer v. Insurance Co.*, 257 N.C. 396, 126 S.E. 2d 135 (1962); *Brooks v. Construction Co.*, 253 N.C. 214, 116 S.E. 2d 454 (1960); *Manufacturing Co. v. Taylor*, 230 N.C. 680, 55 S.E. 2d 311 (1949); *Isler v. Brown*, 196 N.C. 685, 146 S.E. 803 (1929).

For the reasons stated, we hold that defendants' "third defense" states a counterclaim under Rules 8(a) and 9(b) for alleged actionable fraud which is sufficient to repel plaintiff's motion for judgment on the pleadings. Accordingly, the decision of the Court of Appeals is reversed and the cause is remanded to that Court for further remand to the Superior Court of Onslow County for proceedings consistent with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. JOHN LEE EDWARDS

No. 106

(Filed 26 November 1974)

1. **Jury §§ 2, 5— motion to summon jurors from another county — motion to exclude jurors from community where crime occurred — publicity of prior trials**

In this first degree murder prosecution, the trial court did not abuse its discretion in the denial of defendant's motions for the summoning of a jury from another county and, alternatively, for the exclusion from the jury panel of residents of the community in which the offense occurred, made on the ground that two former trials of defendant for the same crime were given extensive newspaper pub-

licity and were the subject of general conversation in the community, where the record contains no evidence as to the extent or nature of such publicity, nothing in the record indicates that any juror at the third trial heard any discussion of the case, saw any newspaper account of it or had formed an opinion as to defendant's guilt, and it does not appear in the record that defendant exhausted his peremptory challenges or that any challenge for cause by him was not allowed. G.S. 9-12(a).

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

The State's evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that the victim was strangled to death, that defendant was left by his companions afoot, in the vicinity of the victim's home after midnight, less than 12 hours before her body was discovered, and that defendant told his girl friend that he entered the victim's home through a window and, in an attempt to rape her, choked her until she stopped struggling and thereafter stole coins from her dresser drawer.

3. **Criminal Law § 112— instructions — reasonable doubt**

Unless he is requested to do so, the trial judge is not required to define "reasonable doubt" in his instructions to the jury and, if he undertakes to define it, he is not limited to the use of an exact formula.

4. **Criminal Law § 112— instructions — reasonable doubt as possibility of innocence — harmless error**

The trial court's definition of reasonable doubt as a possibility of innocence, though disapproved, was favorable to defendant and did not constitute prejudicial error.

5. **Criminal Law § 114— statement of contentions — no expression of opinion**

In a prosecution for first degree murder, the trial court did not express an opinion that the jury should find that the victim was killed in stating the State's contention that defendant was attempting to steal goods or moneys or to commit rape "at the time of the killing of" the victim.

6. **Criminal Law § 87— allowance of leading questions**

The trial court did not err in allowing witnesses for the State to testify in response to leading questions by the prosecuting attorney.

7. **Criminal Law § 135; Homicide § 31— first degree murder — commission prior to 18 January 1973 — life sentence**

The proper sentence to be imposed upon one convicted of murder in the first degree, committed prior to 18 January 1973, is a sentence to imprisonment for life.

8. **Criminal Law § 77— confession to girl friend — admissibility**

In a prosecution for first degree murder, there was no error in the admission of the testimony of defendant's girl friend who recounted to the jury the defendant's confession to her that he strangled the victim in an attempt to commit a rape upon her.

State v. Edwards

APPEAL by defendant from *Kivett, J.*, at the 3 June 1974 Session of ORANGE.

Upon an indictment, proper in form, the defendant was convicted of murder in the first degree and was sentenced to imprisonment for life, the offense having been committed prior to the decision in *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19.

The defendant contends the trial court erred: (1) In its denial of his motions for the summoning of a jury from another county and, alternatively, for the exclusion from the jury panel of residents of the Carrboro community, in which the offense occurred; (2) in its denial of his motion for a judgment as of nonsuit; (3) in its instruction to the jury as to the meaning of reasonable doubt; (4) in its alleged expression of an opinion in its instructions to the jury; and (5) in its admission of evidence, over objection, in response to alleged leading questions by the prosecuting attorney.

The evidence for the State was to the following effect:

Mrs. Dora Lloyd, 83 years of age, lived alone near the intersection of Highway 54 and an undesignated road, west of Carrboro. At approximately 11:30 a.m. on Sunday, 5 September 1971, a neighbor went to her home carrying a lunch tray for Mrs. Lloyd. Receiving no response to her knock, the neighbor investigated, entering the house through the back door by pushing aside a stool which held the door. She found Mrs. Lloyd lying in bed dead. The covers were disarrayed, her head was in an abnormal position, her hair disheveled, her neck bruised and her face mottled. The bedroom light was turned on and the dial of the telephone beside the bed had been pulled off.

The cause of death, in the opinion of the Chief Medical Examiner for the State, who performed an autopsy, was manual strangulation. He found bruises over the body, two fractured ribs and superficial tears and hemorrhage in the genital area.

The deputy sheriff, who went to the house in response to the report of the finding of Mrs. Lloyd's body, observed a dresser drawer open and the contents thereof disarranged.

The defendant spent the evening prior to the discovery of Mrs. Lloyd's body riding about in an automobile with a female relative, who was a witness for the State, and three other companions. At some time after midnight, the car stopped at the intersection of Highway 54 and the road leading to Mrs. Lloyd's

house and the defendant got out. His companions drove away and left him there.

Susan Dark, a witness for the State, and the defendant were both confined in the Orange County jail for 55 days. Their respective cells, though separated by a metal door, were so located that the occupants could engage in a conversation easily. Once or twice a week the defendant, going to make a telephone call or to confer with his lawyer, would pass by Susan Dark's cell and converse with her. They also exchanged letters, those received by Susan Dark being subsequently lost in a fire. He proposed marriage to her. She accepted the proposal on condition that he tell her the truth about the killing of Mrs. Lloyd. He, thereupon, told Susan Dark that he got out of the automobile and left his companions "at Mrs. Lloyd's road," went to her house, entered through a window, struggled with her in an attempt to rape her, in which struggle she bit him on the arm and, thereupon he choked her until she stopped struggling. He further told Susan Dark that he then tore up the telephone and put the telephone cord around Mrs. Lloyd's neck, perpetrated certain indignities to her person and then removed some coins from a drawer. At the time of her testimony, Susan Dark was serving a term in the Women's State Prison for forgery. She had then served six months of her sentence and was hoping to get a parole.

The defendant did not testify but called as his witness Dr. Ladislaw Peter, a psychiatrist serving on the staff of Cherry Hospital. Dr. Peter testified that he examined the defendant at the hospital in the Fall of 1971 and that, in his opinion, the defendant, though mentally retarded to a mild degree, showed no evidence of insanity. He further testified that the defendant, in the course of Dr. Peter's examination of him, denied completely that he killed Mrs. Lloyd. Subsequently, while awaiting the trial which resulted in the conviction and judgment from which the defendant now appeals, he denied to Dr. Peter that he had ever made any statements to Susan Dark. In the opinion of Dr. Peter, based upon his personal observation of the defendant, the defendant's mental condition at the time of the trial now in question was the same as it was when Dr. Peter examined him in the Cherry Hospital.

James H. Carson, Jr., Attorney General, by Rafford E. Jones, Assistant Attorney General, for the State.

F. Lloyd Noell for defendant.

LAKE, Justice.

[1] There is no merit in the defendant's assignment of error directed to the denial of his motion for the summoning of jurors from another county, and the denial of his alternative motion that no jurors be chosen from the Carrboro area of Orange County.

G.S. 9-12(a) provides, "On motion of any party or the State, or on his own motion, any judge of the superior court, *if he is of the opinion that it is necessary in order to provide a fair trial in any case, * * * may* order as many jurors as he deems necessary to be summoned from any county or counties in the same judicial district as the county of trial or in any adjoining judicial district." (Emphasis added.) The statute, obviously, places this matter in the sound discretion of the judge of the Superior Court. *State v. Yoes* and *Hale v. State*, 271 N.C. 616, 641, 157 S.E. 2d 386; *State v. Porth*, 269 N.C. 329, 336, 153 S.E. 2d 10; *State v. Allen*, 222 N.C. 145, 22 S.E. 2d 233. The record discloses no basis whatever for finding that the denial of either of these motions constituted an abuse of discretion by the trial judge.

The defendant was twice before tried and convicted of this offense, each of which former convictions was set aside and a new trial ordered by this Court. *State v. Edwards*, 284 N.C. 76, 199 S.E. 2d 459; *State v. Edwards*, 282 N.C. 201, 192 S.E. 2d 304. In each instance, the ground upon which the new trial was ordered was the admission in evidence, over objection, of the defendant's confession to police officers, obtained through interrogation which this Court deemed improper. In the third trial, now before us for review, the defendant's confession to the officers was not introduced in evidence or in any way mentioned in the presence of the jury.

In support of his motions for the summoning of a special venire from another county, and alternatively, for the exclusion of prospective jurors from the Carrboro area, the defendant contends that the former trials were given extensive newspaper publicity and were the subject of general conversation in Orange County. The record contains no evidence whatever as to the extent or nature of such publicity and nothing in the record indicates that any juror at the third trial heard any discussion of the case, saw any newspaper account of it or had in any way formed an opinion concerning the defendant's guilt. The record

does not contain a transcript of the voir dire examination of any juror. It does not appear in the record that the defendant exhausted his peremptory challenges or that any challenge for cause by him was not allowed.

[2] There was no error in the denial of the defendant's motion for a judgment as of nonsuit (referred to in the defendant's brief as a motion for a directed verdict of not guilty) made at the close of the State's evidence and renewed at the close of all the evidence.

It is elementary that upon such a motion the trial judge is required to take the evidence for the State as true, to give to the State the benefit of every reasonable inference to be drawn therefrom and to resolve in the favor of the State all conflicts, if any, therein. *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. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Overman,* 269 N.C. 453, 468, 153 S.E. 2d 44; *State v. Thompson,* 256 N.C. 593, 124 S.E. 2d 728. There is in the record abundant evidence to support findings that Mrs. Lloyd was murdered, that the crime was perpetrated with brutal cruelty, that the defendant was left by his companions, afoot, in the vicinity of Mrs. Lloyd's home after midnight, less than 12 hours before her body was discovered, and that the defendant told his girl friend that he entered Mrs. Lloyd's home through a window and, in an attempt to commit rape upon her, choked her until she stopped struggling and thereafter stole coins from her dresser drawer. Thus, the evidence for the State was sufficient to support a verdict that the defendant was guilty of the offense with which he was charged, and the denial of the motion for judgment as of nonsuit was proper.

There was no prejudicial error in the court's instruction to the jury concerning the meaning of reasonable doubt. After instructing the jury that the State must prove the defendant guilty beyond a reasonable doubt, the court said:

> "When I speak of a reasonable doubt, I mean a possibility of innocence based on reason and common sense arising out of some or all of the evidence that has been presented, or lack of evidence, as the case may be. It is not a vain, imaginary, fanciful or mere possible doubt, because everything relating to human affairs is open to some possible or imaginary doubt, nor is it a doubt suggested by the in-

genuity of counsel or by your own ingenuity not legitimately warranted by the evidence, nor is it one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him. If after weighing and considering all of the evidence you are fully satisfied and entirely convinced of the defendant's guilt, you will be satisfied beyond a reasonable doubt. On the other hand, if you have any doubt based on reason and common sense, arising from the evidence in the case, or lack of evidence, as to any fact necessary to constitute guilt, and cannot say that you have an abiding faith to a moral certainty in the defendant's guilt, you would then have a reasonable doubt and it would be your duty to give the defendant the benefit of that doubt and to find him not guilty."

[3] The term "reasonable doubt" is more easily understood than defined. Unless he is requested to do so, the trial judge is not required to define "reasonable doubt" in his instructions to the jury and, if he undertakes to define it, he is not limited to the use of an exact formula. *State v. Shaw,* 284 N.C. 366, 200 S.E. 2d 585; *State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113. The instruction here given is in substantial accord with definitions heretofore approved by this Court. See: *State v. Hammonds,* 241 N.C. 226, 85 S.E. 2d 133, and cases there cited; *State v. Schoolfield,* 184 N.C. 721, 114 S.E. 466.

[4] In *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745, we considered a charge containing the first sentence of the one here given, the sentence to which the present defendant's assignment of error is specifically directed. We disapproved the use of the phrase "possibility of innocence" as synonymous with "reasonable doubt." We concluded, however, that this was an instruction more favorable to the defendant than that to which he was entitled to and the error was, therefore, not prejudicial. We adhere to that view.

[5] The defendant contends that, in violation of G.S. 1-180, the trial judge improperly expressed an opinion in the following portion of his instructions:

"The State contends and the defendant denies that from the evidence which the State has presented you should find in this case beyond a reasonable doubt that the defendant entered the house of Mrs. Lloyd with the intention

either to steal the goods or monies of Mrs. Lloyd or to rape her, with that intention at that time, one or the other or both and further the State contends and the defendant denies that the defendant was going about one or the other felony or attempting one or the other of the two felonies, *at the time of the killing of Mrs. Lloyd* * * * ." (Emphasis added.)

The defendant contends that the italicized portion of this instruction was an expression of an opinion by the court that Mrs. Lloyd was killed. We find no merit in this assignment of error. We think it obvious that the court was merely stating the contentions of the parties and it is inconceivable that the jury would otherwise so construe the statement. No error in this statement of contentions was called to the attention of the court at the time. "[I]t is a general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction; otherwise they are deemed to have been waived and will not be considered on appeal." *State v. Gaines*, 283 N.C. 33, 194 S.E. 2d 839. It is totally unrealistic to characterize the above quoted instruction as an expression of an opinion by the court that the jury should find, as a fact, that Mrs. Lloyd was killed. Both before and after the instruction in question, the court plainly instructed the jury that in order for it to find the defendant guilty, it must find beyond a reasonable doubt that the defendant intentionally choked Mrs. Lloyd and thereby proximately caused her death.

[6] The defendant's final contention is that in several specified instances the court, over objection, permitted witnesses for the State to testify in response to leading questions by the prosecuting attorney. It would serve no useful purpose to examine each of these alleged errors separately. In some instances, the questions were not leading. In others, it elicited only repetition of previous testimony. In no instance do we find prejudicial error. "Traditionally the rulings of the judge on the use of leading questions are discretionary." Stansbury's North Carolina Evidence, Brandis Revision, § 31, p. 85. We find no merit in this assignment of error.

[7] G.S. 14-17 provides, "A murder which * * * shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree." The proper sentence to be imposed

upon one convicted of murder in the first degree, committed prior to 18 January 1973, is a sentence to imprisonment for life. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19.

[8] Three times this defendant has been convicted of the murder in the first degree of Mrs. Lloyd. Twice this Court has set aside the conviction and granted a new trial for error in the admission of evidence. At the third trial, which is involved in the present appeal, those errors were not repeated and the record discloses no other error prejudicial to the defendant so as to entitle him to a new trial. There was no error in the admission of the testimony of the defendant's girl friend, Susan Dark, who recounted to the jury the defendant's confession to her that he strangled Mrs. Lloyd in an attempt to commit rape upon her. The credibility of this evidence was for the jury. The witness was subjected to extensive cross-examination by his able court-appointed counsel, experienced in the practice of criminal law, who represented him at all three trials. In an effort to discredit the testimony of this witness, the defendant's counsel properly developed in detail her own criminal record. The jury, nevertheless, believed her testimony concerning the defendant's statement to her. It was the proper function of the jury to determine the credibility of her testimony.

No error.

STATE OF NORTH CAROLINA v. SAMUEL LEE CAMP

No. 73

(Filed 26 November 1974)

1. **Bastards § 5— blood grouping tests — right of defendant to demand — admissibility of results**

In N. C., when paternity is in issue, statutes require that upon motion by defendant the court order blood tests for mother, child and alleged father and that results of such tests be admitted in evidence when offered by a duly licensed practicing physician or other qualified person. G.S. 49-7; G.S. 8-50.1.

2. **Statutes § 5— clear and unambiguous language — prohibition against judicial construction**

It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be added, and where the language of the statute is clear

and unambiguous, there is no room for judicial construction, but the courts must give it its plain and definite meaning and they are without power to interpolate, or superimpose, provisions and limitations not contained therein.

3. **Bastards § 4— blood grouping tests — results not conclusive on paternity issue**

Since G.S. 49-7 and G.S. 8-50.1 are silent as to the weight to be given to blood tests and do not make the test which establishes nonpaternity conclusive of that issue but merely provide that results of the test may be admitted in evidence, it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity.

Chief Justice BOBBITT not sitting.

Justice HUSKINS dissenting.

Justice HIGGINS joins in dissenting opinion.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 22 N.C. App. 109, 205 S.E. 2d 800 (1974), finding error in the trial before *Friday, J.*, at the 29 October 1973 Session of GASTON Superior Court.

Defendant was tried and convicted of wilfully neglecting or refusing to support his minor illegitimate child, a violation of G.S. 49-2. From a six months' prison sentence, suspended on condition, among others, that he support the child, defendant appealed to the Court of Appeals. That court found error in the trial judge's charge to the jury and ordered a new trial. We allowed the State's petition for *certiorari* on 30 August 1974.

The only witness for the State was the mother, Mary Louise Hames, who testified that she was unmarried; that the child, Timothy Taneau Hames, was conceived in October 1972, was born 12 July 1973, and was a full-term baby; and that she had sexual intercourse with the defendant a number of times in October and November 1972 and with no one else.

The only witness for the defendant was Dr. Eugene Dell Rutland, Jr. He testified that he made blood tests involving the defendant, the mother of the child, and the child on three separate days—September 28, 1973, September 29, 1973, and October 3, 1973. He testified further that the mother's blood was in group "O," the defendant's was in group "O," and the baby's was in group "A." He then testified that from his study of medicine he had an opinion satisfactory to himself that the

defendant could not be the father of the child, for the reason that a male and female with group "O" blood cannot produce an infant with a group "A" blood.

Judge Friday charged the jury in part as follows:

> "Now, ladies and gentlemen, in connection with blood-grouping tests, the Court instructs you that our law here in the State of North Carolina says that blood-grouping tests are not conclusive on the issue of paternity. This same law further says that the jury shall consider the tests results, whatever they may show, along with all other evidence, in determining the issue of paternity, that is, in determining who is the father of the child, Timothy Hames."

The Court of Appeals ordered a new trial.

Attorney General James H. Carson, Jr., Deputy Attorney General Jean A. Benoy, and Associate Attorney Noel Lee Allen for the State, appellant.

Nicholas Street for defendant appellee.

MOORE, Justice.

The sole question presented by this appeal is the weight to be given a properly administered blood test that shows nonpaternity. The trial court instructed the jury that blood tests are not conclusive on the issue of nonpaternity but that the results of such tests are to be considered along with all the other evidence in determining the issue of paternity. The Court of Appeals awarded a new trial, saying that the instruction as given was erroneous, and that the court should have charged that under the law of genetics and heredity a man and woman of blood group "O" cannot possibly have a child of blood group "A," and that if they believed the testimony of the doctor and believed that the tests were properly administered, it would be their duty to return a verdict of not guilty.

Cases from other jurisdictions involving the question before us are collected in Annot., 46 A.L.R. 2d 1000 (1956). The positions taken by other courts are summarized by the Supreme Court of Nebraska in *Houghton v. Houghton,* 179 Neb. 275, 285-86, 137 N.W. 2d 861, 869 (1965):

> "In cases arising either under . . . statutes or by courts which have taken judicial notice of the reliability of such

tests, the courts are not in harmony as to the weight to be given to such evidence. . . . Some cases have held that blood tests indicating nonpaternity are only entitled to the same weight as other evidence. Among them are *Arais v. Kalensnikoff*, 10 Cal. 2d 428, 74 P. 2d 1043, 115 A.L.R. 163; *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P. 2d 442; and *Ross v. Marx*, 24 N. J. Super. 25, 93 A. 2d 597. The reasoning of the courts holding this view is stated in *Arais v. Kalensnikoff, supra,* as follows: 'Expert testimony "is to be given the weight to which it appears in each case to be justly entitled." * * * "When there is a conflict between scientific testimony and testimony as to the facts, the jury or trial court must determine the relative weight of the evidence. . . . "'

"The courts of other jurisdictions, while holding the results obtained from tests are not conclusive on the issue of nonpaternity, do hold that such tests should be given great weight. See, *Commonwealth v. Gromo*, 190 Pa. Super. 519, 154 A. 2d 417; *State ex rel. Steiger v. Gray*, Ohio Jur., 145 N.E. 2d 162; *Beck v. Beck*, 153 Colo. 90, 384 P. 2d 731. . . .

"[There is] a third rule followed by some courts. . . . It is that, in the absence of evidence of a defect in the testing methods, blood grouping tests are conclusive on the issue of nonpaternity. See, *Anonymous v. Anonymous*, 1 App. Div. 2d 312, 150 N.Y.S. 2d 344; *Saks v. Saks*, 189 Misc. 667, 71 N.Y.S. 2d 797; *Jordan v. Davis*, 143 Me. 185, 57 A. 2d 209; *Commonwealth v. D'Avella*, 339 Mass. 642, 162 N.E. 2d 19; *Commonwealth v. Coyle*, 190 Pa. Super. 509, 154 A. 2d 412; *Retzer v. Retzer* (D.C. Mun. App.), 161 A. 2d 469."

[1] In North Carolina, when paternity is in issue, statutes require that upon motion by defendant the court order blood tests for mother, child and alleged father. G.S. 49-7; G.S. 8-50.1. G.S. 8-50.1 further provides that " . . . The results of such blood grouping tests shall be admitted in evidence when offered by a duly licensed practicing physician or other qualified person." Neither statute prescribes the weight to be given such evidence.

[2] It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be supplied. 2A Sutherland Statutory Con-

struction § 47.38 (4th ed., 1973); *State v. Humphries,* 210 N.C. 406, 186 S.E. 473 (1936). Here, it is clear that G.S. 49-7 and G.S. 8-50.1 allow the results of blood-grouping tests into evidence, but the statutes are silent regarding the weight to be given such results. "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein." 7 Strong, N. C. Index 2d, Statutes § 5 (1968). This rule was applied in *Board of Architecture v. Lee,* 264 N.C. 602, 142 S.E. 2d 643 (1965). In that case, the North Carolina Board of Architecture, pursuant to G.S. 83-12, sought to enjoin the defendant from practicing architecture without a license. An exemption to the licensing requirement provided: " . . . Nothing in this chapter shall be construed to prevent any person from making plans or data for buildings *for himself.*" (Emphasis added.) One of the buildings construction of which was sought to be enjoined was an automobile sales and service building to be located on defendant's property. Defendant had drawn the plans for the building, though he planned to lease it to others. The Board contended that "for himself" in the statute meant buildings that defendant would actually occupy. This Court disagreed. Justice Parker (later Chief Justice), speaking for the Court, said:

> " . . . It seems plain that the statutory exception contemplates possession by the designer of the building for whatever lawful purpose he may choose. If the General Assembly had intended the statutory exception to be limited to buildings actually occupied by the designer, and not for lease and use by the public, it could quite easily have said so. . . . The General Assembly having thus formally and clearly expressed its will, the Court is without power to interpolate or superimpose conditions and limitations which the statutory exception does not of itself contain."

[3] More recently, we applied this rule to the question now before us. In *State v. Fowler,* 277 N.C. 305, 177 S.E. 2d 385 (1970), Justice Sharp, speaking for the Court, said:

> "There can be no doubt that a defendant's right to a blood test is a substantial right and that, upon defendant's motion, the court must order the test when it is possible to do so. However, as Professor Stansbury has pointed out, both G.S. 49-7 and G.S. 8-50.1 are silent as to the weight

to be given to the blood tests. Stansbury, N. C. Evidence (2d Ed., 1963) § 86 n. 7. *See,* 33 N.C. L. Rev. 360 n. 15 (1955) ; 27 N.C. L. Rev. 456-457 (1949). Since the statutes do not make the test which establishes nonpaternity conclusive of that issue but merely provide that the results of such test 'when offered by a . . . duly qualified person' shall be admitted in evidence, it seems clear that the legislative intent was that the jury should consider the test results, whatever they might show, along with all the other evidence in determining the issue of paternity. [Citations omitted.]"

The opinion of the Court of Appeals is well reasoned and documented, and cogently presents the view of many jurisdictions that blood-grouping tests that point to nonpaternity are conclusive. Indeed, this Court, recognizing the reliability of such tests, has said: " . . . Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known. See Note, 50 N.C. L. Rev. 163 (1971)." *Wright v. Wright,* 281 N.C. 159, 172, 188 S.E. 2d 317, 326 (1972). Perhaps the General Assembly should provide that the results of such tests showing nonpaternity should be conclusive. However, when public policy requires a change in a constitutionally-valid statute, it is the duty of the Legislature and not the courts to make that change. 2 Strong, N. C. Index 2d, Constitutional Law § 10 (1967) ; *Clark's v. West,* 268 N.C. 527, 151 S.E. 2d 5 (1966) ; *Insurance Co. v. Bynum,* 267 N.C. 289, 148 S.E. 2d 114 (1966) ; *Fisher v. Motor Co.,* 249 N.C. 617, 107 S.E. 2d 94 (1959). " . . . As long as [the legislative body] does not exceed its powers, the courts are not concerned with the motives, wisdom, or expediency which prompt its actions. These are not questions for the court but for the legislative branch of the government. *State v. Warren,* 252 N.C. 690, 114 S.E. 2d 660; *Ferguson v. Riddle,* 233 N.C. 54, 62 S.E. 2d 525; *State v. Harris,* 216 N.C. 746, 6 S.E. 2d 854." *Clark's v. West, supra.* "The legislative, executive, and supreme judicial powers of State government shall be forever separate and distinct from each other." Article I, section 6, North Carolina Constitution.

For the above reasons, we adhere to the interpretation of the statute as set out in *State v. Fowler, supra,* and leave to the General Assembly the question of the weight to be given such blood-grouping tests.

The cause is returned to the Court of Appeals for remand to the Superior Court with direction that the judgment entered by Judge Friday be affirmed. The decision of the Court of Appeals is reversed.

Reversed.

Chief Justice BOBBITT not sitting.

Justice HUSKINS dissenting.

The majority opinion accurately depicts the present state of the law and is unquestionably correct unless we are prepared to take judicial notice of the laws of heredity. I think we should judicially recognize these hereditary laws and my dissent is based solely on that ground.

Defendant was charged with the willful failure to support his illegitimate child. He is presumed to be innocent. To establish his guilt the State is required to prove *beyond a reasonable doubt* (1) that defendant is the father of the child and (2) that he willfully failed to support it.

The mother of the child was the only witness for the State. She testified that she was unmarried and that the child was conceived in October 1972, was a full-term baby and born on 12 July 1973. She swore that she had sexual relations with defendant two or three times a week in October and November 1972 and with no one else.

The only witness for the defendant was Dr. Eugene Dell Rutland, Jr. He testified that he tested the blood of the mother, the defendant and the child. These tests revealed that both the mother and the defendant had type O blood while the child had type A blood. Dr. Rutland then testified that in his opinion, based on the laws of genetics and heredity, two parents with type O blood cannot produce a child with type A blood.

According to Mendel's Law of Hereditary Characteristics, two parents with type O blood cannot produce a child with type A blood. The validity of this scientific principle is accepted by the medical profession and among scientists generally. The medical profession apparently admits that, theoretically, due to possible mutation of the genes, two parents with type O blood might produce a child with type A blood in one out of 50,000

to 100,000 cases. See Comment, Conclusiveness of Blood Tests in Paternity Suits, 22 Md. L. Rev. 333 (1962), and cases cited; Comment, Blood Grouping Test Results: Evidential Fact or Conclusion of Law? 23 Wash. & Lee L. Rev. 411 (1966), and cases cited. Notwithstanding this "theoretical exception," when the quantum of proof required to convict is "beyond a reasonable doubt," the possibility of error is so infinitesimal that the tests should be accepted as infallible when they exclude the defendant as the father of the child. The administration of justice is not aided by a rule of evidence, such as ours, which permits a jury in its unbridled discretion to ignore scientific facts and base its verdict on testimony which, according to Mendel's Law, is false 49,999 out of every 50,000 times!

It is my view that Mendel's Law of Hereditary Characteristics is so notoriously true as to exclude reasonable dispute and its accuracy and reliability has been demonstrated by readily accessible scientific sources of indisputable accuracy. This Court, therefore, may and should take judicial notice of the fact that two parents with type O blood cannot produce a child with type A blood. *Kennedy v. Parrott,* 243 N.C. 355, 90 S.E. 2d 754 (1956). The Court of Appeals so held and I am in full accord with the well reasoned and fully documented opinion of that court. Whether the blood tests are properly administered and whether the results of the tests are truthfully reported to the court and jury, if disputed, are jury questions. The jury should have been instructed in this case, as the Court of Appeals held, "that under the laws of genetics and heredity a man and woman of blood group O cannot possibly have a child of blood group A and that if they believed the testimony of the doctor and believed that the tests were properly administered, it would be their duty to return a verdict of not guilty."

For the reasons stated I respectfully dissent from the majority opinion which reverses the decision of the Court of Appeals and upholds the conviction of this defendant on the unsupported testimony of the mother and in the face of blood tests which, if properly administered and truthfully reported, show that defendant could not be the father of this child.

I am authorized to say that Mr. Justice HIGGINS joins in this dissent.

Hinson v. Creech

WILBUR HINSON, WIDOWER OF NANNIE MAE HINSON, DECEASED, EMPLOYEE-PLAINTIFF v. MR. & MRS. JOHN W. CREECH, t/a JACKSON EGG FARM, EMPLOYER-DEFENDANT (NON-INSURER)

No. 68

(Filed 26 November 1974)

1. **Master and Servant § 49 — workmen's compensation — farm labor exemption — delivery of eggs to retailer**

An employee whose duties consisted of cleaning, grading and packaging of eggs, delivering eggs by motor vehicle to retail customers on a regularly maintained schedule, and keeping records of sales and collecting for the eggs she delivered was not a "farm laborer" excluded from coverage under the Workmen's Compensation Act by G.S. 97-13(b).

2. **Master and Servant § 48 — workmen's compensation — agricultural exemption — egg producers delivering eggs to retailers**

When egg producers formed a business association with a registered trade name, sought to increase the profits of the business by selling and delivering eggs over stated routes to stores, institutions and individuals, and subjected their employee to the daily hazards of operating a motor vehicle upon the highways to places far removed from the farm, their business ceased to be "agriculture" within the meaning of G.S. 97-2(1), which exempts "agriculture" from the meaning of "employment" under the Workmen's Compensation Act.

3. **Master and Servant § 48 — workmen's compensation — exemption for agriculture — service business**

It is only when a farmer departs from his agricultural pursuits and clearly enters into a service business or another business remote from the direct production of agricultural products that his services cease to be "agriculture" within the meaning of G.S. 97-2(1).

Chief Justice BOBBITT not sitting.

ON *certiorari* to review decision of the North Carolina Court of Appeals reported in 21 N.C. App. 727, 205 S.E. 2d 606.

On 3 December 1971 deceased, Nannie Mae Hinson, was fatally injured in a motor vehicle accident while operating a truck belonging to her employers and while she was engaged in delivering eggs for her employers.

Plaintiff, the surviving spouse and administrator of the estate of the decedent, filed notice of the accident with the employers pursuant to G.S. 97-22 and filed claim with the Industrial Commission as required by G.S. 97-24. On 30 May 1972, a hearing was held before Chief Deputy Commissioner Delbridge of the Industrial Commission.

The uncontradicted evidence presented at the hearing showed that defendants John W. Creech and wife Jean Creech, trading as Eugene Jackson Egg Service (employers), were engaged in the production and sale of eggs. Employers bought baby chicks and raised them until they began laying eggs, and when the hens were no longer productive, they were removed from the premises. There were twelve laying houses on the premises, and defendants had purchased a $5,000 egg grader. The eggs were cleaned, graded, and packaged on premises leased by employers and were then delivered to various customers, including stores, restaurants, institutions, and individuals. Brokers also purchased eggs from employers and transported them from the premises. Employers purchased all the chicken feed used in the operation. They also raised hogs on the premises.

Decedent's duties consisted of cleaning, grading, packaging, and delivering eggs. She also kept records of sales and collected for the eggs that she delivered.

It was stipulated that decedent was employed by employers and received an average weekly wage of $50. It was further stipulated that decedent died as a result of injuries sustained in an automobile-truck wreck on 3 December 1971; that on that date employers had five or more employees; and that employers had no Workmen's Compensation Insurance. Evidence was submitted concerning decedent's medical and burial expenses.

After finding facts substantially in accord with the above-recited evidence and stipulations, Chief Deputy Delbridge concluded that "[t]he defendants are engaged in an agricultural pursuit, and the employees of the defendants, including the deceased employee, Nannie Mae Hinson, are farm laborers. The defendants are exempt from the North Carolina Workmen's Compensation Act. . . ."

The claim was dismissed, and plaintiff appealed to the full Commission for further review. The full Commission adopted the opinion and award of Chief Deputy Commissioner Delbridge as its own and affirmed the results of the opinion and award. Plaintiff appealed from the award and opinion of the full Commission, and the North Carolina Court of Appeals affirmed. We allowed plaintiff's petition for writ of certiorari to review the decision of the Court of Appeals on 30 August 1974.

Gerrans & Spence, by William D. Spence, for plaintiff appellant.

White, Allen, Hooten & Hines, by John R. Hooten, for defendants.

BRANCH, Justice.

We first consider whether plaintiff's intestate was a farm laborer within the meaning of G.S. 97-13(b), which provides, in relevant part: "This Article shall not apply to . . . farm laborers. . . ."

The "farm labor" exemption has generally received a more narrow interpretation than the exemption of "agricultural labor" from the definition of employment under the various Workmen's Compensation Acts. 99 C.J.S. *Workmen's Compensation* § 33, page 195; *Gwin v. J. W. Vestal & Son,* 205 Ark. 742, 170 S.W. 2d 598. Whether an employee is a farm laborer depends, in a large degree, upon the nearness of his occupation to the planting, cultivation, and harvesting of crops. *Mulanix v. Falen,* 64 Idaho 293, 130 P. 2d 866; *see* Note, 16 Tex. L. Rev. 608. In considering the question of whether an employee is a farm laborer, a majority of the jurisdictions have placed emphasis upon the nature of the employee's work rather than upon the nature of the employer's business. 1A A. Larson, The Law of Workmen's Compensation § 53.31.

The prevailing rule is aptly stated in *H. J. Heinz Co., v. Chavez,* 236 Ind. 400, 140 N.E. 2d 500:

> " . . . [A]lthough the character of the 'employment' of an employee must be determined from the 'whole character' of his employment and not upon the particular work he is performing at the time of his injury, nevertheless the coverage of an employee under the Act is dependent upon the character of the work he is hired to perform and not upon the nature and scope of his employer's business. . . . "

Accord, Bob White Packing Co. v. Hardy, 340 S.W. 2d 245 (Ky.); *Peterson v. Farmers State Bank,* 180 Minn. 40, 230 N.W. 124.

In reaching its decision, the Court of Appeals relied heavily upon *Department of Labor and Industries v. McLain,* 66 Wash. 2d 54, 401 P. 2d 211. There the Court held that a chicken farm

constituted "farming" within the meaning of the Washington statute. *McLain* is factually distinguishable from instant case in that there the claimant was on the premises of the farm shoveling snow from the roof of a chicken house. The duty that he performed was obviously a necessary farm chore connected with the raising of chickens and production of eggs.

The Court of Appeals also relied upon *Fleckles v. Hille,* 83 Ind. App. 715, 149 N.E. 915, which stated that agriculture includes the "raising, feeding and management of livestock and poultry," and upon *Davis v. Industrial Commission,* 59 Utah 607, 206 P. 267, which contains the following language: "Every standard authority that defines the word agriculture includes in the definition the rearing and care of livestock."

We have no quarrel with the holdings in these cases; however, they furnish no authority for decision of the question here presented. In instant case there is no evidence that plaintiff's intestate was ever engaged in duties which included the "raising, feeding, care and management of livestock or poultry." To the contrary, the uncontradicted evidence shows that plaintiff's intestate regularly used employers' automobile to deliver employers' eggs to retail customers on a regularly maintained schedule. Her other duties consisted of cleaning, grading, and packaging the eggs. She also kept records and collected for the eggs delivered to various retail customers, including stores, restaurants, institutions, and individuals.

[1] We hold that the duties of plaintiff's intestate were sufficiently removed from the normal process of argiculture to prevent her exclusion from coverage under the Workmen's Compensation Act as a "farm laborer."

We next turn to the question of whether the employment relationship under the facts of this case constituted agriculture within the meaning of G.S. 97-2(1), which exempts "agriculture" from the definition of "employment" under the Workmen's Compensation Act.

Traditionally, agriculture has been broadly defined as "the science or art of cultivating the soil and its fruits, especially in large areas or fields, and the rearing, feeding, and management of livestock thereon, including every process and step necessary and incident to the completion of products therefrom for consumption or market and the *incidental* turning of them to account." 3 Am. Jur. 2d *Agriculture* § 1 (emphasis supplied); *see*

Keeney v. Beasman, 169 Md. 582, 182 A. 566. This traditional definition has been extended to encompass the storage and marketing of agricultural products. *H. Duys & Co. v. Tone,* 125 Conn. 300, 5 A. 2d 23; *Bucher v. American Fruit Growers Co.,* 107 Pa. Super. 399, 163 A. 33; *see generally* 3 C.J.S. *Agriculture* § 2. The same general definition of agriculture has obtained under the various Workmen's Compensation Acts, *see generally* 1A A. Larson, The Law of Workmen's Compensation § 53.30, and at least one court has construed such a definition to include egg-producing operations. *Department of Labor & Industries v. McLain, supra.*

It must be recognized that the line of demarcation between agricultural and nonagricultural employment often becomes "extremely attenuated." *Mulanix v. Falen, supra; see generally* 1A A. Larson, The Law of Workmen's Compensation § 53.33 and cases there cited. The question in marginal factual situations must frequently turn upon whether the employment is a separable, commercial enterprise rather than a purely agricultural undertaking. *See* Davis, *Death of a Hired Man,* 13 S.D.L. Rev. 1.

In *Crouse v. Lloyd's Turkey Ranch,* 251 Iowa 156, 100 N.W. 2d 115, defendant was engaged in business under a trade name and operated a turkey and chicken operation on a six-acre tract. When the poultry was ready for market, he processed about half the turkeys by slaughtering and dressing them in his own processing plant located on the premises. Plaintiff, a seasonal worker in the processing plant, was injured when she slipped on the floor in the processing plant and brought an action to recover Workmen's Compensation benefits. The Court held that the employee was not engaged in agriculture within the meaning of the agricultural exclusion. Although the Iowa statute contains wording somewhat different from our own, we nevertheless consider the reasoning helpful in instant case. The Court there stated a test for inclusion in doubtful situations:

> "The determination of where agriculture stops and commercial processing begins is not easy. The defendant thought it more profitable to process as many of his turkeys as he could sell; but this in no way answers the question. Grains must be harvested, and fruits and vegetables must be garnered and put in condition for marketing; and these are properly a part of agriculture. But the problem before us goes one step further. It involves the question of a

process, not necessary but perhaps more profitable, in marketing. . . . "

In *Barbour v. State Hospital*, 213 N.C. 515, 196 S.E. 812, a State employee suffered fatal injuries while driving a tractor in the cultivation of food crops on State land. His representative filed a claim with the North Carolina Industrial Commission, and defendant contended that it was exempt from the provisions of the Workmen's Compensation Act. The full Commisson ruled in favor of plaintiff, and the Superior Court, in affirming the award of the full Commission, *inter alia*, concluded " . . . [t]hat the statute's exemption of farm laborers was intended for the protection of farmers as an occupational class, and a farm laborer in contemplation of the statute is a man hired to till the soil or to do other agricultural work by one whose occupation is that of a farmer. . . . "

In affirming the opinion and award of the full Commission, this Court stated:

" . . . The question involved: Is the death of a State employee, arising out of and in the course of his employment, while driving a tractor in the cultivation of food crops on the lands of the State used by the State Hospital at Raleigh compensable under the Workmen's Compensation Act? We think so.

"This and other courts of the United States have held that the various compensation acts should be liberally construed so that the benefits thereof should not be denied upon technical, narrow and strict interpretation. The primary consideration is compensation for injured employees. We think the judgment of the court below correct—that the State Hospital employee, Tessie Barbour, deceased, was not a 'farm laborer' in contemplation of the statute."

[2] The rule of liberal construction stated in *Barbour v. Hospital, supra*, is supported by a host of decisions in this jurisdiction. *See, e.g., Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281; *Hollman v. City of Raleigh*, 273 N.C. 240, 159 S.E. 2d 874; *Cates v. Construction Co.*, 267 N.C. 560, 148 S.E. 2d 604; *Guest v. Iron & Metal Co.*, 241 N.C. 448, 85 S.E. 2d 596. We concede that the production of eggs is an agricultural pursuit. Nevertheless, in the case *sub judice*, when employers formed a business association with a registered trade name and sought to increase the profits of the business by selling and delivering

eggs over stated routes to stores, institutions, and individuals, they subjected their employee to the daily hazards of operating a motor vehicle upon the highways to places far removed from the farm. Applying the above-stated rule of liberal construction to the facts of this case, we conclude that employers' business ceased to be agriculture and became part and parcel of the activities of the marketplace.

[3] By this decision we do not intend to hold that the ordinary marketing of produce by a farmer or the incidental sale of eggs, poultry, or other farm products should be in any way affected. It is only when a farmer departs from his argicultural pursuits and clearly enters into a service business or another business remote from the direct production of agricultural products that his services cease to be "agriculture" within the meaning of G.S. 97-2(1).

We hold that the Court of Appeals erred in affirming the conclusion of law adopted by the full Commission that "[t]he defendants are engaged in an agricultural pursuit, and the employees of the defendants, including the deceased employee, Nannie Mae Hinson, are farm laborers. The defendants are exempt from the North Carolina Workmen's Compensation Act. . . ."

This cause is remanded to the Court of Appeals with direction that it be returned to the North Carolina Industrial Commission with order for entry of opinion and award in accord with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. HAYWOOD EDWARDS

No. 78

(Filed 26 November 1974)

1. **Criminal Law § 84; Searches and Seizures § 3 — search warrant lost — proof of contents by photostatic copy**

Where the State's evidence disclosed that the original search warrant was lost, the trial judge properly considered a photostatic

copy of the original warrant for the purpose of passing upon the validity of the original.

2. **Searches and Seizures § 3 — when magistrate may issue warrant**

A magistrate issuing a search warrant must have before him circumstances which raise a reasonable ground to believe that the proposed search will reveal the presence of the objects sought upon the premises to be searched and that such objects will aid in the apprehension or conviction of the offender.

3. **Searches and Seizures § 3 — affidavit for warrant — confidential informant — underlying circumstances**

An affidavit stating that "A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time" was insufficient to establish probable cause for issuance of a warrant to search for nontaxpaid whiskey because it did not inform the magistrate of any underlying circumstances from which the informant concluded that nontaxpaid whiskey was where he said it was.

APPEAL by defendant from decision of the North Carolina Court of Appeals, reported in 22 N.C. App. 535, 207 S.E. 2d 352, finding no error in the trial before *Rouse, J.*, at the 27 August 1973 Session of LENOIR Superior Court. Defendant's appeal of right arises from a dissent by Parker, Judge. G.S. 7A-30(2).

Defendant was charged with possession of tax-paid liquor for the purpose of sale in violation of G.S. 18A-7(a)(2). He was tried and convicted in the District Court of Lenoir County, and upon his appeal the case came on for trial *de novo* in the Lenoir County Superior Court, where defendant again entered a plea of not guilty. The State offered evidence which tended to show that deputy sheriffs, armed with a search warrant authorizing search of defendant's premises and a 1965 Chevrolet station wagon for non-tax-paid liquor, went to defendant's home. At this point defendant objected to the introduction of any evidence obtained by the search. Judge Rouse conducted a *voir dire* hearing, concluded that the search was made pursuant to a valid search warrant, and overruled the objection. Thereupon Deputy Sheriff Garris testified that he and the other deputies found four pints of tax-paid bourbon whiskey and four pints of tax-paid gin on the floorboard of the station wagon and two pints of tax-paid bourbon whiskey in the spare-tire section of the vehicle.

Defendant testified and denied any knowledge of the two pints of bourbon found in the spare-tire section and further

denied that he possessed any of the alcoholic beverages for the purpose of sale.

The jury returned a verdict of guilty, and defendant appealed to the North Carolina Court of Appeals from judgment imposed.

Attorney General James H. Carson, Jr., by Associate Attorney William A. Raney, Jr., for the State.

Turner & Harrison, by Fred W. Harrison, for the defendant.

BRANCH, Justice.

[1] The Court of Appeals correctly decided that the trial judge properly considered a photostatic copy of the original search warrant for the purpose of passing upon the validity of the original. The State's evidence disclosed that the original search warrant was lost, and in our opinion the introduction of the photostatic copy of the original provided plenary evidence both of the contents of the original and of regularity on its face. *See State v. Cobb*, 250 N.C. 234, 108 S.E. 2d 237; *State v. McMilliam*, 243 N.C. 771, 92 S.E. 2d 202.

Defendant's argument that the evidence resulting from the search was inadmissible because the affidavit upon which the search warrant was issued was insufficient to establish probable cause to search poses a more serious question.

The affidavit upon which the search warrant was issued averred:

> "CAPT Stanle [sic] Moore Lenoir County Sheriff's DEPT being duly sworn and examined under oath, says under oath that he has probable cause to believe that Haywood Edwards has on his premises and in his vehicle certain property, to wit: Non Tax Paid Whiskey, The Possesion of which is a crime, to wit: Violation of Liquor laws Apr, [sic] 7, 1973 RT 2 Grifton.
>
> The property described above is located On the Premises and in a 1965 Chevrolet described as follows: A red frame farm house located 8/10 of a mile west of NC 11 on rural unpaved road 1714 and a 1965 Chevrolet station wagon Lic #EZM771. The facts which establish probable cause for the issuance of a search warrant are as follows:

A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time.

s/ STANLEY MOORE, D. S.
Signature of Affiant"

[2] A search warrant will not be issued except upon a finding of probable cause. Both the state and federal decisions require that the issuing magistrate have before him circumstances which raise a reasonable ground to believe that the proposed search will reveal the presence of the objects sought upon the premises to be searched and that such objects will aid in the apprehension or conviction of the offender. *State v. Campbell,* 282 N.C. 125, 191 S.E. 2d 752; *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755.

The United States Supreme Court considered the sufficiency of an affidavit to support issuance of a search warrant in the case of *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723. The affidavits upon which the search warrants were based in *Aguilar* and the affidavit in the case *sub judice* are strikingly similar. The affidavit in *Aguilar,* in pertinent part, recited:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

In *Aguilar* the United States Supreme Court held that the affidavit did not provide a sufficient basis for a finding of probable cause to search and, *inter alia,* stated:

"Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States,* 362 U.S. 257, *the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were,* and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf v. United States,* 376 U.S. 528, was 'credible' or his information 'reliable.' Otherwise, 'the inferences from the facts which lead to the complaint' will

be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime,' *Giordenello v. United States,* [357 U.S. 480]; *Johnson v. United States,* [333 U.S. 10], or, as in this case, by an unidentified informant." (Emphasis ours.)

Aguilar was followed by *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed. 2d 637, and in that case the Supreme Court approved the standards set forth in *Aguilar* and further refined the procedures mandated by the Constitution relating to the issuance of search warrants. We quote from that opinion:

"The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* test without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it establishes were designed to implement the long-standing principle that probable cause must be determined by a 'neutral and detached magistrate,' and not by 'the officer engaged in the often competitive enterprise of ferreting out crime.' *Johnson v. United States,* 333 U.S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone."

In *State v. Campbell, supra,* a search warrant was issued upon an affidavit which in relevant part recited:

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

Affiant is holding arrest warrants on M. D. Queensberry for sale of narcotics on April 16, 1971, April 28, 1971 and April 29, 1971. Also affiant has four arrest war-

rants charging Queensberry with four counts of possession of Narcotics.

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

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

In *Campbell,* following the rule set forth in *Aguilar,* and citing *Spinelli* and *Vestal,* Justice Huskins, writing for a unanimous Court, stated:

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

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

Tested by the constitutional principles stated above, the affidavit in this case is fatally defective. It details no underlying facts and circumstances from which the issuing

officer could find that probable cause existed *to search the premises described. . . .*"

The affidavit in instant case, as in *Aguilar* and *Campbell,* does not contain any semblance of a statement showing underlying circumstances from which the informant concluded that the articles sought were where he declared they were.

In reaching its decision, the Court of Appeals relied upon language taken from *Spinelli v. United States, supra,* and *United States v. Harris,* 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed. 2d 723. The language from *Spinelli* is as follows:

> " . . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

It should be borne in mind that this language is taken out of context and that *Spinelli* in fact approved the standards set forth in *Aguilar* and held that there was not sufficient probable cause for issuance of a search warrant.

The Court of Appeals quoted the following language from *Harris:*

> "In evaluating the showing of probable cause necessary to support a search warrant, against the Fourth Amendment's prohibition of unreasonable searches and seizures, we would do well to heed the sound admonition of *United States v. Ventresca,* 380 U.S. 102 (1965):
>
> > '[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.

> A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting.' 380 U.S., at 108."

We are in complete accord with the rationale of this language and heartily approve a rule based upon common sense and realism instead of one based upon technical requirements of great specificity. However, neither *Harris* nor *Ventresca* furnishes guidance for decision in this case since each of those cases arose upon facts radically different from those presently before us.

In *Harris* the affidavit upon which the search warrant authorizing search for illicit liquor was issued stated that the informant, whom the affiant had found to be a prudent person, gave affiant a sworn statement (1) that he had purchased illicit whiskey from within accused's residence for a period of more than two years and had made purchases most recently within two weeks of the giving of the information, (2) that he had knowledge of another person who had purchased illicit whiskey within two days, and (3) that he had seen accused bring whiskey from outbuildings and deliver it to other persons. In addition the affiant recited facts concerning his knowledge of accused's bad reputation as a trafficker in illicit whiskey.

In *Ventresca* the affidavit which was executed to support issuance of a search warrant of premises suspected to house an illicit distillery contained statements by affiant based on his personal knowledge and based upon information obtained from other governmental investigators to the effect that within a month a Pontiac automobile had on four occasions carried loads of bagged sugar to the house in question, had twice carried tin cans to the house, and had been loaded from the house with apparently full five-gallon cans. The investigators simultaneously smelled the odor of fermenting mash in front of the house and heard metallic noises and the sound of a motor or pump emanating from the house.

Unquestionably in *Ventresca* and *Harris* there were strong statements in the respective affidavits showing underlying circumstances upon which the informant based his belief of probable cause. Under these circumstances the Court very properly refused to invalidate the search warrants; however, we do not interpret these cases to hold that *Aguilar, Spinelli, Vestal* and

Campbell are no longer the law. Neither has our research disclosed any other decision by the United States Supreme Court which overrules the holdings in these decisions.

[3] We conclude that in instant case the search warrant was invalid because the affiant did not inform the magistrate of *any* underlying circumstances from which the *informant* concluded that non-tax-paid whiskey was where he said that it was. Neither does the record disclose that the magistrate was furnished any evidence of probable cause other than that contained in the affidavit. Since there was not sufficient basis for a finding of probable cause to issue the search warrant, the evidence obtained as a result of its issuance was erroneously admitted at trial.

The decision of the Court of Appeals is reversed, and this cause is remanded to that Court for entry of order remanding it to the Superior Court of Lenoir County for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

HUMBLE OIL & REFINING COMPANY AND FLAGLER SYSTEM, INC., PETITIONERS v. BOARD OF ALDERMEN OF THE TOWN OF CHAPEL HILL, JOSEPH L. NASSIF, ALICE WELSH, REGINALD D. SMITH, ROSS F. SCROGGS, GEORGE L. COXHEAD AND JAMES C. WALLACE

No. 3

(Filed 26 November 1974)

Municipal Corporations § 30 — special use permit — evidence improperly considered by Board of Aldermen

In a proceeding to obtain a special use permit for the construction of an automobile service station on a designated lot in Chapel Hill, the Board of Aldermen erred in denying the permit based on (1) a letter from the N. C. Highway Commission which was highly critical of the application, (2) the MAGDA model zoning ordinance which a member of the Board called to the Board's attention, and (3) the special knowledge of the individual members of the Board which was not disclosed at any public hearing and was unknown to the petitioners, since petitioners had no knowledge of such evidence and no opportunity to refute it.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed February 20, 1974 (20 N.C. App. 675, 202 S.E. 2d 806) finding no error in the judgment entered in the Superior Court of ORANGE County by *McKinnon, J.*, at the October 19, 1973 Session.

This proceeding originated by petition filed on October 28, 1971, by Humble Oil & Refining Company before the Board of Aldermen of the Town of Chapel Hill requesting a special use permit for the construction of an automobile service station on a designated lot at the intersection of Highway 54 and U. S. 15-501 in the Town of Chapel Hill. The petitioner alleges the permit is authorized by the Chapel Hill zoning ordinance. Flagler System, Inc. was permitted to intervene as petitioner.

A public hearing, as provided by the zoning ordinance, was held at which the applicant appeared and offered evidence in support of the petition. No one appeared in opposition to the permit. The request was referred to the Planning Board which, after review, reported:

> "In the opinion of the Planning Board, the proposed development:
>
> "1. Will not materially endanger the public health or safety if located where proposed and developed according to plans as modified by the stipulations . . .;
>
> "2. Meets all required conditions and specifications;
>
> "3. Will not substantially injure value of adjoining or abutting property;
>
> "4. Will be in harmony with the area in which it is to be located and in general conformity with the plan of development of Chapel Hill and its environs, if developed according to the plan as modified by the stipulations . . .
>
> "The Planning Board, therefore, . . . recommends that the Board of Aldermen grant this request. . . . " (Exhibit No. 28.)

The record discloses that after the public hearing was completed, a member of the Board, at a meeting in which the plaintiff was not allowed to particpate, read a letter from the State Highway Commission opposing the granting of the permit. A member of the Board also read from a publication

by the Mid-America Gasoline Dealers Association, Inc. entitled MAGDA's Model Zoning Recommendations. This publication had not been produced or reported at the public hearing. The publication recommended that all gasoline service stations be located in mid-block or on minor street intersections. The publication suggested that stations be spaced 200 feet from major intersections. Further reference was made to abandoned stations as eyesores, potential fire bombs and dangerous to life and property. The publication (Exhibit 23) closes with this statement: "Perhaps there are those who will say the above recommendations are too severe and restrictive. However, one can well visualize how your city will look after such a zoning program has been put into effect."

At the final meeting, by a vote of four to two, the Board of Aldermen denied the permit. In the notice of denial the Board gave this explanation: "[T]hat the use would materially endanger the public health and safety if located where proposed and developed according to the plans submitted."

The petitioners, by certiorari, obtained a review by the superior court which affirmed the decision of the Board of Aldermen. On further review the Court of Appeals affirmed the judgment of the superior court. Our writ of certiorari brought the proceeding here for final review.

F. Gordon Battle of Bryant, Lipton, Bryant & Battle, P.A.; K. Byron McCoy of Newsom, Graham, Strayhorn, Hedrick, Murray & Bryson for petitioner appellant, Humble Oil & Refining Company; John T. Manning for petitioner appellant Flagler System, Inc.

Haywood, Denny & Miller, by Emery B. Denny, Jr., for respondent appellees.

HIGGINS, Justice.

The factual background of this proceeding indicates that in the early stages, decisions were favorable to the petitioners. In the concluding stages, however, the Board of Aldermen disregarded the findings of the Planning Board and concluded "that the use would materially endanger the public health and safety if located where proposed and developed according to the plans as submitted." These findings are tainted by evidence that the Board improperly considered a letter from the Highway Commission opposing the permit. This letter was dated

nine days after the public hearing. The Board also considered and apparently was impressed by the model zoning regulations, parts of which were read into the record by a member of the Board, also after the public hearing date. The consideration of these documents was challenged by proper exceptive assignments.

By considering the Highway Commission's letter dated after the last hearing and by considering the model zoning regulations prepared by MAGDA, the Board of Aldermen committed error which the superior court, on review, failed to correct.

The recent decision of this Court between the same parties, involving a different location in Chapel Hill, was decided on January 25, 1974 *(Refining Co. v. Board of Aldermen,* 284 N.C. 458, 202 S.E. 2d 129) and hence was not available to the Chapel Hill authorities during the consideration of this proceeding. The Court, citing abundant authority, held:

> "When a board of aldermen, a city council, or zoning board hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity. Its findings of fact and decisions based thereon are final, subject to the right of the courts to review the record for errors in law and to give relief against its orders which are arbitrary, oppressive or attended with manifest abuse of authority. (Citing cases.)"
>
> "When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record. . . . In no other way can the reviewing court determine whether the application has been decided upon the evidence and the law or upon arbitrary or extra legal considerations.
>
> "If there be facts within the special knowledge of the members of the Board of Aldermen or acquired by their personal inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument

and the reviewing court may judge their competency and materiality. (Citing many authorities.)"

The petitioners attended a public hearing and presented evidence in support of the application for the permit. The Board of Aldermen referred the application to the Planning Board which gave its unqualified approval. Though notices of the meetings were published, no one appeared in opposition to the permit.

The opposition to the permit appears to have developed in a subsequent session of the Board of Aldermen in which Humble was not allowed to participate. The minutes of the Board indicate the denial of the permit was based on the consideration of one or more of these factors: (1) The letter from the North Carolina Highway Commission which was highly critical of the application; (2) the MAGDA model zoning ordinance which a member of the Board called to the Board's attention; (3) the special knowledge of the individual members of the Board which was not disclosed at any public hearing and was unknown to the petitioners. The use of any of these factors before the Board under the circumstances disclosed was in direct violation of our decision in *Refining Co. v. Board of Aldermen, supra. Jackson v. Board of Adjustment,* 275 N.C. 155, 166 S.E. 2d 78; *Craver v. Board of Adjustment,* 267 N.C. 40, 147 S.E. 2d 599; *Jarrell v. Board of Adjustment,* 258 N.C. 476, 128 S.E. 2d 879.

The record indicates that the Board of Aldermen in a subsequent meeting, considered and were influenced by evidence of which the petitioners had neither knowledge nor opportunity to refute, and which had not been presented at the public hearing. Based in part at least on the foregoing, the Board denied the application. The superior court and the Court of Appeals committed prejudicial error by affirming the findings, conclusions and order of the Board denying the permit.

As this Court stated in *Refining Co. v. Board of Aldermen, supra:*

"(1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn

statements (Citations omitted); and (3) crucial findings of fact which are 'unspported by competent, material and substantial evidence in view of the entire record as submitted' cannot stand."

The decision of the Court of Appeals is reversed. That Court will remand to the Superior Court of Orange County for entry of judgment vacating the findings and order of the Board of Aldermen of Chapel Hill and directing the Board of Aldermen to proceed *de novo* to reconsider the petitioners' application in conformity with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

SAMUEL W. EARLE, ADMINISTRATOR OF THE ESTATE OF JULIANNE EARLE, DECEASED v. LOUISE MARTIN WYRICK

No. 67

(Filed 26 November 1974)

1. **Negligence § 12— last clear chance**

The contributory negligence of a plaintiff does not preclude recovery where it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the plaintiff and could have avoided the injury but failed to do so.

2. **Automobiles § 89 — last clear chance — sufficiency of evidence**

The trial court erred in failing to submit to the jury an issue of last clear chance where plaintiff's evidence tended to show that plaintiff's intestate and a companion were walking in the paved street at night when the intestate was struck from the rear by defendant's car, that the street was well lighted, was straight and permitted an unobstructed view in either direction, that at the time of the accident there was no interfering traffic and no parked vehicles on the street, that defendant failed to sound her horn, and that defendant did not apply her brakes until immediately after striking the intestate.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed June 5, 1974, finding no error in the trial and judgment dismissing the action entered by *Crissman*,

J., in the Superior Court of GUILFORD County (Greensboro Division) at the October 22, 1973 Session.

The plaintiff, Samuel W. Earle, administrator of the estate of his infant daughter, Julianne Earle, age thirteen, instituted this wrongful death action alleging the death of his intestate was proximately caused by the negligence of the defendant in operating her automobile at night on Cornwallis Drive on the outskirts of Greensboro. At the place where the accident occurred, Cornwallis Drive, for several hundred feet both east and west, was straight and permitted an unobstructed view in either direction. The street is paved and thirty feet wide. However, there are no sidewalks on either side so pedestrian and vehicular traffic both use the hard surface. Plaintiff's intestate and her friend, Martha Jane Smith, also thirteen, lived within a few blocks of each other on Cornwallis Drive.

About 8:15 on the evening of April 12, 1971, the two girls, having had dinner at Martha's home, started on foot to intestate's home to spend the night. They both wore white or very light colored clothing and one carried a white suitcase. The plaintiff's evidence indicated the street was well lighted. As the girls walked eastward, an automobile approached going westward, but turned off on a side street in front of the girls. However, at the same time, the defendant, driving her 1968 model Plymouth automobile going east on Cornwallis Drive, approached the girls from the rear. Miss Smith made a break for the curb, but plaintiff's intestate failed to go to either side. She remained in the street and was run down from behind by the defendant's automobile. At the time of the collision there was no interfering traffic and no parked vehicles on either side of the street. The defendant's automobile left skid marks at or near the center of the street for a distance of twenty-six feet.

A witness, Mrs. Greene, intestate's grandmother, testified that immediately after the accident the defendant said to her: "I just didn't see her. That's all. . . . I just don't know. It must be my fault. I just didn't see her."

Another witness, Mr. Collier, who lives near the scene of the accident, testified: "[W]hile I was in my living room by the door, I heard a thud, to me sounded about like a car hitting a sack of bran, and almost simultaneously brakes squeaking. I believe the brake squeak was after the—the hit; but it wasn't much. . . . I did not at any time hear the sound of a horn. . . .

[R]ight out in front of the car I saw the girl laying a little bit to the north of the car. If she could have stretched her arm out, she could have touched the car. . . ." It was at or near the middle of the street.

The plaintiff's complaint alleged the defendant's negligence, giving details, was the proximate cause of the accident. The defendant's answer denied negligence and pleaded intestate's contributory negligence as a bar to recovery. By reply, the plaintiff alleged the defendant saw or should have seen the perilous position of the plaintiff's intestate, had ample opportunity to avoid the injury, should have availed herself of that opportunity which she negligently failed to do, and that such failure was the proximate cause of intestate's death.

At the close of the evidence, the court submitted issues of negligence and contributory negligence, but refused to submit plaintiff's issue of last clear chance.

The jury found the defendant guilty of negligence and found the plaintiff's intestate guilty of contributory negligence. The court entered judgment dismissing the action. Plaintiff's intestate appealed.

Schoch, Schoch, Schoch and Schoch, by Arch K. Schoch; John T. Manning for plaintiff appellant.

Jordan, Wright, Nichols, Caffrey & Hill, by Welch Jordan and Karl N. Hill, Jr., for defendant appellee.

HIGGINS, Justice.

By agreement of the parties, the jury's finding of negligence on the part of the defendant and the contributory negligence of the plaintiff's intestate are deemed to be established and no question is raised by either party on this appeal with respect to either issue. Nothing else appearing, these findings would be conclusive against the plaintiff's right to recover in the absence of a further issue and finding that the negligent defendant by exercising reasonable care and prudence might have avoided the accident and its injurious consequences to the plaintiff's intestate by the exercise of due care and prudence after the perilous position of intestate was, or should have been, discovered in time to take evasive action.

[1] It is generally held in this State that the contributory negligence of a plaintiff does not preclude recovery where it is

made to appear that the defendant by exercising reasonable care and prudence could have avoided the injurious consequences to the plaintiff, notwithstanding plaintiff's negligence. The doctrine applies if and when it is made to appear that the defendant discovered, or by the exercise of reasonable care should have discovered, the perilous position of the party injured or killed and could have avoided the injury, but failed to do so. *Exum v. Boyles,* 272 N.C. 567, 158 S.E. 2d 845; *Wanner v. Alsup,* 265 N.C. 308, 144 S.E. 2d 18; *Redmon v. R. R.,* 195 N.C. 764, 143 S.E. 829; *Haynes v. R. R.,* 182 N.C. 679, 110 S.E. 56; *Thacker v. Harris,* 22 N.C. App. 103, 205 S.E. 2d 744.

Peril and the discovery of such peril in time to avoid injury constitutes the back-log of the doctrine of last clear chance. *Exum v. Boyles, supra; Wanner v. Alsup, supra; Williams v. Henderson,* 230 N.C. 707, 55 S.E. 2d 462; *Ingram v. Smoky Mountain Stages, Inc.,* 225 N.C. 444, 35 S.E. 2d 337; *Hunter v. Bruton,* 216 N.C. 540, 5 S.E. 2d 719; *Miller v. R.R.,* 205 N.C. 17, 169 S.E. 811.

[2] In this case, two young girls, age thirteen, were walking on the hard surface of a paved street thirty feet wide on the outskirts of Greensboro. There was no sidewalk on either side of the street. One of the little girls was barefooted. Between the homes of the two girls there was a pine tree with large pine cones on the ground at the curb. Also between the homes was an abandoned alley leading off Cornwallis Drive. This alley contained discarded cans, broken bottles, etc. This evidence was offered indicating the reason why the girls, one barefoot, were walking on rather than off the street surface. The plaintiff's evidence disclosed that the part of the street where the accident occurred was well lighted.

In answer to the interrogatories submitted to the defendant, she stated she was driving 25 to 30 miles an hour, but that she saw the girls only a split second before the impact. The defendant did not offer evidence at the trial. All the evidence indicates the defendant failed to sound the horn.

The appeal here presents the sole question: Was the evidence sufficient to warrant the submission of the issue of last clear chance and to sustain a jury finding in favor of the plaintiff on that issue? After careful review, we conclude that the plaintiff did offer sufficient evidence. The court committed error of law in not submitting the tendered issue.

The decision of the Court of Appeals finding no error in the trial is reversed. The case will be remanded to the Superior Court of Guilford County for the jury's answer to the issue tendered which the court refused to submit. An answer by the jury favorable to the plaintiff on that issue would then require the jury to pass on the issue of damages.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. LINDSEY KEESTER CARVER

No. 103

(Filed 26 November 1974)

1. **Criminal Law § 88 — failure to subpoena witnesses — cross-examination proper**

The trial court did not err in allowing the solicitor to cross-examine defendant concerning his failure to subpoena witnesses who were on the premises when the shooting occurred or witnesses from the crowd which gathered after the shooting where such evidence tended to impeach defendant's testimony.

2. **Criminal Law § 111 — conflicting instructions on material point — new trial**

When there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and an incorrect charge.

3. **Homicide § 27 — reduction of crime to manslaughter — instructions erroneous**

Defendant in this first degree murder case is entitled to a new trial where the trial court's original instruction was confusing and where the court, upon a request by the jury for clarification of the possible verdicts, instructed that in order to reduce the crime to manslaughter, the defendant must prove to the jury's satisfaction that he acted in self-defense.

ON *certiorari* to review decision of the Court of Appeals reported in 22 N.C. App. 674, 207 S.E. 2d 299, finding no error in the trial of defendant before *McLelland, J.*, 22 October 1973 Session of PERSON Superior Court.

Defendant was tried upon a bill of indictment charging him with the first-degree murder of Leon Clay. Through his counsel he entered a plea of not guilty.

The State offered evidence tending to show that on 17 September 1972 Leon Clay, the deceased, engaged in a fist fight with defendant's friend, Sam Little, in the yard of Ray Paylor's Entertainment Center. Clay left the scene and returned with a shotgun which he held on Sam Little. Thereupon, defendant obtained a pistol, which he pointed at the head of deceased, and obtained the shotgun from deceased. Defendant then took two or three steps backward and fired one shot, striking Clay in the head and fatally injuring him.

Defendant's evidence, in brief summary, tended to show that after obtaining the shotgun, the deceased Leon Clay threatened the lives of defendant, his half brother Larry Ramsey, and Sam Little. Defendant then obtained a pistol, pointed it at deceased, and wrestled the shotgun from him. Defendant then saw the deceased in the act of taking a pistol from his clothing, and at that point shot the deceased. Defendant stated: "I had no doubt at the time that I shot that he [deceased] would have shot me." Defendant also offered evidence to the effect that the deceased, Leon Clay, had a reputation for "being a man of violence."

The jury returned a verdict of guilty of voluntary manslaughter, and the court imposed judgment sentencing defendant to imprisonment for a term of not less than twelve years nor more than fifteen years.

Defendant appealed to the North Carolina Court of Appeals, and that court found no error in the trial below. We allowed defendant's petition for writ of certiorari to the North Carolina Court of Appeals on 24 September 1974.

Attorney General James H. Carson, Jr., by Assistant Attorney General George W. Boylan, for the State.

Ramsey, Jackson, Hubbard & Galloway, by Mark Galloway, for defendant appellant.

BRANCH, Justice.

[1] Defendant contends that the trial judge erred by allowing the solicitor to cross-examine defendant concerning his failure to subpoena certain witnesses.

In this connection, the record discloses the following exchange between the solicitor and defendant:

"Q. Did you ever make any effort to find any witnesses who could verify your side of the case other than these two gentlemen you have brought into court?

OBJECTION OVERRULED.

EXCEPTION.

"A. Yes, sir. I contacted Roy Paylor and William Pointer, the man that told Leon [the deceased] to go home.

"Q. Did you subpoena them to come to Court today?

OBJECTION.

OBJECTION OVERRULED.

EXCEPTION.

"A. No, I had not. They did not testify for me at the preliminary hearing."

The Court of Appeals held that the scope of cross-examination is largely within the trial judge's discretion and that "there was no manifest abuse of such discretion in this case which could be considered to be prejudicial."

The scope of cross-examination rests largely in the trial judge's discretion, and his ruling thereon will not be held as reversible error unless it is shown that the verdict was improperly influenced thereby. *State v. McPherson,* 276 N.C. 482, 172 S.E. 2d 50; *State v. Ross,* 275 N.C. 550, 169 S.E. 2d 875, cert. denied, 397 U.S. 1050, 90 S.Ct. 1387, 25 L.Ed. 2d 665; *State v. Edwards,* 228 N.C. 153, 44 S.E. 2d 725; and *State v. Beal,* 199 N.C. 278, 154 S.E. 604.

Defendant relies on the case of *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874, to support his contention that the above-quoted testimony was erroneously admitted to his prejudice. In *Gainey,* the defendant had testified without objection that one Willie Ray could have supported his defense of alibi but was not in court. When the solicitor asked defendant if he had subpoenaed Ray, the defendant answered that Ray "didn't want to come to court." The solicitor then asked, "He didn't want to go on the stand and prejure himself, did he?" There was no objection to the latter question, which defendant answered by saying, "He didn't have no reason to tell no lie." There Justice Sharp, speaking for the Court, stated: "The solicitor's question

with reference to Ray's motives was objectionable. However, it is inconceivable that it affected the outcome of the case, and under all the circumstances, it cannot be held prejudicial error. [Citations omitted.]" (Emphasis supplied.)

Here, there was testimony that Roy Paylor and William Pointer were on the premises when the shooting occurred. There was also testimony by defendant that, after the shooting, a "crowd" approached him and Clay's body. Defendant did not subpoena a person from the "crowd" and in particular failed to subpoena Roy Paylor and William Pointer, who were shown to have been on the premises. The only witnesses to the shooting offered by defendant were his half brother, Larry Ramsey; Samuel David Little, defendant's friend, who apparently helped to precipitate the altercation; and defendant himself.

Under these circumstances we think that this evidence was correctly admitted as tending to impeach defendant's testimony. Even if we were to hold the admission of this evidence to be erroneous, we do not believe that its admission would have affected the outcome of the trial.

Defendant's Assignment of Error Number 17, directed to the court's charge, presents a more serious question. In his final mandate to the jury in the original charge, the trial judge instructed the jury:

> "If you do not find the defendant guilty of second degree murder, you must consider whether or not he is guilty of voluntary manslaughter. If you find from the evidence beyond a reasonable doubt that on or about September 17th, 1972, Lindsey Keester Carver intentionally shot Leon Clay with a pistol, a deadly weapon, thereby proximately causing Leon Clay's death, but are satisfied that the defendant killed without malice in the heat of sudden passion, nothing else appearing, or being the agressor without murderous intent in bringing on the confrontation with Leon Clay, or using excessive force in exercising a right of self-defense, it would be your duty to return a verdict of guilty of voluntary manslaughter.
>
> EXCEPTIONS 18 & 20."

After beginning its deliberations, the jury returned to the courtroom and requested that the court "clarify to us or give to us again the verdicts, one of which we are supposed to bring

back." The court then stated the possible verdicts and inquired whether this statement answered the question posed. The foreman responded: "No sir, it isn't quite clear in our minds yet the differences of the charges." Thereupon, after briefly and correctly charging as to first-degree murder and second-degree murder, the court stated:

> "In order to reduce the crime to manslaughter, the defendant must prove, not beyond a reasonable doubt, but simply to your satisfaction *that he acted in self-defense.*
>
> EXCEPTION No. 22." (Emphasis supplied.)

The court thereafter correctly charged both on self-defense and as to how malice might be negated so as to reduce the homicide from second-degree murder to manslaughter.

The Court of Appeals held that while the charge above-quoted was obvious error, it amounted to a mere *lapsus linguae* and was harmless error beyond a reasonable doubt. We agree with the decision of the Court of Appeals that the challenged portion of the charge was obvious error, but we are unable to concur in its holding that the error was not prejudicial.

[2] It is well recognized in this jurisdiction that when there are conflicting instructions upon a material point, there must be a new trial since the jury is not supposed to be able to distinguish between a correct and incorrect charge. *State v. Jennings,* 276 N.C. 157, 171 S.E. 2d 447; *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892; *State v. Ellerbe,* 223 N.C. 770, 28 S.E. 2d 519; *State v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658; *State v. Johnson,* 184 N.C. 637, 113 S.E. 617.

In *State v Ellerbe, supra,* we find the following pertinent statement:

> ". . . An erroneous instruction upon a material aspect of the case is not cured by the fact that in other portions of the charge the law is correctly stated. This is especially applicable in the instant case, because the jury was instructed that, in order for the defendant to have the benefit of the principle of law, that is, of self-defense, he must show certain things, some of which he was not required to show under the facts and circumstances disclosed on this record, in order to have the jury consider his evidence on the plea of self-defense. It is impossible to determine

on which of the instructions the jury acted. [Citations omitted.]"

In instant case, defendant did not controvert the fact that he intentionally shot Leon Clay with a deadly weapon, thereby proximately causing his death. He relied on self-defense for an acquittal. Thus, the challenged portion of the charge is material since it, in effect, instructs the jurors to return a verdict of voluntary manslaughter if they find that defendant did act in self-defense.

[3] It is apparent that the able trial judge had full knowledge of the pertinent principles of law; however, in the original charge, through *lapsus linguae* or error in transcription of the record, we find language that might well have confused the jury. The questions asked by the foreman when the jury returned dispel any doubt that confusion existed among the jurors as to the elements of the possible verdicts submitted to them. This confusion must have been magnified by the inadvertent, erroneous instruction that in order to reduce the crime to manslaughter, the defendant must prove to the jury's satisfaction that he acted in self-defense. Further, we note that although the trial judge, in another part of the charge, instructed correctly, he did not retract the erroneous instruction and substitute the correct one in its place.

Since we are unable to determine whether the jury acted on the correct instructions or on the incorrect instructions, we hold that there was prejudicial error in the court's charge.

We do not deem it necessary to discuss defendant's other assignments of error since the questions there presented may not arise at another trial.

The decision of the Court of Appeals is reversed, and this cause is remanded to that Court with direction that it be remanded to the Superior Court of Person County for a new trial.

Reversed and remanded.

State v. Little

STATE OF NORTH CAROLINA v. LAWRENCE ROBERT LITTLE

No. 54

(Filed 26 November 1974)

1. **Criminal Law § 162 — assignment of error to evidence — necessity of going beyond assignment**

Defendant's assignment of error to the trial court's admission of certain testimony failed to comply with Rules of Practice of the Supreme Court where it failed to show specifically what question was intended to be presented for consideration without the necessity of going beyond the assignment of error itself.

2. **Property § 4 — damage of occupied property by use of explosive — competency of evidence**

In a prosecution for damaging occupied real property by the use of an explosive or incendiary device, the trial court properly admitted testimony concerning conversations defendant had with various witnesses indicating his hatred for blacks and for the owner of a black newspaper, the office of which was located in the building that was damaged by the explosion, and indicating that defendant had the dynamite that he planned to use and did in fact use in dynamiting the building, since such testimony was competent to show the requisite intent or state of mind and the motive for the commission of the crime, as well as the commission of the crime itself.

3. **Criminal Law § 169 — exclusion of witness's answer — failure to show what answer would have been — exclusion not prejudicial**

Defendant failed to show prejudice in the trial court's refusal to let an officer testify regarding whether Ben Chavis was in the area on the day of the explosion where the record does not show the answer the witness would have given had he been permitted to answer.

4. **Criminal Law § 163 — assignment of error to charge — failure to set out objectionable portion**

Defendant's assignment of error that "The lower court erred in its definition of malice in its charge" was insufficient since it did not quote the portion of the charge to which defendant objected or set out defendant's contention as to what the court should have charged.

5. **Property § 4 — malicious damage to occupied property by use of explosive — sufficiency of definition of malicious**

In a prosecution for wilfully and maliciously damaging occupied real property by the use of an explosive or incendiary device, the trial court's instruction defining "the term malicious to mean with animosity, hatred or ill will" was sufficient.

Chief Justice BOBBITT not sitting.

State v. Little

APPEAL by defendant under G.S. 7A-27(a) from *Tillery, J.*, at the 25 February 1974 Criminal Session of NEW HANOVER Superior Court.

Defendant was convicted of wilfully and maliciously damaging occupied real property by the use of an explosive or incendiary device, a violation of G.S. 14-49.1, and was sentenced to life imprisonment.

About 10:55 p.m. on 28 May 1973 there was an explosion at the two-story, wood-frame building at 412½ South Seventh Street, Wilmington. The first floor of this building was used as office space for the *Wilmington Journal*, a weekly newspaper owned by T. C. Jervay. The six-room apartment on the second floor was occupied by Mr. and Mrs. Richard L. Warren. Damage to the first floor and surrounding buildings was extensive.

Richard L. Warren and T. C. Jervay testified concerning the extent of the damage to the building and its environs.

Michael Burress, a United States Marine who was stationed in Jacksonville, North Carolina, at the time of the offense, testified that he had accepted rides from defendant on 27 April and 6 May 1973; that on 27 April defendant was wearing a black jacket, a green beret, and across his chest a bandolier cartridge belt full of shotgun shells; that on 6 May 1973, defendant took him to a bookstore that had recently been bombed and asked him how the explosives might have been placed so that more damage would have been done to the building; that defendant became "very perturbed" and pulled over to the side of the road after passing a black man walking with a white woman; that defendant wanted to "beat the black man up"; that he helped defendant deposit some heavy green bags in a hole behind a trailer belonging to a friend of defendant; that defendant told him all blacks were animals trying to impersonate humans; that defendant told him he was a member of an organization, Rights of White People (ROWP), whose purpose was to exterminate all blacks and Jews; and that defendant had a .16-gauge shotgun in the back of his vehicle.

David Harvey Smith next testified for the State. His testimony tends to show that he met defendant in February of 1973 and was with him from time to time after that; that defendant came to his trailer on 6 May 1973 with Michael Burress and deposited some bags in a hole behind his trailer so defendant could "get the heat off" himself; that the bags contained dyna-

mite; that, on defendant's request, he took some of this dynamite to defendant on 28 May 1973 and that defendant said to him, "Justice will be done tonight." He further testified that on 2 June 1973 defendant told him he had used some of the dynamite to blow up the *Journal* office.

Michael Corbett, a cellmate of defendant in the New Hanover County jail from 20 July to 28 July 1973, testified that defendant told him "that he blew up the *Wilmington Journal* and that he used twenty-two pounds of dynamite and that he placed the dynamite in front of the door on the steps." Corbett also testified that defendant told him that he had a cache of dynamite on David Smith's property, and that he had a dynamite plunger, blasting caps, and whatever he needed to blow up something. He also stated that defendant told him that he did not like colored people.

Peggy Brown, who worked with defendant, testified that on 18 June defendant talked to her about his membership in the ROWP and that he defined this as an organization that worked in protest against black people, that he expressed an extreme hatred and a deep hatred for black people, and said that the black population was rapidly increasing and that something had to be done about it. He told her that he was Minister of Propaganda for the ROWP. He also told her that he bombed the *Wilmington Journal.* She said she asked him why, and he said he did it because it was a black newspaper and that he had left it in a mess.

Officers of the Wilmington Police Department and Federal and State law enforcement agencies testified in corroboration.

Defendant offered no evidence.

Attorney General Robert Morgan by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

John Richard Newton for defendant appellant.

MOORE, Justice.

Defendant in his brief brings forward three assignments of error numbered first, sixth, and ninth. All assignments of error and exceptions not discussed in the brief are deemed to be abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783 (G.S. 4A, Appendix I(1)); *State v. Crews,* 284

N.C. 427, 201 S.E. 2d 840 (1974); *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322 (1955).

[1] The first assignment of error is as follows:

> "1. The lower Court erred in admitting irrelevant testimony.
>
> EXCEPTIONS NOS. 1 (R p 10), 2 (R p 11), 3 (R pp 11, 12), 4 (R p 12), 5 (R p 13), 6 (R p 14), 7 (R p 15), 8 (R p 16), 9 (R p 17), 10 (R p 19), 13 (R p 22), 16 (R p 25), 17 (R p 26), 20 (R p 28), 21 (R p 29)."

This assignment of error fails to comply with the Rules of this Court in that it fails to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. Rules 19(3) and 21, Rules of Practice in the Supreme Court, supra; *State v. Kirby, supra; In re Will of Adams,* 268 N.C. 565, 151 S.E. 2d 59 (1966).

As stated in *In re Will of Adams:*

> "Rules 19 and 21, Rules of Practice in the Supreme Court, 254 N.C. 783, 795, 803, require that asserted error must be based on an appropriate exception, and must be properly assigned. We have repeatedly said that these rules require an assignment of error to show specifically what question is intended to be presented for consideration without the necessity of going beyond the assignment of error itself. A mere reference in the assignment of error to the record page where the asserted error may be discovered is not sufficient. *Samuel v. Evans,* 264 N.C. 393, 141 S.E. 2d 627; *Darden v. Bone,* 254 N.C. 599, 119 S.E. 2d 634; *Hunt v. Davis,* 248 N.C. 69, 102 S.E. 2d 405; *Lowie & Co. v. Atkins,* 245 N.C. 98, 95 S.E. 2d 271; *Steelman v. Benfield,* 228 N.C. 651, 46 S.E. 2d 829. The rules of practice in this Court are mandatory and will be enforced. *Walter Corp. v. Gilliam,* 260 N.C. 211, 132 S.E. 2d 313; *Balint v. Grayson,* 256 N.C. 490, 124 S.E. 2d 364; *Pruitt v. Wood,* 199 N.C. 788, 156 S.E. 126. . . ."

[2] Defendant's first assignment of error is ineffectual to bring up for review by this Court any part of the trial judge's rulings as to the admission of evidence. Despite the failure of defendant to perfect his appeal in conformity with the Rules,

since a life sentence is involved we have elected to consider the testimony that he seeks to attack. The conversations defendant had with the various witnesses, the admission of which he alleges was error, indicated his hatred for blacks and for Jervay who owned the black newspaper, the office of which was located in the building that was damaged by the explosion. These conversations further indicate that defendant had the dynamite that he planned to use and did in fact use in dynamiting the building. Such testimony was competent to show the requisite intent or state of mind and the motive for the commission of the crime, as well as the commission of the crime itself.

"In criminal cases every circumstance that is calculated to throw light upon the supposed crime is relevant and admissible if competent. . . . It is always competent to show a motive for the commission of the crime though motive does not constitute an element of the offense charged. To this end, evidence or threats made by defendant, or ill will existing between him and the victim of the offense, is competent." 2 Strong, N. C. Index 2d, Criminal Law § 33 (1967). *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506, cert. den. 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1965); *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954).

Defendant's first assignment of error is overruled.

[3] Defendant next assigns as error the trial court's refusal to let Officer Page testify regarding whether Ben Chavis was in the area on 28 May 1973. This assignment is without merit. Assuming, without deciding, that the question was competent, defendant has failed to show the answer the witness would have given had he been permitted to answer. In *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972), this Court said: "The record does not show what the State's witnesses or defendant would have said had they been permitted to answer the questions. Therefore we cannot know whether the rulings were prejudicial. The burden is on appellant not only to show error but to show *prejudicial error.* [Citations omitted.]"

[4] Finally, defendant's ninth assignment of error is as follows: "The lower court erred in its definition of malice in its charge." Again, this assignment of error fails to meet the requirements of our Rules. "Assignments of error to the charge should quote the portion of the charge to which 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, supra. Accord, State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Crews, supra.* The trial court instructed the jury that in order to convict the defendant they must be satisfied beyond a reasonable doubt of the following:

> "First, that the defendant damaged the building on South Seventh Street which was owned by Mr. T. C. Jervay and used by him as an office for the Wilmington Journal.
>
> "Second, that the defendant did this with an explosive or incendiary device of some sort. And I charge you that among other things, dynamite is an explosive device within the meaning of the statute.
>
> "Third, that the defendant acted wilfully, that is intentionally and without justification or excuse.
>
> "Fourth, that the defendant acted maliciously, that is [with] animosity, hatred or ill will.
>
> "And fifth, that the real property was at that time occupied by some person, which in this instance if occupied would have been by Mr. Richard Warren and his wife.
>
> "It is necessary for me to define for you some of these terms I have used. I have already defined the term malicious to mean with animosity, hatred or ill will."

[5] Defendant contends that the trial court's definition of the word "maliciously" was insufficient. He contends that the charge must not only set out that the act was maliciously done but that the act was maliciously done with ill will, animosity, or a preconceived revenge toward the owner. In the present case, the court charged the jury that in order to convict it must find beyond a reasonable doubt that defendant damaged the building of Mr. Jervay with an explosive, that defendant acted wilfully and maliciously, and that the building was occupied at the time. In *State v. Conrad,* 275 N.C. 342, 168 S.E. 2d 39 (1969), the defendant was convicted of malicious damage to an occupied building, a violation of G.S. 14-49.1, the same statute that defendant is charged with violating in this case. In affirming Conrad's conviction, Justice Higgins speaking for the Court said: "The gist of the offense . . . is malicious injury or damage to property, real or personal, by the use of high ex-

plosives. The word 'malicious' as used in the statute connotes a feeling of animosity, hatred or ill will toward the owner, the possessor, or the occupant."

In the present case, there was ample evidence of defendant's animosity, hatred, and ill will towards T. C. Jervay, the owner of the building, towards blacks generally, and towards the *Wilmington Journal,* a black newspaper, one of the occupants of the building. The trial court charged that the act of dynamiting the building must have been done maliciously and then defined maliciously exactly as set out in *State v. Conrad, supra.* This assignment is without merit.

A careful review of the record discloses that defendant had a fair and impartial trial free from prejudicial error.

No error.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. RICKY BLACK

No. 40

(Filed 26 November 1974)

1. **Robbery § 1 — common-law robbery**

Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear.

2. **Robbery § 1 — armed robbery**

The gist of the offense of robbery with firearms is the accomplishment of robbery by the use or threatened use of firearms or other dangerous weapons.

3. **Robbery § 1 — common-law robbery — armed robbery — taking of property**

There must be an actual taking of property for there to be the crime of common-law robbery, whereas under G.S. 14-87 the offense is complete if there is an attempt to take property by use of firearms or other dangerous weapon.

4. **Robbery § 5 — armed robbery — submission of lesser offenses**

In a prosecution for robbery with a firearm, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from

the person or simple larceny, if a verdict for the included or lesser offense is supported by allegations in the indictment and by evidence on the trial.

5. **Robbery § 5 — armed robbery — failure to submit common-law robbery**

In a prosecution for robbery with a dangerous weapon, the trial court did not err in failing to charge the jury that it might return a verdict of guilty of the lesser included offense of common-law robbery where the State's evidence tended to show that defendant threatened the victim with a knife that was for sale in the victim's store and took the knife from the store, and defendant's evidence tended to show that he did not threaten the victim with the knife and did not take the knife, there being no evidence of a lesser offense.

Chief Justice BOBBITT not sitting.

APPEAL by defendant from the decision of the Court of Appeals, reported in 21 N.C. App. 640, 205 S.E. 2d 154 (1974), finding no error in the trial before *McConnell, J.*, at the 22 October 1973 Session of UNION Superior Court. Defendant's right of appeal arises from the dissenting opinion of Judge Baley. G.S. 7A-30(2).

Defendant was charged in a bill of indictment with robbery with a dangerous weapon, a knife, whereby the life of Mrs. Lonnie S. Carr was endangered and threatened, a violation of G.S. 14-87.

The evidence for the State tends to show that on 13 September 1973 Mrs. Lonnie S. Carr, who was 81 years of age, was operating her place of business, Carr's Novelty Shop, on Main Street in Monroe, North Carolina. Ricky Black (defendant), Michael Duncan, and Jack Coffey entered Mrs. Carr's store at approximately twelve noon. Defendant asked to see a certain knife, and Mrs. Carr gave him the knife for his examination and told him its price. The three stayed in the store until Mrs. Carr asked them to leave so she could close the store for lunch. After a few minutes' delay they left. Mrs. Carr locked the door and was having her lunch when defendant and Duncan returned. Mrs. Carr asked them what they wanted, and defendant said that he had come to buy the knife. Thereupon Mrs. Carr opened the door and they came in. She handed defendant the knife that he had previously looked at and told him the price was the same. The blade of the knife was open, as it had not been shut since it was previously examined. Defendant held the knife up and said, "If you don't give us this knife, we're going to get you." Mrs. Carr was then beaten and lost consciousness. She testified that the knife was taken.

Michael Duncan testified for the State. He denied that he or defendant robbed Mrs. Carr, although he had previously been convicted in juvenile court for robbing her on this occasion.

Defendant testified in his own behalf. He denied beating Mrs. Carr and taking the knife.

The record discloses that on 16 October 1973 defendant entered a plea of guilty to armed robbery before Judge A. P. Godwin, Jr., but that the plea was not accepted, and the case was set for trial the next week before a jury, at which time the jury returned a verdict of guilty of attempt to commit robbery with a dangerous weapon. From sentence imposed, defendant appealed to the Court of Appeals. That court found no error in the trial, and defendant appeals to this Court by virtue of G.S. 7A-30(2).

Attorney General Robert Morgan by Donald A. Davis and John M. Silverstein, Assistant Attorneys General, for the State.

William H. Helms for defendant appellant.

MOORE, Justice.

The trial court charged the jury that it might return a verdict of guilty of robbery with a dangerous weapon or not guilty. Defendant's sole assignment of error is to the court's failure to charge that the jury might also return a verdict of guilty of common-law robbery.

G.S. 14-87 in part provides:

> "Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business . . . shall be guilty of a felony. . . ."

[1-3] Robbery at common law is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. *State v. Moore,* 279 N.C. 455, 183 S.E. 2d 546 (1971); *State v. Stewart,* 255 N.C. 571, 122 S.E. 2d 355 (1961). G.S. 14-87 creates no new offense, but provides that when firearms or other dangerous weapons are used, more severe punishment may be imposed. *State v. Lee,* 282 N.C. 566, 193 S.E. 2d 705 (1973);

State v. Rogers, 273 N.C. 208, 159 S.E. 2d 525 (1968). The gist of the offense of robbery with firearms is the accomplishment of robbery by the use or threatened use of firearms or other dangerous weapons. *State v. Rogers, supra; State v. Williams,* 265 N.C. 446, 144 S.E. 2d 267 (1965). There must be an actual taking of property for there to be the crime of common-law robbery, whereas under G.S. 14-87 the offense is complete if there is an attempt to take property by use of firearms or other dangerous weapon. *State v. Rogers, supra; State v. Parker,* 262 N.C. 679, 138 S.E. 2d 496 (1964). Hence, in the present case the verdict of guilty of an attempt to commit robbery with a dangerous weapon has the same effect as a verdict of guilty of robbery with a dangerous weapon under the provisions of G.S. 14-87.

Although in the case now under consideration the record contains no description of the knife allegedly used by defendant, one described as identical to it was introduced in evidence and presumably was seen and examined by the jury. In *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965), it was held that evidence of defendant's pointing a pocketknife with opened blade at his victim was sufficient under the circumstances of that case to support a finding that the pocketknife was a dangerous weapon within the meaning of G.S. 14-87. *Accord, State v. Moore, supra. See also State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661 (1965).

[4] In a prosecution for robbery with a firearm, an accused may be acquitted of the major charge and convicted of an included or lesser offense, such as common-law robbery, or assault, or larceny from the person, or simple larceny, if a verdict for the included or lesser offense is supported by allegations of the indictment and by evidence on the trial. G.S. 15-170; *State v. Parker, supra; State v. Wenrich,* 251 N.C. 460, 111 S.E. 2d 582 (1959). However, as said in *State v. Hicks,* 241 N.C. 156, 84 S.E. 2d 545 (1954):

> ". . . The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime

charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice."

Accord, State v. Lee, supra; State v. Bell, 228 N.C. 659, 46 S.E. 2d 834 (1948).

In the present case, Mrs. Carr testified that defendant held the opened knife between his palms, and after raising it said to her: "If you don't give us this knife, we are going to get you." She then testified: "That's the last thing I knew. I was down on the floor on my knees, and they had been beating my head. I could hear, but I couldn't see them. And I screamed. The boys that got the knife were beating my head. . . . My ear was cut. I had to go to the hospital and have about three stitches taken in it. I had on a little blue print dress. When I got up, I looked at it and there was blood all over it. The knife was taken. It had a value of $2.49, plus the taxes."

Michael Duncan testified for the State as follows: "He [defendant] told her he wanted some money, and she was talking and so she didn't hear him. He then again said he wanted some money, and then she jumped back and started to run. She ran toward the back of her store. That was all. When she went backward, Ricky [defendant] just stood there and looked at her, and then went out the back door. The two of us were in there about three minutes at that time. . . . Ricky said he left the knife there. I don't know what he did with the knife."

Defendant testifying in his own behalf said: "I had the knife looking at it. The woman was standing behind the counter. She was standing next to the wall on the back side of the counter. She might have thought I was going to take it, but I had the money in my pocket to pay for it. I was going to pay for it. She started hollering and screaming and ran to the right side of the counter where Michael was. Michael started beating the lady and she fell. She fell on her left knee and her head was laying on the glass counter on the left side. Michael started beating the lady in the head and I just stood there. I just stood there and the knife I had—I dropped it in the store on the floor. I ran over there and pushed Michael off the lady and he said, 'Are you going to get the money?' I said, 'No, let's get out of here.' So we ran."

In *State v. Fletcher,* 264 N.C. 482, 141 S.E. 2d 873 (1965), the defendant walked up to the prosecuting witness, pulled out

his knife, opened it, and said, "I want to see your pocketbook." The witness just stood there and defendant, holding the knife in his hand, pulled the pocketbook out of the witness's pocket and removed $24 from it. The trial court charged the jury that it might return one of three verdicts: "Guilty as charged, guilty of common-law robbery, or not guilty." The jury returned a verdict of "Guilty, as charged, of armed robbery." From sentence imposed, defendant appealed assigning error in the ruling on the motion to nonsuit and in the charge. This Court, in a *per curiam* opinion, stated:

> "The evidence, detailed above, obviously repelled defendant's motion for judgment of nonsuit. It likewise restricted the jury to two verdicts: guilty of robbery with a dangerous weapon, *i.e.*, a knife, or not guilty. *State v. Parker*, 262 N.C. 679, 138 S.E. 2d 496. Either defendant robbed Mulchi of $24.00 by the threatened use of a knife having a 2-3 inch blade or (a) no robbery occurred or (b) defendant was not the robber. Defendant's contention here that 'his Honor should have charged the jury on the guilt or innocence of the defendant as to the crime of larceny from the person' has no substance whatever. There was no evidence of larceny from the person. In charging the jury that it might return a verdict of common-law robbery, the court gave defendant a more favorable charge than the evidence justified."

[5] Here, if defendant's evidence was believed by the jury, defendant did not threaten Mrs. Carr with the knife and did not take the knife. On the other hand, if the State's evidence was believed by the jury, defendant threatened Mrs. Carr with the knife and took it from the store. Clearly, defendant robbed Mrs. Carr with a knife, or he did not rob Mrs. Carr at all. There was no testimony tending to establish the commission of an included or lesser crime. The evidence necessarily restricted the jury to the return of one of two verdicts; namely, a verdict of guilty of robbery with a dangerous weapon upon Mrs. Carr, or a verdict of not guilty. It follows that the court did not err by failing to instruct the jury that it might acquit the defendant of the crime of robbery with a dangerous weapon as charged in the bill of indictment and convict him of the lesser offense of common-law robbery. *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Bell, supra.*

For the reasons stated, the decision of the Court of Appeals finding no error in the trial is affirmed.

Affirmed.

Chief Justice BOBBITT not sitting.

GEORGE S. HEATH v. DAVID F. MOSLEY AND EUNICE C. MOSLEY

No. 21

(Filed 26 November 1974)

1. **Damages § 4 — injury to personal property — measure of damages**

The measure of damages for injury to personal property is the difference between its fair market value immediately before and immediately after the injury.

2. **Damages § 13 — price paid by purchaser as evidence of value**

The price voluntarily paid by a purchaser is some evidence of market value if the sale is not too remote and the purchase price is probative of the value of the property at the time in question.

3. **Damages § 13 — boat purchased at government surplus sale — competency of purchase price**

In an action to recover damages for injury to a boat owned by plaintiff, evidence of the purchase price of the boat was not rendered incompetent by remoteness or by extensive changes in its condition where the evidence tended to show that plaintiff purchased the boat fourteen months before the accident at a government surplus sale in Charleston, S. C., the boat was tested in the water for three days and then towed to Charlotte, N. C., where it was placed on a wooden cradle in plaintiff's driveway, and the boat was roughly in the same condition at the time of the accident as it was at the time plaintiff purchased it.

4. **Damages § 13 — government surplus sale — no compulsory sale — price paid for boat competent evidence**

In an action to recover damages for injury to plaintiff's boat which he had purchased at a government surplus sale, the amount which plaintiff bid and paid for his boat was competent since the government was under no compulsion to sell.

Chief Justice BOBBITT not sitting.

DEFENDANTS appeal from decision of the Court of Appeals, 21 N.C. App. 245, 204 S.E. 2d 234 (1974), upholding judgment

of *Johnson, J.*, 22 October 1973 Session, MECKLENBURG District Court.

This is an action to recover damages for injury to a boat owned by plaintiff.

Plaintiff's evidence tends to show that in September 1967 he purchased a 26-foot diesel-powered work boat from the United States Department of Defense at a government surplus sale in Charleston, South Carolina. The boat was purchased upon a sealed bid and then hauled to Southport, North Carolina, where it was tested in the water for three days and thereafter towed to Charlotte. Plaintiff unloaded the boat upon a wooden cradle he had built for it at the end of his driveway. From September 1967 to 15 November 1968 plaintiff and his son worked on the boat intermittently, cleaning the engine, stripping off the old paint, and performing other minor repairs.

On 15 November 1968 a car owned by defendant Eunice C. Mosley and operated by defendant David F. Mosley collided with the stern of the boat and knocked it forward on the cradle on which it rested. The rudder, pintle housing, stern post, gudgeon arm, gudgeon block, a garboard plank, and perhaps other parts were broken. Without objection, plaintiff testified that the fair market value of his boat immediately before the accident was $3,500.00 to $4,000.00 and immediately after the accident was $600.00. He stated that the cost of materials to make proper repairs would total $1,753.00 and that the total cost of repairs would exceed the value of the boat.

On cross-examination plaintiff was asked the price he had paid for the boat and the court sustained the plaintiff's objection. Had plaintiff been permitted to answer, he would have testified that he paid $287.75 for the boat when his sealed bid in that amount was accepted by the government.

Defendants offered no evidence.

The jury awarded plaintiff $2,000.00 damages and judgment was entered accordingly. Defendants appealed, and the Court of Appeals found no error, Campbell, J., dissenting. Defendants appealed to the Supreme Court as of right under G.S. 7A-30(2) assigning errors discussed in the opinion.

James P. Crews of the firm Carpenter, Golding, Crews & Meekins, for defendant appellants.

Parker Whedon for plaintiff appellee.

HUSKINS, Justice.

The sole question presented is whether, for impeachment purposes and as substantive evidence bearing on the fair market value of the boat immediately before the accident, defendants are entitled to show the amount plaintiff paid for his boat.

[1] The measure of damages for injury to personal property is the difference between its fair market value immediately before and immediately after the injury. *Roberts v. Freight Carriers,* 273 N.C. 600, 160 S.E. 2d 712 (1968); *Givens v. Sellars,* 273 N.C. 44, 159 S.E. 2d 530 (1968); *Simrel v. Meeler,* 238 N.C. 668, 78 S.E. 766 (1953); *Guaranty Co. v. Motor Express,* 220 N.C. 721, 18 S.E. 2d 116 (1942); *Farrall v. Garage Co.,* 179 N.C. 389, 102 S.E. 617 (1920).

[2] It is an accepted rule of law that the price voluntarily paid by a purchaser is some evidence of market value if the sale is not too remote and the purchase price is probative of the value of the property at the time in question. Whether the purchase involves realty or personalty is immaterial. *Highway Commission v. Nuckles,* 271 N.C. 1, 155 S.E. 2d 772 (1967); *Shopping Center v. Highway Commission,* 265 N.C. 209, 143 S.E. 2d 244 (1965); *Highway Commission v. Coggins,* 262 N.C. 25, 136 S.E. 2d 265 (1964); *Redevelopment Commission v. Hinkle,* 260 N.C. 423, 132 S.E. 2d 761 (1963); *Palmer v. Highway Commission,* 195 N.C. 1, 141 S.E. 338 (1928); *Potts v. Motor Co.,* 191 N.C. 821, 131 S.E. 739 (1926) (see Southeastern cite for complete report of this case); *Wilson v. Scarboro,* 169 N.C. 654, 86 S.E. 611 (1915), *petition for rehearing denied,* 171 N.C. 606, 88 S.E. 872 (1916); *Boggan v. Horne,* 97 N.C. 268, 2 S.E. 224 (1887); *Small v. Pool,* 30 N.C. 47 (1847). The probative value of evidence of purchase price depends upon similarity of conditions at time of purchase and time of injury. *Shopping Center v. Highway Commission, supra; Redevelopment Commission v. Hinkle, supra.*

Here, plaintiff contends that evidence of purchase price was properly excluded because the remoteness and nature of the sale at which he purchased the boat rendered the evidence incompetent. In support of this contention he notes that the purchase was made at a "bargain day" government surplus sale in another state two hundred miles from Charlotte and fourteen months prior to the injury. He further asserts that the boat had undergone some repairs from time of purchase to time of the accident.

The fact that plaintiff purchased the boat fourteen months before the accident is insufficient, standing alone, to require exclusion of the purchase price on the ground of remoteness. In *Palmer v. Highway Commission, supra,* this Court held that evidence of the price paid for property eighteen years before the taking was competent and was properly admitted on cross-examination in an eminent domain proceeding "to test the accuracy of the opinion of the witness as to the value of the property as well as to demonstrate the basis of his opinion as to the value thereof." *Compare Peele v. Hartsell,* 258 N.C. 680, 129 S.E. 2d 97 (1963), where testimony as to the value of a house trailer three years after it had been damaged and after repairs had been made or attempted and after the trailer had been moved several times was excluded as too remote to throw any light on the difference in the value of the trailer immediately before and immediately after its injury.

In *Shopping Center v. Highway Commission,* 265 N.C. 209, 143 S.E. 2d 244 (1965), the rule governing the competency and the admissibility of evidence of purchase price, and the effect of remoteness and changes in the character of the property, is articulated by Justice Moore, speaking for the Court, as follows:

> "In determining whether such evidence is admissible, the inquiry is whether, under all the circumstances, the purchase price fairly points to the value of the property at the time of the taking. Some of the circumstances to be considered are the changes, if any, which have occurred between the time of purchase by condemnee and the time of taking of condemnor, including physical changes in the property taken, changes in its availability for valuable uses, and changes in the vicinity of the property which might have affected its value. The fact that some changes have taken place does not *per se* render the evidence incompetent. But if the changes have been so extensive that the purchase price does not reasonably point to, or furnish a fair criterion for determining, value at the time of taking, when purchase price is considered with other evidence affecting value, the evidence of purchase price should be excluded."

[3] Applying the foregoing principles to the case before us, we hold that evidence of the purchase price of plaintiff's boat was not rendered incompetent by remoteness or by extensive

changes in its condition. On direct examination plaintiff testified that about one fourth of one side of the boat had been stripped of paint and that he had done no other work on the boat before its damage except cleaning the engine "a little bit." On cross-examination he testified that "about ten percent of the total paint . . . had been stripped off" prior to the accident. He further testified that nothing else had been done to it. "The boat was roughly in the same condition after it had been at my house for about a year as it was when I bought it except for whatever weathering that had taken place during that year."

The fact that the sale took place in Charleston, South Carolina, does little to strengthen plaintiff's contention of remoteness. The record discloses no reason why the fair market value of the boat in Charlotte was different from its fair market value in Charleston. To the contrary, it appears that the market for such boats covers a wide geographic area, and plaintiff testified he examined boats in Key West, Savannah, Pawtucket and Patuxent Naval Air Station before purchasing the boat in Charleston. Plaintiff's testimony tends to show that he finally bid on the boat in Charleston because it was in good condition, not because he thought he could get a better price there.

Plaintiff's final argument for excluding the evidence is that the price paid for property at a government surplus sale, conducted on a sealed bid basis with an open invitation for bids, is not indicative of market value. He contends the government was under some compulsion to dispose of surplus property at any price obtainable and that the sale price under those circumstances is incompetent on the question of actual market value.

[4] This contention has no merit. Market value is defined as the price property will bring "when it is offered by one who desires, but is not compelled to sell it, and is purchased by one who is under no necessity to buy it." *Light Co. v. Sloan,* 227 N.C. 151, 41 S.E. 2d 361 (1947). We have held the price obtained at an auction of property seized in claim and delivery made within a reasonable time after seizure of the property is competent evidence of its value at the time of the taking. *Implement Co. v. McLamb,* 252 N.C. 760, 114 S.E. 2d 668 (1960). *See* 29 Am. Jur. 2d, *Evidence* § 389 (1967). By like reasoning we hold that the government was under no compulsion to sell as would render incompetent the amount which plaintiff bid and paid for his boat. Innumerable judicial sales are conducted each year to settle estates, to foreclose security interests, to par-

tition property, and for other similar purposes. Such sales are not involuntary merely because they are conducted by order of the court. Nor is a government surplus sale involuntary or coerced merely because the government desires to dispose of property it no longer needs.

The price plaintiff paid for his boat is some evidence of his opinion of its value at the time of purchase and some evidence of its fair market value at the time of the accident. Stansbury, North Carolina Evidence §§ 100 & 128 (2d ed. 1963). The price paid is also admissible on cross-examination to test the accuracy of plaintiff's opinion at the trial that the boat was worth $3,500.00 to $4,000.00 immediately before the accident. *Davis v. Ludlum,* 255 N.C. 663, 122 S.E. 2d 500 (1961); *Palmer v. Highway Commission, supra.* Plaintiff's reluctance to have the purchase price before the jury is understandable. Even so, nothing appears which would render the evidence inadmissible. He will have ample opportunity to explain to the jury the nature of the government sale, the fair market value of the boat, and any benefit of bargain he claims. If he bought a bargain he, not the defendants, is entitled to the benefit of it.

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for entry of an order awarding defendants a new trial in accord with this opinion.

Reversed and remanded.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. SAMUEL FRANCIS AIKEN

No. 81

(Filed 26 November 1974)

1. Indictment and Warrant § 9 — crime charged in indictment — lesser included offenses

A defendant brought to trial under an indictment, proper in form, may, if the evidence so warrants and the trial is free from error, be properly convicted of the offense charged in the indictment or of a lesser offense all of the elements of which are included in the offense charged in the indictment and all of which elements can be

proved by proof of the allegations of fact contained in the indictment. G.S. 15-170.

2. **Narcotics § 1— possession and sale of controlled substances — separate offenses**

Neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other; thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each.

3. **Narcotics §§ 1, 4.5 — possession with intent to deliver — possession as lesser included offense — instructions proper**

Possession is an element of possession with intent to deliver a controlled substance, and the unauthorized possession is of necessity an offense included within the charge that the defendant did unlawfully possess with intent to deliver; consequently, the trial court did not err in instructing the jury that, under the indictment charging defendant with possession of heroin with intent to deliver, it might find defendant guilty of the unauthorized possession of a controlled substance.

Chief Justice BOBBITT not sitting.

ON *certiorari* to the Court of Appeals to review its decision, reported in 22 N.C. App. 310, 206 S.E. 2d 348, finding no error upon appeal by the defendant from *Long, J.*, at the 4 March 1974 Session of WAKE.

By an indictment, proper in form, the defendant was charged with the unlawful, wilful and felonious possession of 21 bags of heroin, a controlled substance, with intent to deliver the same, a violation of G.S. 90-95(a)(1).

The evidence for the State was to the following effect:

Officers of the Raleigh Police Department, having in their possession a search warrant which the defendant concedes to have been lawfully issued and served, entered and searched the defendant's bedroom in a rooming house at approximately 2:30 a.m. At the time of the entry, the defendant was asleep in the bed and was the only occupant of the room. On a shelf of a bookcase from three to five feet from the foot of the bed, the officers found a Kool cigarette pack in which there were 21 small glycene envelopes containing a white powder, subsequently analyzed and identified as heroin. The defendant's identification card lay approximately two inches from the cigarette pack. On the table in front of the bed were two other packs of Kool

cigarettes and in the book case there was a carton containing seven or eight packs of Kool cigarettes which the defendant took with him when he left the room with the officers. Prior to doing so, the defendant sat on the edge of the bed, took one of the cigarettes from one of the packs lying on the table and smoked it. The defendant told the officers he had been staying in that room two days but his room was in another part of the house. He denied ownership of the heroin or knowledge of its presence in the room. Under the rug, between the bed and the book case, the officers found $230.00 in cash which the defendant stated was his. Upon arrival at the jail, the defendant asked the officers if they were going to put him in jail without his "being able to get anything," stating to the officers that he was going to need a "fix" later on that night.

The defendant's evidence, consisting entirely of the testimony of the proprietor of the rooming house, was to the effect that this was the defendant's first night in that room, his second in the rooming house, that the searched room had previously been occupied by another man and a girl who had left without paying their rent, the day preceding the search, and that the room had not been cleaned between their departure and the search by the officers.

The court instructed the jury that it might return a verdict of guilty of possession with the intent to distribute, a verdict of guilty of possession, or a verdict of not guilty. The verdict was, "Guilty of the charge of possession of a controlled substance." The court sentenced the defendant to imprisonment for a term of four years.

James H. Carson, Jr., Attorney General; Rafford E. Jones, Assistant Attorney General; and T. Buie Costen, Assistant Attorney General, for the State.

William A. Smith, Jr., for defendant.

LAKE, Justice.

The North Carolina Controlled Substances Act, G.S. 90-86 to G.S. 90-113.8, defines a "controlled substance" to mean "a drug, substance, or immediate precursor included in Schedules I through VI of this Article." G.S. 90-87(5). Heroin is a substance included in Schedule I. G.S. 90-89(b)(10).

The pertinent portions of G.S. 90-95 provide:

"*Violations; penalties.*—(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

* * * *

(3) To possess a contolled substance.

* * * *

(d) Any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court."

The sole contention of the defendant in this Court is that the crime of possession of a controlled substance is not a lesser included offense of the crime of possession of a controlled substance with intent to deliver it, and, therefore, the trial court erred when it instructed the jury that it might return a verdict of guilty of possession of a controlled substance.

[1] A defendant brought to trial under an indictment, proper in form, may, if the evidence so warrants and the trial is free from error, be properly convicted of the offense charged in the indictment or of a lesser offense all of the elements of which are included in the offense charged in the indictment and all of which elements can be proved by proof of the allegations of fact contained in the indictment. G.S. 15-170; *State v. Riera,* 276 N.C. 361, 172 S.E. 2d 535; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Rorie,* 252 N.C. 579, 114 S.E. 2d 233. See also: 41 AM. JUR. 2d, Indictment and Information, § 313; Wharton, Criminal Law and Procedure, § 1799.

The defendant, recognizing this rule, contends that the offense of the unauthorized possession of a controlled substance (heroin) is not included within the offense of the unauthorized possession of such substance with the intent to deliver it. He relies upon our decision in *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481. That case is clearly distinguishable from the pres-

ent. In the Cameron case, the defendant was charged in separate indictments with the unlawful possession of heroin and with the unlawful sale of the same heroin. He was convicted on both charges and sentenced to imprisonment on each, the sentences to run consecutively. Cameron contended that the possession of a controlled substance is a lesser offense included within the offense of the unauthorized sale of such substance and, therefore, the imposition of separate sentences upon him for these two offenses constituted double jeopardy, in violation of the State and Federal Constitutions. We held that these were two separate, distinct crimes and that there was no error in imposing the separate sentences therefor. We reaffirm that decision.

[2] As we pointed out in *State v. Cameron, supra,* one may unlawfully sell a controlled substance which he lawfully possesses. Furthermore, the sale of a substance is the passage of title thereto and while usually the seller of a controlled substance has possession thereof, actual or constructive, it is not necessarily so as a matter of law. One may sell an article or substance which he does not possess. Quite obviously, one may possess an article or substance which he does not sell. Consequently, possession is not an element of sale and sale is not an element of possession. Thus, neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other. Thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each.

[3] On the contrary, one may not possess a substance with intent to deliver it (the offense charged in the present indictment) without having possession thereof. Thus, possession is an element of possession with intent to deliver and the unauthorized possession is, of necessity, an offense included within the charge that the defendant did unlawfully possess with intent to deliver. Consequently, there was no error in instructing the jury that, under the indictment in the present case, it might find the defendant guilty of the unauthorized possession of a controlled substance.

No error.

Chief Justice BOBBITT not sitting.

IN THE MATTER OF ALBERT LEE WILLIS

No. 32

(Filed 26 November 1974)

Appeal and Error § 46 — Court evenly divided — judgment affirmed — no precedent

Where members of the Court were equally divided and one Justice was not present and did not participate in the hearing, the judgment entered in the superior court is affirmed without becoming a precedent.

Chief Justice BOBBITT not sitting.

THIS proceeding originated in January 1972 by written application and supporting affidavits filed by Albert Lee Willis before the North Carolina Board of Law Examiners for permission to take the Bar examination required of applicants for license to practice law in North Carolina. The Board of Law Examiners, having some question whether the applicant had furnished sufficient evidence of his good moral character, notified the applicant to appear before the Bar Candidate Committee for hearing. Some question arose with respect to the applicant's Air Force service record. He was unable to produce his 201 file. This file, however, was later secured by the Board of Law Examiners.

After full hearing, at which the applicant and his counsel were present, the Board of Law Examiners made detailed findings of fact which are contained in the record. The Board concluded: that the applicant, Albert Lee Willis, has not satisfied the Board that he is possessed of good moral character and entitled to the high regard and confidence of the public. . . . THEREFORE, BE IT RESOLVED by the Board of Law Examiners, that the application of Albert Lee Willis to stand the 1973 North Carolina Bar Examination be denied for reason that he has failed to satisfy the Board that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public as required by Rule VIII of the Rules Governing Admission to the Practice of Law in The State of North Carolina."

Upon receiving notice of the ruling, the applicant petitioned the Board for reconsideration. This petition the Board denied. The applicant appealed from the order to the Superior Court of Wake County contending that the rules for admission to the Bar as authorized by G.S. 84-21 and G.S. 84-24 constituted an unconstitutional delegation of legislative power to the Board of

Law Examiners and, therefore, were violative of his constitutional rights.

Judge McKinnon made detailed findings of fact; and on the basis thereof affirmed the decision of the Board of Law Examiners holding that G.S. 84-21 and G.S. 84-24 are constitutionally valid.

The applicant gave notice of appeal from Judge McKinnon's order and filed in the Supreme Court the record of the proceeding before the Bar examiners and before Judge McKinnon and petitioned this Court to review the entire proceeding. The attorney for the Board of Examiners filed a reply contending the statutes and procedures followed are constitutional and moved before this Court that the appeal be dismissed. This Court ordered that the record and the motion to dismiss be docketed in this Court and the questions involved be calendared for argument.

Pearson, Malone, Johnson, DeJarmon & Spaulding by C. C. Malone, Jr. and W. G. Pearson II for plaintiff appellant.

N. C. Board of Law Examiners by Fred P. Parker III for appellee.

PER CURIAM

The parties, both by briefs and oral arguments, debated before this Court the question whether the judgment of the superior court should be affirmed or reversed.

Chief Justice Bobbitt was not present and did not participate in the hearing. On the question presented, the members of the Court were equally divided, three members voting to affirm and three members voting to reverse the judgment of the superior court. This equal division requires that the judgment entered in the superior court be affirmed without becoming a precedent. *Sharpe v. Pugh* (decided this day) ; *Parrish v. Piedmont Publishing Co.*, 271 N.C. 711, 157 S.E. 2d 334; *James v. Rogers*, 231 N.C. 668, 58 S.E. 2d 640; *Gardner v. McDonald*, 223 N.C. 854, 25 S.E. 2d 397; *Smith v. McDowell Furniture Co.*, 221 N.C. 536, 19 S.E. 2d 17.

Affirmed.

Chief Justice BOBBITT not sitting.

HOMER M. SHARPE, ADMINISTRATOR OF THE ESTATE OF BRENDA ADELINE SHARPE v. DR. V. WATSON PUGH

No. 26

(Filed 26 November 1974)

Appeal and Error § 46 — Court evenly divided — judgment affirmed — no precedent

Where the Court was equally divided on the question presented and one Justice did not participate in the hearing or disposition of the case, the decision of the Court of Appeals is affirmed without becoming a precedent.

Chief Justice BOBBITT not sitting.

The plaintiff, administrator of his infant daughter's estate, instituted his civil action in the superior court against the defendant, her attending physician, alleging her death was proximately caused by the defendant's negilgence in administering chloromycetin as treatment for tonsillitis when he knew, or should have known, the use of this powerful drug is often attended by dangerous side effects, including aplastic anemia, and that such use is not recommended by the manufacturer as treatment for intestate's ailments; notwithstanding such knowledge, defendant administered the drug without explaining the danger to the infant's parents and that thereafter aplastic anemia developed from the use of the drug and caused intestate's death.

The defendant, by answer, admitted the relationship of physician and patient and that he administered chloromycetin without notifying the parents of his infant patient of the danger incident to the use of the drug. He denied all other material allegation of the complaint.

At the close of the plaintiff's evidence, which included the defendant's adverse examination, Judge Bone sustained defendant's motion for a directed verdict and entered judgment dismissing the action.

On plaintiff's appeal, the North Carolina Court of Appeals affirmed the judgment of the superior court. (21 N.C. App. 110, 203 S.E. 2d 330.) On plaintiff's application, this Court granted certiorari.

Boyce, Mitchell, Burns & Smith by F. Kent Burns and Eugene Boyce for plaintiff appellant.

Maupin, Taylor & Ellis by W. W. Taylor, Jr. and Richard C. Titus; Manning, Fulton & Skinner by Howard E. Manning for defendant appellee.

PER CURIAM

Chief Justice Bobbitt did not participate in the hearing or disposition of this case. The six members of the Court who heard the appeal were equally divided on the question whether the decision of the Court of Appeals should be affirmed or reversed. This equal division requires that the decision of the Court of Appeals be affirmed without becoming a precedent. *Parrish v. Piedmont Publishing Co.*, 271 N.C. 711, 157 S.E. 2d 334; *James v. Rogers*, 231 N.C. 668, 58 S.E. 2d 640; *Gardner v. McDonald*, 223 N.C. 854, 25 S.E. 2d 397; *Smith v. McDowell Furniture Co.*, 221 N.C. 536, 19 S.E. 2d 17.

Affirmed.

Chief Justice BOBBITT not sitting.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BROOKS v. BOUCHER

No. 79 PC.

Case below: 22 N.C. App. 676.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

BROWN v. SMITH

No. 95 PC.

Case below: 23 N.C. App. 224.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

CHAVIS v. REYNOLDS

No. 81 PC.

Case below: 22 N.C. App. 734.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

HEARNE v. SMITH

No. 94 PC.

Case below: 23 N.C. App. 111.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

HOWELL v. NICHOLS

No. 70 PC.

Case below: 22 N.C. App. 741.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

SHIPTON v. BARFIELD

No. 90 PC.

Case below: 23 N.C. App. 58.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

STATE v. BETHUNE

No. 100 PC.

Case below: 23 N.C. App. 229.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

STATE v. BURTON

No. 71 PC.

Case below: 22 N.C. App. 559.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

STATE v. FAIRE

No. 62 PC.

Case below: 22 N.C. App. 573.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1974.

STATE v. HARRINGTON

No. 97 PC.

Case below: 22 N.C. App. 473.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HART

No. 77 PC.

Case below: 22 N.C. App. 738.

Petition of Attorney General for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1974.

STATE v. KETCHIE

No. 79.

Case below: 22 N.C. App. 637.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 13 November 1974.

STATE v. RICHARDSON

No. 92 PC.

Case below: 23 N.C. App. 33.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1974.

STATE v. ROBERTS

No. 85.

Cases below: 18 N.C. App. 388 and 22 N.C. App. 579.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 21 October 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 21 October 1974.

STATE v. ROGERS

No. 101 PC.

Case below: 23 N.C. App. 142.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1974.

STATE v. SPLAWN

No. 88 PC.

Case below: 23 N.C. App. 14.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1974.

STATE v. WILBORN

No. 107.

Case below: 23 N.C. App. 99.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 8 November 1974.

STATE v. WILKINS

No. 98 PC.

Case below: 22 N.C. App. 691.

Petition for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

TRUST CO. v. LARSON

No. 93 PC.

Case below: 22 N.C. App. 371.

Petition by defendants Larson and Powell for writ of certiorari to North Carolina Court of Appeals denied 8 November 1974.

UTILITIES COMM. v. TELEGRAPH CO.

No. 82 PC.

Case below: 22 N.C. App. 714.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 8 November 1974.

IN THE MATTER OF THE APPEAL OF CLAYTON-MARCUS COMPANY, INC., FROM ADMINISTRATIVE DECISION No. 114 OF TAX REVIEW BOARD OF NORTH CAROLINA

No. 105

(Filed 11 December 1974)

1. **Appeal and Error § 3— review of constitutional questions**

The Supreme Court will not pass upon the constitutionality of a statute unless necessary to determine the rights of the parties to the litigation before it.

2. **Taxation § 23— construction of taxing statutes**

When there is doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the State and in favor of the taxpayer; conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is to be construed strictly against the taxpayer and in favor of the State.

3. **Statutes § 5; Taxation § 23— construction of taxing statutes — meaning of words used therein**

In the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing; where, however, the statute itself contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be.

4. **Taxation § 31— use tax — storage — purchase from retailer**

The mere keeping of fabrics used in swatch books in the storeroom of a furniture plant in North Carolina would not support the assessment of a use tax on the fabrics where there is nothing in the record to show that the fabrics were purchased from a retailer. G.S. 105-164.3(17).

5. **Taxation § 31— use tax — goods used outside the State**

There is no merit in the contention that G.S. 105-164.3(19), which is part of the definition of taxable "use," should be construed as if the concluding words, "used solely outside the State," read, "used by the owner or purchaser solely outside the State."

6. **Taxation § 31— use tax — processing material into different product — use outside the State**

A taxable "use" does not include a processing of material into a different product, which resulting product is, itself, to be transported outside the State and used outside the State exclusively, regardless of who the user there may be. G.S. 105-164.3(18) and (19).

7. **Taxation § 31— material — exemption from use tax — sales promotional material**

The exemption from the use tax provided in G.S. 105-164.13(8) was not intended by the Legislature to apply, and does not apply, to use of material by a manufacturer in the production of an article

intended for use by the manufacturer, itself, through its distribution to potential customers as sales promotional material.

8. **Taxation § 31— use tax — fabrics used in furniture manufacturer's swatch books**

A furniture manufacturer's use in North Carolina of fabrics in the production of swatch books of sample fabrics for distribution without charge to its potential customers, in or out of this State, is not exempted by G.S. 105-164.13(8) from the use tax imposed by G.S. 105-164.6; nevertheless, since the production of the swatch books is not a "use" of the fabrics within the definition of that word contained in G.S. 105-164.3(18) and (19), no tax thereon is imposed by G.S. 105-164.6.

APPEAL by Clayton-Marcus Company, Inc., from the decision of the Court of Appeals, reported in 23 N.C. App. 6, 207 S.E. 2d 795, *Baley, J.*, having dissented. The Court of Appeals affirmed the judgment of *Hobgood, J.*, at the 26 November 1973 Session of WAKE, which judgment affirmed the decision of the Tax Review Board sustaining the levying of a use tax by the Commissioner of Revenue. The facts are not in dispute.

Clayton-Marcus Company, Inc., is a manufacturer of furniture in Hickory, North Carolina. It purchases from suppliers thereof quantities of fabrics which it uses primarily in the manufacture of furniture for sale to its customers in this and other states. The Commissioner of Revenue concedes that the use of fabrics in the manufacture of furniture for sale is not, in itself, subject to the North Carolina Use Tax.

Clayton-Marcus produces at and distributes from its plant in Hickory swatch books for use by its sales representatives and by its customers (furniture dealers) in this and other states. No charge is made for such swatch books. The purpose for which they are used is to enable the prospective customer to see what fabrics are available, including the various colors thereof, and to place orders for furniture in which the desired fabric and color are used.

The swatch books are prepared in the plant of Clayton-Marcus by cutting from the roll of fabric the desired lengths, overedging each such cutting, sewing the smaller color swatches onto the master swatch for the fabric and then assembling the several master swatches and binding them into swatch books. At the time Clayton-Marcus purchased the fabrics, it was not possible to determine what part of the yardage in any roll or lot of fabric would be used in the manufacture and what part

would be used in the production of swatch books, the latter being a relatively small portion of the whole.

The Commissioner of Revenue does not contend that the fabric used in the production of swatch books which are sent to the sales representatives of Clayton-Marcus in other states for their own use therein is subject to the North Carolina Use Tax. On the other hand, Clayton-Marcus does not, on this appeal, contest the validity of the assessment of a use tax upon the purchase price of fabrics used in the production of swatch books distributed by Clayton-Marcus to either its sales representatives or its customers in this State for their use here. The Commissioner of Revenue assessed a use tax upon the purchase price of fabrics used in the production of swatch books sent, without charge, by Clayton-Marcus to its customers in other states for their use therein. It is the validity of that assessment ($4,385.67, plus interest, for the period beginning 1 January 1965 and ending 30 November 1967) which is presented by this appeal.

The Tax Review Board concluded that the fabrics used by Clayton-Marcus in the preparation of these swatch books is not, by reason of G.S. 105-164.13(8), exempt from the use tax as an ingredient or component part of a manufactured article (the swatch book). The Board adopted the view of the Commissioner of Revenue that this exemption is intended to apply only to materials used in the manufacture of articles which, themselves, are intended by the manufacturer to be sold. It further concluded that G.S. 105-164.3(19) has no application. This statute excludes from taxable uses the keeping or exercising power over tangible personal property for the original purpose of subsequently transporting it outside the State for use solely outside the State, and further excludes from taxable uses a use of tangible personal property for the purpose of processing, fabricating, manufacturing, attaching or incorporating it into other tangible personal property which is to be transported outside the State. Here, also, the Board adopted the view of the Commissioner of Revenue that this statute applies only when the use outside the State is to be made by such manufacturer himself.

Clayton-Marcus assigns each of these conclusions of the Board of Tax Review as error and also contends that to impose a tax upon the use of fabrics in the preparation of these swatch books would be to tax interstate commerce, in violation of the Commerce Clause, contained in Art. I, § 8, of the Constitution of the United States.

James H. Carson, Jr., Attorney General, and Myron C. Banks, Assistant Attorney General, for the North Carolina Department of Revenue, Appellee.

Kenneth D. Thomas for appellant.

The North Carolina Schoonbeck Company, a Michigan corporation, Amicus Curiae, by Hudson, Petree, Stockton, Stockton and Robinson.

LAKE, Justice.

G.S. 105-164.6, in the part thereof pertinent to this appeal, provides:

> "*Imposition of tax.*—An excise tax is hereby levied and imposed on the storage, use or consumption in this State of tangible personal property purchased within and without this State for storage, use or consumption in this State, the same to be collected and the amount to be determined by the application of the following rates against the sales price * * * ."

Clayton-Marcus purchased fabric in rolls or bolts from sources of supply in and out of this State, received the fabric at its plant in this State, put and held it in its inventory for an unspecified time, removed it from inventory and cut from various rolls swatches or samples. These swatches it bound around the edges to prevent raveling. To each swatch showing material type it then attached smaller samples of the same fabric but of varying colors. It then compiled groups of such swatches, each group consisting of one swatch of each type of fabric, with color samples attached. It then bound each group into a swatch book. It distributed the swatch books to its sales representatives and to its customers for their use in soliciting and in placing orders for furniture with Clayton-Marcus.

If this course of dealing with the portion of fabric, which thus came to be included within the swatch books, constituted a "storage," a "use" or a "consumption" of such fabric, the assessment of the use tax here in question was proper, unless some other provision of the Sales and Use Tax Act, G.S. Chapter 105, Art. 5, requires a different conclusion, or the imposition of such a use tax would violate a provision of the Constitution of North Carolina or of the Constitution of the United States.

[1] Clayton-Marcus contends that, assuming such handling and disposition of the fabric constitutes a "storage, use or consumption" of the fabric in this State, the imposition of an excise tax thereon would violate the Commerce Clause contained in Art. I, § 8, of the Constitution of the United States. We do not reach this question since we conclude that other provisions of the Sales and Use Tax Act exclude the Clayton-Marcus procedure in the compilation of the swatch books here in question from the operation of G.S. 105-164.6. This Court does not pass upon the constitutionality of a statute unless necessary to determine the rights of the parties to the litigation before it. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 168 S.E. 2d 401; *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792; *State v. Blackwell,* 246 N.C. 642, 99 S.E. 2d 867; *Fox v. Commissioners of Durham,* 244 N.C. 497, 94 S.E. 2d 482; *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129.

[2] It is well established that when there is doubt as to the meaning of a statute levying a tax, it is to be strictly construed against the State and in favor of the taxpayer. *Colonial Pipeline Co. v. Clayton, Comr. of Revenue,* 275 N.C. 215, 166 S.E. 2d 671; *Watson Industries v. Shaw,* 235 N.C. 203, 69 S.E. 2d 505; *Henderson v. Gill, Comr. of Revenue,* 229 N.C. 313, 49 S.E. 2d 754. Conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is to be construed strictly against the taxpayer and in favor of the State. *Good Will Distributors v. Shaw, Comr. of Revenue,* 247 N.C. 157, 100 S.E. 2d 334; *Henderson v. Gill, supra.* These rules come into play, however, only when there is ambiguity in the statute. When the meaning of the statute is clear, there is no need for construction and the clear intent of the Legislature must be given effect by the courts. *Colonial Pipeline Co. v. Clayton, supra; Watson Industries v. Shaw, supra.*

[3] In the construction of any statute, including a tax statute, words must be given their common and ordinary meaning, nothing else appearing. *Duke Power Co. v. Clayton, Comr. of Revenue,* 274 N.C. 505, 164 S.E. 2d 289; *Supply Co. v. Maxwell, Comr. of Revenue,* 212 N.C. 624, 194 S.E. 117. Where, however, the statute, itself, contains a definition of a word used therein, that definition controls, however contrary to the ordinary meaning of the word it may be. *Johnston v. Gill, Comr. of Revenue,* 224 N.C. 638, 32 S.E. 2d 30. The courts must construe the statute as if that definition had been used in lieu of the word

in question. If the words of the definition, itself, are ambiguous, they must be construed pursuant to the general rules of statutory construction, including those above stated.

The Sales and Use Tax Act, in G.S. 105-164.3(17), (18) and (19), expressly defines the words "storage" and "use," and provides that these shall be the meanings of these words "except where the context clearly indicates a different meaning." Thus, these terms, as used in G.S. 105-164.6, the section of the Act imposing the tax which the State here seeks to collect, must be given the meaning stated in those definitions, which are:

> "(17) 'Storage' means and includes any keeping or retention in this State for any purpose [by the purchaser thereof], except sale in the regular course of business of tangible personal property purchased from a retailer.
>
> "(18) 'Use' means and includes the exercise of any right or power or dominion whatsoever over tangible personal property by a purchaser thereof and includes, but is not limited to, any withdrawal from storage, installation, affixation to real or personal property, exhaustion or consumption of tangible personal property by the owner or purchaser thereof, but shall not include the sale of tangible personal property in the regular course of business.
>
> "(19) 'Storage' and 'Use'; Exclusion.—'Storage' and 'use' do not include the keeping, retaining or exercising any right or power over tangible personal property [by the purchaser thereof] for the original purpose of subsequently transporting it outside the State for use thereafter solely outside the State and which purpose is consummated, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the State and thereafter used solely outside the State."

The words above shown in brackets in paragraphs (17) and (19) of this section of the Act and the two commas in paragraph (17) were inserted by Chapter 1287 of the Session Laws of 1973, § 8, which amendment became effective 1 July 1974, after the events which the State contends constituted a taxable "storage, use or consumption" of the fabrics in the swatch books. These words and commas, therefore, have no bearing upon the decision of this appeal, except insofar as the enactment of such amend-

ment may cast light upon the intent of the Legislature as to the meaning of the definition with these words and commas omitted therefrom. See, *Colonial Pipeline Co. v. Clayton, supra,* at p. 227.

It will be observed that the definition of "storage" in paragraph (17), as it appeared at the time of the events here in question, contained no punctuation. As a result, the definition, as then written, is ambiguous. Are the words "of tangible personal property purchased from a retailer" part of the exception, thus limiting the exception, or are these words, themselves, a separate limitation of "storage," thus confining "storage" to a "keeping or retention * * * of tangible personal property purchased from a retailer?" Applying the rule that a statute imposing a tax is to be construed strictly against the State, we construe paragraph (17) to limit "storage" to the keeping or retention of personal property purchased from a retailer, thus excluding from the tax the storage of personal property not so acquired. The commas inserted by the amendment make this clear as to "storage" thereafter.

[4] In the present instance, there is nothing in the record to show that the fabrics used in the swatch books were purchased from a retailer. The natural inference is to the contrary. Consequently, mere keeping of these fabrics in the storeroom of the Clayton-Marcus plant in North Carolina would not support the assessment of the tax in question. The State does not contend that it would.

There is no such limitation upon the definition of "use" contained in paragraph (18). This paragraph, standing alone, is unambiguous and, if it stood alone, would clearly support the assessment of the tax. There was an exercise of dominion over the fabric, a withdrawal of it from storage, an affixation of the separate pieces of fabric to each other and to the binding in the compilation of the swatch book, and a consumption of the fabric by transforming it from a part of a roll of cloth into swatches and then into a book, just as a roll of paper is consumed by transforming it into a magazine, newspaper or book. See. Annot., 17 A.L.R. 3d 7, 108, 127.

However, paragraph (18) does not stand alone. Paragraph (19) is part of the definition of "use." It provides that "use"—i.e., a taxable use—does not include the exercise of any right or power over tangible personal property for the purpose of its being "processed, fabricated, or manufactured into, attached to

or incorporated into, other tangible personal property," which other property is, itself, "to be transported outside the State and thereafter used solely outside the State." An exclusion, by definition, from the taxable event should be strictly construed against the State under the above mentioned rules for the construction of a taxing statute. It is not an exemption of a favored activity, first brought within the meaning of the taxing provision. It is an original fixing of the outer boundaries of the activity to be taxed.

The fabric in question was processed, fabricated, manufactured and incorporated into a swatch book. It was not only attached to other pieces of fabric and to the binding, but its form was significantly changed in the same way that the leaves of a book, while still paper, have become a book in the ordinary thought of the beholder. See, Annot., 17 A.L.R. 3d 7, 108, 127.

[5, 6] The argument of the State virtually concedes this, for the State's contention is that paragraph (19) should be construed as if the concluding words, "used solely outside the State," read, "used by the owner or purchaser [i.e., by the processor, fabricator or manufacturer] solely outside the State." That is, the State concedes that the use of fabric in compiling swatch books sent to and used by Clayton-Marcus' own sales representatives outside this State is not taxable. The State's difficulty is that this is not what the statute says. We perceive nothing in this definition of a taxable "use" which indicates such intent on the part of the Legislature. Both the plain, clear, ordinary meaning of the words of the statute and the rule that such a statute must be strictly construed against the State compel the conclusion that a taxable "use" does not include a processing of material into a different product, which resulting product is, itself, to be transported outside the State and used outside the State exclusively, regardless of who the user there may be.

Clayton-Marcus further contends that even if its handling of the fabric in the compilation of the swatch books here in question is a "use" of the fabric, within the meaning of the Sales and Use Tax Act, it is exempted from the use tax by G.S. 105-164.13, which provides:

> "*Retail Sales and Use Tax.*—The sale at retail, the use, storage or consumption in this State of the following tangi-

ble personal property is specifically exempted from the tax imposed by this Article:

* * * *

"(8) Sales of tangible property to a manufacturer which enters into or becomes an ingredient or component part of tangible personal property which is manufactured."

This provision of the Act, being an exemption from the tax otherwise imposed upon a "use" of tangible personal property, is to be construed strictly against the claim of exemption, insofar as its meaning is in doubt. The clear intent of this provision of the Act is that a sale of such property to a "manufacturer" is not taxed and neither is its use by the manufacturer as an ingredient or component of another "manufactured" article. The question is whether Clayton-Marcus is a "manufacturer" of the swatch books involved in this appeal.

The State contends that Clayton-Marcus is a manufacturer of furniture, so that its use of so much of the fabric as becomes a component part of furniture is not subject to the Use Tax, but that Clayton-Marcus is not a manufacturer of the swatch books, which it distributes to its customers, because it gives those swatch books to its customers without charge. That is, the State contends that one is not a manufacturer of articles which he makes for the purpose of distribution without charge, but is merely a consumer or user of the materials from which he makes such article. See, Annot., 17 A.L.R. 3d 7, 31.

In *Duke Power Co. v. Clayton, supra;* Justice Sharp, speaking for this Court, said:

"The word *manufacture* 'is not susceptible of an accurate definition that is all-embracing or all-exclusive, but is susceptible of many applications and many meanings. * * * In its generic sense, "manufacturing" has been defined as the producing of a new article or use or ornament by the application of skill and labor to the raw materials of which it is composed.' 55 C.J.S. Manufactures, § 1, at 667 and 670 (1948). *Accord, Bleacheries Co. v. Johnson, Comm'r of Revenue* [266 N.C. 692, 147 S.E. 2d 177]. * * * 'To make an article manufactured, the application of the labor must result in a new and different article with a distinctive name, character, or use,' *Inhabitants of Leeds v. Maine Crushed Rock & Gravel Co.,* 127 Me. 51, 56, 141

A. 73, 75 (1928). Thus, the usual connotation of *manufacturing* is the making of a new product from raw or partly wrought materials. * * *

"*In Anheuser-Busch Brewers Ass'n v. United States,* 207 U.S. 556, 28 S.Ct. 205, 52 L.Ed. 336 (1908) * * * The Supreme Court, speaking through Mr. Justice McKenna, said: 'Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary. * * * There must be a transformation; a new and different article must emerge, "having a distinctive name, character, or use." ' "

In our opinion, a swatch book or sample book is a new and different article from the fabrics in the respective samples contained therein. Thus, nothing else appearing, Clayton-Marcus has "manufactured" these swatch books. See, Annot., 17 A.L.R. 3d 7, 108, 127. In the construction of this statutory exemption, however, we should not press the word "manufactured" to its dryly logical extreme in disregard of the obvious purpose of the Sales and Use Tax Act. It is clear that the purpose of the Act, as a whole, is to impose a use tax (credited with a sales tax previously paid by the user) upon the consumer or user of tangible personal property in this State.

As the State points out in its brief, a lady who bakes a cake, or makes a child's dress, for the purpose of giving it to a neighbor is not a "manufacturer" within the meaning of G.S. 105-164.13(8), notwithstanding the fact that, by the application of skill and labor to raw materials, she has created a new and different article. To hold otherwise would defeat the purpose of the Use Tax Act by giving the word "manufactured" a meaning which it does not have in its ordinary usage. The distinction between such a lady and the commercial bakery or the commercial dress shop is not, however, confined to the fact that she makes no charge for her product. We are not required, in this instance, to determine whether one who devotes a substantial plant to the preparation of food or clothing, which he donates to a charitable agency, should be deemed a "manufacturer" within the meaning of this exemption statute.

In the present instance, Clayton-Marcus is not distributing the swatch books in question to its potential customers as gifts. It is distributing them as advertising matter for the purpose of

soliciting sales of its furniture. It is as if Clayton-Marcus had purchased paper, ink and other printing materials from which it produced, in its own plant, catalogues, containing pictures and descriptions of furniture manufactured by it for sale, and had distributed such catalogues among potential customers for its furniture. The purpose of the producer of such catalogue or swatch book is thereby to increase its own business, not to benefit the recipient of the book. The catalogue or the swatch book is created for use (by distribution) by the producer itself as an instrumentality in the conduct of the producer's own business.

Decisions by the courts of our sister states are, in many instances, not fully persuasive for the reason that the language of the statutes construed by them is not the same as that used in G.S. 105-164.13(8). For example, in many of the comparable statutes of other states, the exemption is expressly limited to the use of material as an ingredient or component part of another article which is "manufactured *for sale.*" (Emphasis added.) Nevertheless, the decisions construing those statutes are somewhat indicative of the general legislative purpose in the enactment of a use tax.

Because of the general legislative purpose in the enactment of the Sales and Use Tax Act, the State contends G.S. 105-164.13(8) should be construed as if the words "for sale" actually appeared at the end thereof. When material is used in the manufacture of another article (i.e., furniture), which manufactured product is intended for sale, a sales or use tax will ultimately be levied upon the purchaser or user, in North Carolina, of the manufactured article. Thus, to levy a tax upon the manufacturer's use of the raw material would be to tax twice the value added to the finished article by the incorporation therein of the material. On the other hand, there is no such double taxation where the material does not enter into an article which, itself, is designed for subsequent sale.

In *Iden v. Bureau of Revenue,* 43 N.M. 205, 89 P. 2d 519, a railroad company which purchased rough logs, which it cut, shaped and processed into cross-ties for use on its own tracks, was held to be a consumer of the logs, not a manufacturer within the meaning of the sales tax exemption. In *Union Oil Co. of California v. Johnson,* 58 Cal. App. 2d 636, 137 P. 2d 706, an oil refining company was likewise held to be a consumer, not a manufacturer, within the meaning of such a statute, with refer-

ence to that portion of lubricants made by it and used by it for the lubrication of its own machinery. In *State v. Bemis Bros. Bag Co.*, 267 Ala. 161, 100 So. 2d 736, a manufacturer of cotton cloth was held subject to tax on cotton bagging or tubing used by it as a container in which to ship cloth to its customers. In *Granite City Steel Co. v. Dept. of Revenue*, 30 Ill. App. 2d 552, 198 N.E. 2d 507, a steel company was held taxable upon its use of coal from which it made coke, which coke it then burned in its production of pig iron and steel, such coke not, itself, becoming an ingredient of the iron and steel produced.

[7] We hold that the exemption provided in G.S. 105-164.13(8) was not intended by the Legislature to apply, and does not apply, to use of material by a manufacturer in the production of an article intended for use by the manufacturer, itself, through its distribution to potential customers as sales promotional material.

[8] Thus, we hold that the use, in North Carolina, by Clayton-Marcus of fabric in the production of swatch books for distribution, without charge, to its potential customers, in or out of this State, is not exempted by G.S. 105-164.13(8) from the Use Tax imposed by G.S. 105-164.6. Nevertheless, since this is not a "use" within the definition of that word contained in G.S. 105-164.3(18) and (19), no tax thereon is imposed by G.S. 105-164.6, and Clayton-Marcus is not liable for the tax assessed by the Commissioner of Revenue in this instance.

Reversed.

IN THE MATTER OF: WILLIE BEATTY, JR. S. S. No. 238-48-6459 LONGSHOREMAN-CLAIMANT, ET AL AND WILMINGTON SHIPPING COMPANY POST OFFICE BOX 1809, WILMINGTON, NORTH CAROLINA 28401 ET AL AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RALEIGH, NORTH CAROLINA

No. 104

(Filed 11 December 1974)

Master and Servant § 108— unemployment compensation — guaranteed annual income plan — effect of requirements on availability for work

Claimants seeking unemployment benefits were not available for work within the meaning of G.S. 96-13(3) where, in compliance with terms of a guaranteed annual income plan provided for in their collective bargaining contract, they were required to report each weekday

to a hiring center and remain there until 8:15 to 9:15 a.m., but temporary jobs for which they were qualified, including construction work, maintenance, and forklift operation, generally required that work begin between 7:00 and 8:00 a.m.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 22 N.C. App. 563, 207 S.E. 2d 321, finding no error in the judgment of *Peel, J.*, 10 December 1973 Civil Term of NEW HANOVER Superior Court.

The claimant, Willie Beatty, Jr., filed a claim for unemployment insurance benefits. On 5 June 1973, his case and one hundred twenty-five additional claims were removed to the Employment Security Commission and by consent consolidated because of common interest and similarity of issues. Pursuant to this order, testimony concerning the consolidated cases was taken at Wilmington by Hearing Officer Garland D. Crenshaw on 21 June 1973, pertaining to forty-three longshoremen, and at Morehead City on 22 June 1973, concerning claims of eighty-three longshoremen.

On 14 August 1973, the consolidated cases were heard by the Chairman, who found facts which may be summarized as follows:

The claimants are longshoremen employed either at Wilmington, Southport, or Morehead City pursuant to a collective bargaining agreement between the South Atlantic Employers Negotiating Committee and the International Longshoremen's Association, AFL-CIO (ILA).

The existing collective bargaining contract provides, *inter alia*, for a guaranteed annual income fund (GAI) to furnish benefits to employees who are ready, willing, and able to work but who could not do so because of lack of work as longshoremen. The plan is financed by contributions from those ordering the longshoremen for work. The contributions are derived from a tonnage assessment on cargoes handled by the longshoremen and are paid to the trustees of the fund.

The guaranteed annual income amounts to two hundred fifty hours for each quarter at the pay rate of $5.50 per hour, with twenty-five percent to be withheld for year-end adjustments. In order to be eligible for payments, the longshoremen must report each weekday (excluding holidays) to a hiring center, where they are selected for work. The procedure for show-

ing availability is for the employees to report to a hiring hall, where the men report daily to "shape up," which is a trade term used to mean that the men personally appear and evidence their availability for work as longshoremen by presenting a plastic badge to "badge in" and "badge out." Employees "badge in" each workday between the hours of 6:00 a.m. and 7:30 a.m., and if work is not available to them, they "badge out" *between 8:15 a.m. and 9:15 a.m.*, at which time they may seek part-time employment. According to the GAI contractual obligation, a longshoreman loses all benefits under the plan if he accepts full-time outside employment.

Longshoremen generally qualify for outside employment as construction workers, helpers, laborers, material handlers, lift operators, and related work which carries a prevailing wage of $2.50 per hour. Ninety percent of the opportunities for work are in construction where the employers prefer permanent workers but will, on occasion, hire temporary help who must report for work *not later than 8:00 a.m.*

Upon these findings, to which claimants filed no exception, the Commission concluded that GAI longshoremen are "neither available for permanent nor temporary employment and are therefore not eligible for unemployment insurance benefits." An order was entered consistent with this conclusion. Claimants appealed to the Superior Court, where the decisions of the Commission were affirmed. Claimants appealed to the North Carolina Court of Appeals, and that Court found no error in the judgment entered in the Superior Court. We allowed certiorari to the North Carolina Court of Appeals on 24 September 1974.

Andrew A. Canoutas and Gleason & Miller for claimant appellants.

H. D. Harrison, Jr., Howard G. Doyle, and Garland D. Crenshaw, by H. D. Harrison, Jr., for the Employment Security Commission.

BRANCH, Justice.

The sole question presented by this appeal is whether claimants, by adhering to the contractual obligations of the Guaranteed Annual Income agreement, met the availability requirement of G.S. 96-13(3).

G.S. 96-13(3), in relevant part, provides:

"An unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that—

(3) He is . . . available for work. . . ."

The phrase "available for work" is not susceptible of precise definition, and whether a person is available for work differs according to the facts of each individual case. *In re Watson*, 273 N.C. 629, 161 S.E. 2d 1; *In re Miller*, 243 N.C. 509, 91 S.E. 2d 241. We recognize that the General Assembly "intended to provide a wide field of usefulness for this agency [the Employment Security Commission] for social security and for mitigating the economic evils of unemployment." *Unemployment Compensation Commission v. Willis*, 219 N.C. 709, 15 S.E. 2d 4. In creating the statutory framework for the attainment of this laudable objective, however, the General Assembly required, *inter alia*, that a claimant for benefits under the statute remain available for suitable employment.

The key to decision of this appeal lies in our interpretation of the statutory phrase "available for work." More specifically, the question is whether claimants, by their adherence to the terms of the guaranteed annual income provisions of their collective bargaining agreement, have placed themselves in a position which, for all practical purposes, eliminated their availability for work.

It is fundamental that the intent of the General Assembly controls judicial interpretation of a statute. *In re Watson, supra; In re Abernathy*, 259 N.C. 190, 130 S.E. 2d 292; *Shue v. Scheidt*, 252 N.C. 561, 114 S.E. 2d 237. In this respect, we find assistance in the legislative declaration of public policy set forth in G.S. 96-2, which, in part, provides:

"As a guide to the interpretation and application of this chapter, the public policy of this State is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this State. *Involuntary unemployment* is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his

family. . . . The legislature, therefore, declares that in its considered judgment the public good and the general welfare of the citizens of this State require the enactment of this measure, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed *through no fault of their own.*" (Emphasis supplied.)

This availability requirement has generally been viewed as an indication of a claimant's attachment to the labor force and is designed *to test each claimant's attachment to the labor market.* 34 N.C. L.Rev. 591. *See generally* 81 C.J.S. *Social Security and Public Welfare* § 203. One writer has attempted to explain the availability requirement in the following manner:

"The availability requirement is said to be satisfied when an individual is willing, able, and ready to accept suitable work which he does not have good cause to refuse, that is, when he is genuinely attached to the labor market. Since, under unemployment compensation laws, it is the availability of an individual that is required to be tested, the labor market must be described in terms of the individual. . . ."

Freeman, *Able to Work and Available for Work,* 55 Yale L.J. 123, 124.

There are, of course, limits to the availability requirement because carrying the concept too far would result in the unwarranted disqualification of otherwise qualified workers and thwart the legislatively declared objectives of the Act. *Id.* at 126. ". . . The problem is . . . whether or not the restrictions [which the claimant places on his employment] serve to limit the work which a claimant can accept to such a degree that he is no longer genuinely attached to the labor force. It is essentially a matter of degree to ascertain to what extent a claimant can impose restrictions and on what these restrictions must be based." Note, 34 N.C. L.Rev. 591, 604.

In a lead article by Lee G. Williams, entitled *Eligibility for Benefits,* 8 Vand. L.Rev. 286, 292, we find the following pertinent statement:

"Obviously, the whole inquiry as to whether a particular claimant for benefits is available for work is an inquiry designed to find out whether the claimant actually

wants to work *and whether he is so situated that he can work.* Every fact which is to be ascertained must be a fact which is evidence of this attitude and this condition. 'The availability requirement is a test to discover whether claimants would, in actuality, now be working, were it not for their inability to obtain work that is appropriate for them.' " (Emphasis ours.)

The recent advent of supplemental unemployment benefit plans and guaranteed annual income plans has introduced a new dimension into the field of unemployment compensation. Although the question here presented seems to be one of first impression, we find guidance in analogous cases dealing with the effect of collective bargaining agreements on eligibility for unemployment compensation benefits, when the claimants refused proffered employment.

In *Lybarger Unemployment Compensation Case,* 203 Pa. Super. 336, 201 A. 2d 310, the claimant was a union member working under a collective bargaining agreement which provided, *inter alia,* that to facilitate an adjustment of personnel, the employer would retain by seniority the number of chain machine operators necessary to maintain production at the normal forty-hour-per-week level. When the senior group of employees had earned, from January 1 of the calendar year, gross earnings of $5,000, plus or minus $50, those workers would go on lay-off status for the remainder of the year or until all younger workers were recalled and additional senior workers were required in seniority order. This cycle of work and lay-off continued throughout the duration of the collective bargaining agreement. Plaintiff had earned the maximum amount by October. Under the terms of the agreement, he would have remained in non-working status until the subsequent January 1. Claimant filed for state unemployment compensation. In denying benefits, the Court stated:

". . . Although we agree that the purpose may be an admirable one [sic] it was not the intention of the legislature to use the unemployment compensation fund to subsidize such a plan. To contend that the claimant's unemployment was due to no fault of his own is to fly into the face of ordinary common sense."

In *Mills v. Mississippi Employment Security Commission,* 228 Miss. 789, 89 So. 2d 727, the claimant refused to accept

non-union employment on the ground that he would not work for less than the union scale fixed by a duly negotiated collective bargaining agreement. Noting that the Employment Security Act made no distinction between union and non-union workers, the Court held that the claimant had rendered himself unavailable for work.

The language of the Delaware Supreme Court in *Bigger v. Unemployment Compensation Commission,* 43 Del. 553, 53 A. 2d 761, clearly states the cardinal principle upon which these decisions and our decision in instant case rest:

> "In the body of the Act, the Legislature has defined with some care the standards for determining who is entitled to benefits from the reserve fund created. Nothing in the Act suggests that a union or a group of employers or any one else may add to, or substract from, the standards laid down in the Act itself.
>
> "From what has been said, it is clear that the Legislature had no thought of strengthening or of weakening the power of unions. Its purpose was to protect all workmen involuntarily unemployed. Membership in a union gives an individual no greater rights under the Act than he otherwise has. Likewise, a group of individuals cannot secure higher privileges merely by adopting a rule which binds themselves to a certain course of conduct. We cannot agree with a theory which would have the effect of substituting a union rule for a statutory requirement. If a man wants to benefit by the Act, he must comply with its provisions; his unemployment is not involuntary if he refuses a job without good cause; 'good cause' means those reasons contained in the Act."

See also Lemelin v. Administrator, Unemployment Compensation Act, 27 Conn. Sup. 446, 242 A. 2d 786; *Bedwell v. Review Board of Indiana Employment Security Division,* 119 Ind. App. 607, 88 N.E. 2d 916; *Mattey v. Unemployment Compensation Board of Review,* 164 Pa. Super. 36, 63 A. 2d 429 (dictum).

A leading case in this area is *Chambers v. Owens-Ames-Kimball Co.,* 146 Ohio St. 559, 67 N.E. 2d 439. There claimant was referred to an otherwise suitable job but refused to accept the referral on the sole ground that acceptance of the proffered work, a non-union job, would violate the rules of his union. The

Court denied benefits and emphatically rejected such a basis for an approach to compensation:

> ". . . [T]he interpretation of [claimant] would make the operative effect of a refusal to work depend entirely upon the whim or caprice of an organization to which the applicant for unemployment compensation might belong. It is within the range of possibility that a labor organization might adopt a rule that no member could work where negroes are employed, or where the employment calls for more than four hours as a day's work, or where the place of business of an employer is more than a mile from the residence of the unemployed member, or where an employer fails to maintain certain facilities relating to the conditions of employment, even though not required by law so to do, or where an employer does not pay a wage equal to the union wage for the same kind of work.
>
> "Under such an interpretation, the right of the applicant for unemployment compensation would not be fixed or determined by the provisions of the statute but by rules adopted by organizations in which the applicant has membership. Such interpretation of the statute, and as a consequence its administration in conformity to such interpretation, is clearly untenable."

We find only two cases in which this Court has considered the "available for work" requirement. In *In re Miller, supra,* we held that a textile worker whose Seventh Day Adventist teachings impelled her not to work from sundown Friday until sundown Saturday, and who actively sought employment which would not require her to perform secular work during this period, was not unavailable for work. We held explicitly that the "availability for work" criterion did not require one to engage in work offensive to the moral conscience of the claimant.

Similarly, in *In re Watson, supra,* we held that an electrical plant worker who had been involuntarily discharged from her job on the first shift, and who thereafter rejected a second-shift job solely on the grounds that she could not obtain adequate care and supervision for her nine-year-old child, did not thereby render herself unavailable for employment. Speaking through Justice Lake, the Court stated:

> "Here, as in the *Miller* case, we do not undertake to formulate an all-embracing rule for determining what con-

stitutes being 'available for work.' Here, as there, we reject the contention that to be eligible for benefits under the act one must be available for work at any and all times. If, as we there held, one is not rendered unavailable for work by her unwillingness, by reason of moral convictions, to accept work during the period within which ninety five per cent of the jobs in her community are to be found, even though her moral standards are not accepted by the majority in the community, it surely follows that one, who actively seeks employment during the hours in which seventy per cent of the available jobs in the community in her line of work are normally found, is not rendered unavailable for work by her refusal of employment during other hours, which would require her to leave her nine year old child unattended and unsupervised."

Decision of the question presented by this appeal is not complicated by evidentiary questions since the Commission's findings of fact are amply supported by the evidence in the record. Under these circumstances, this Court is bound by the Commission's findings of fact. *Employment Security Commission v. Freight Lines,* 248 N.C. 496, 103 S.E. 2d 829; *Employment Security Commission v. Monsees,* 234 N.C. 69, 65 S.E. 2d 887.

In instant case the hours prescribed for "badging-in" and "badging-out" pursuant to the GAI plan obviously conflicted with the hours in which suitable temporary, outside employment could well have been available to claimants. The unchallenged findings of the Commission included the following statement:

"According to their GAI contractual obligation, longshoremen cannot accept outside, steady, full-time employment. They are qualified in the main for general construction work, helpers, laborers, material handlers, forklift operators, maintenance men, and related permanent or temporary work. . . . Employers in both areas prefer permanent workers but will hire temporary help, beginning not later than 8:00 A.M. The majority of orders from employers in the construction industry specify that temporary help begin work between 7:00 A.M. and 8:00 A.M., Monday through Friday. Therefore, the requirement to shape up or badge in and badge out excludes the vast majority of longshoremen from chances of employment, even on a temporary basis. . . ."

It is obvious that claimants, by adhering to the contractual requirements making them eligible for GAI benefits, effectively removed themselves from the labor market in contravention of the requirements of G.S. 96-13(3). The rights of claimants to unemployment compensation must be determined by the statutory provisions of Chapter 96 rather than by rules promulgated by a union, other employee groups, an employer, employer groups, or anyone else.

The Court of Appeals correctly found no error in the judgment of the Superior Court affirming the legal conclusion of the Commission, which determined that claimants were not available for work within the meaning and intent of Chapter 96 of the General Statutes and therefore were not eligible for unemployment benefits.

The decision of the Court of Appeals is

Affirmed.

TENNESSEE-CAROLINA TRANSPORTATION, INC. v. STRICK CORPORATION

No. 95

(Filed 11 December 1974)

1. **Courts § 21— contract made in different state — what law governs**

Sales contract executed in Pennsylvania but performed in Illinois was governed by the substantive law of Pennsylvania, as determined by the Supreme Court in an earlier appeal of the case.

2. **Appeal and Error § 68— effect of Supreme Court decision on subsequent proceedings**

The decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.

3. **Sales § 14; Uniform Commercial Code § 20— breach of warranty — evidence of value six years after sale — remoteness**

Where the measure of damages in this action for breach of warranty of fitness of trailers was the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, evidence as to the trade-in value of the trailers some six years after the delivery and acceptance was too remote in time to be competent and the trial court properly excluded it.

4. **Sales § 14; Uniform Commercial Code § 20— breach of warranty — value of trailers — depreciation schedule properly excluded**

Depreciated value is an arbitrary valuation and does not necessarily reflect fair market value, and depreciation is a means of setting aside a reserve or sinking fund for replacement, and, further, a tax deduction for business expenses; therefore, depreciation schedules and depreciated values did not fairly point to the value of trailers at the time they were delivered by defendant and accepted by plaintiff, and such evidence was properly excluded in an action for breach of warranty of fitness of the trailers.

5. **Evidence § 19— condition of property — condition at another time**

Whether evidence of condition at one time is competent as evidence of condition at another time depends altogether on the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime.

6. **Sales § 14; Uniform Commercial Code § 20— warranty of fitness of trailers — hardness tests — exclusion improper**

Trial court in an action for breach of warranty of fitness of trailers erred in excluding evidence of hardness tests made on the top rails of the trailers some six years after their manufacture, since the hardness of metal is such a constant, immutable characteristic that the six-year time lapse was greatly diminished in significance; furthermore, plaintiff was allowed to introduce evidence of hardness tests and defendant should have been allowed to introduce refuting evidence.

7. **Sales § 14; Uniform Commercial Code § 20— breach of warranty — instruction as to cause of malfunction**

In an action for breach of warranty of fitness of trailers, the trial court's instruction that, "When a semi-trailer malfunctions, it obviously lacks fitness regardless of the cause of the malfunction," was erroneous, since the charge should have limited the malfunction necessary to constitute a breach to something done or not done by defendant in manufacturing the trailers.

APPEAL by defendant from *Ervin, J.*, at the 21 January 1974 Session of MECKLENBURG Superior Court, certified pursuant to G.S. 7A-31(a) for initial appellate review by the Supreme Court.

This case was before this Court at the Spring Term 1973, and a new trial was ordered in a decision reported in *Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 196 S.E. 2d 711 (1973).

Plaintiff, a Tennessee corporation, is a general commodities carrier licensed by the Interstate Commerce Commission to operate in eight states, including North Carolina. Defendant is a trailer manufacturer incorporated in Pennsylvania. On 10 July

1967 plaintiff placed a purchase order with defendant for 150 42-foot trailers at $5,695 per trailer. The trailers were delivered f.o.b. defendant's Chicago factory during August, September, and October, 1967.

In the following six months, two or three of the trailers sagged downward in the middle and bulged out at the sides. Upon notice, defendant at its expense repaired these trailers. Defendant also at its expense modified all the trailers by placing a reinforced aluminum rail approximately 20 feet long about midway along the top inside of each trailer. This repair work was completed early in 1968.

No further problems with the trailers were encountered until 1970. Plaintiff offered evidence that from May 1970 to June 1973 about nine trailers failed. Defendant denied that any warranty covered these trailers, or that these failures were caused by any defects in their construction.

In remanding this case for a new trial on the former appeal, we held:

> "That defendant impliedy warranted that the 150 trailers were fit for the particular purpose for which the plaintiff purchased them has been established by the verdict of the jury in the trial below. The verdict on that issue stands. On retrial appropriate issues shall be submitted to the jury as to whether and to what extent defendant breached the implied warranty of fitness and what amount, if any, plaintiff is entitled to recover for breach of warranty. The question of interest as 'damages for delay in compensation' shall be left to the jury's discretion under appropriate instructions."

On retrial, issues were submitted to and answered by the jury as follows:

> "1. Did the Defendant breach its implied warranty to the Plaintiff, as alleged in the Complaint?
>
> ANSWER: Yes
>
> "2. If so, what damages, if any, is the Plaintiff entitled to recover from the Defendant?
>
> ANSWER: $300,750.

"3. In what amount, if any, is the defendant indebted to the plaintiff as damages for delay in compensation?

ANSWER: $ NONE"

In addition, the court submitted a special issue as follows:

"We, the Jury, find that Strick breached its implied Warranty of fitness to Tennessee-Carolina Transportation, Inc., as to ..... of the 150 trailers involved in this action."

The jury was instructed to place in the blank the number of trailers as to which the warranty was breached. The jury placed "150" in the blank.

From judgment entered on the issues, defendant appealed.

Other facts pertinent to decision are set out in the opinion.

Welling & Miller by George J. Miller and Charles M. Welling; Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell for defendant appellant.

Wallace S. Osborne; Waggoner, Hasty & Kratt by William J. Waggoner for plaintiff appellee.

MOORE, Justice.

[1] The sales contract here involved was executed in Pennsylvania but was to be performed by delivery of the trailers in Illinois. Defendant now contends that the substantive law of the place of performance (Illinois) controls the question of breach of implied warranty and, if there was a breach, the measure of damages.

In the former opinion in this case we stated:

". . . [T]he parties have not contended that any law other than the law of Pennsylvania shall govern. We proceed accordingly, noting only that the contract of sale did not attempt to choose the applicable law, but each of the six security agreements provided: 'This instrument . . . is made and accepted in Pennsylvania, and shall be governed and interpreted according to the laws of Pennsylvania.'

"Therefore, the substantive issues in the case before us are to be resolved under the law of Pennsylvania, of which we are required to take judicial notice by G.S. 8-4.

With respect to procedural matters, the law of North Carolina governs [Citation omitted]." *Transportation, Inc. v. Strick Corp.*, 283 N.C. 423, 431, 196 S.E. 2d 711, 716 (1973).

[2] The decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. As stated by Parker, Justice (later Chief Justice), dissenting in part in *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E. 2d 298, 305 (1962):

> "As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal. *Hayes v. Wilmington*, 243 N.C. 525, 91 S.E. 2d 673; *Bruce v. O'Neal Flying Service*, 234 N.C. 79, 66 S.E. 2d 312; *Pinnix v. Griffin*, 221 N.C. 348, 20 S.E. 2d 366, 141 A.L.R. 1164; *Robinson v. McAlhaney*, 216 N.C. 674, 6 S.E. 2d 517; Strong's N. C. Index, Vol. 1, Appeal and Error, sec. 60, where many of our cases are cited; 3 Am. Jur., Appeal and Error, sec. 985."

This contention is without merit.

Defendant next contends that the court erred in excluding evidence offered by defendant to show the value of the trailers as entered on plaintiff's books, the depreciation taken by plaintiff, and the price obtained by plaintiff when the trailers were resold after having been used for almost six years.

Questions of the admission and exclusion of evidence are generally procedural and governed by the *lex fori*. *Transportation, Inc. v. Strick Corp., supra.*

[3] The measure of damages in this case for breach of warranty is " 'the difference *at the time and place of acceptance* between the value of the goods accepted and the value they would have had if they had been as warranted. . . .' Pa. Stat. Ann. tit. 12A, § 2-714(2) (1970). (Emphasis added.)" *Id.* at 283 N.C. 436, 196 S.E. 2d 720. "[T]he *proper* time for a determination of the value of the trailers under Pa. Stat. Ann. tit. 12A,

§ 2-714(2) was the period from 30 August 1967 through 31 October 1967, the time during which delivery and acceptance of the trailers occurred." *Id.*, at 283 N.C. 437, 196 S.E. 2d 720. In the former decision we held that the opinions of two witnesses—opinions of the value of the trailers more than two and one half years and five years after the time of acceptance—were improperly admitted. We stated:

> "Where the value of personal property at a given point in time is in issue, evidence of its value within a reasonable time before or after such point is competent as bearing upon its value at the time in issue. *Newsome v. Cothrane*, 185 N.C. 161, 116 S.E. 415 (1923). Evidence of the property's value beyond a reasonable time before or after that point lacks probative force and is incompetent. *Highway Comm'n v. Hartley*, 218 N.C. 438, 11 S.E. 2d 314 (1940) (real property). See 31A C.J.S. Evidence § 183(5) (1964). . . ." *Id.*, at 283 N.C. 437, 196 S.E. 2d 720.

Applying this rule, we hold that the trade-in value some six years after the delivery and acceptance in 1967 was too remote in time to be competent and was properly excluded.

[4] Depreciation schedules are maintained for two primary reasons: first, to create a depreciation reserve which, coupled with the salvage value of the equipment, will enable the owner to replace the equipment when no longer useful due to deterioration from age, use, and improvements due to better methods; second, to enable the owner to make a reasonable annual deduction from gross income to offset loss in value and thereby reduce taxable income. Various methods of depreciating items are permissible, such as straight line, 200% declining balance, and sum of the years-digits. Treas. Reg. § 1.167(b) (1974). The plaintiff in this case used a straight-line method over a six-year period. Depreciated value is an arbitrary valuation and does not necessarily reflect fair market value. Depreciation is a means of setting aside a reserve or sinking fund for replacement and, further, a tax deduction for business expenses. The depreciation schedules and the depreciated values do not fairly point to the value of the trailers in 1967—the time of delivery and acceptance. Hence, these were properly excluded.

Plaintiff introduced evidence that tended to show the trailers had soft faulty top rails that gave way and thereby caused the trailers to fail; that, according to Strick's specifications, the

rails should have a 78 to 84 hardness, and that one trailer tested by a Barcol Impressionor had a hardness factor of 64 to 68. To rebut this evidence, defendant offered the testimony of James Nelson Johnson, found by the court to be an expert in the field of trailer repair and maintenance. In the absence of the jury, this witness testified that on 22 January 1974 he examined five of the trailers in question that had been traded in by the plaintiff to Fruehauf Corporation; that he ran a test on the top rails of these trailers with the Barcol Impressionor; that these top rails were the original rails installed when the trailers were built in 1967; and that these tests disclosed that the top rails on these five trailers had a hardness factor varying from 78 to 90. On objection by the plaintiff, the court stated, "I am not going to permit him to give the foregoing testimony in the presence of the jury," and the evidence was excluded.

[5] Whether evidence of condition at one time is competent as evidence of condition at another time "depends altogether on the nature of the subject matter, the length of time intervening, and the extent of the showing, if any, on the question of whether or not the condition had changed in the meantime." 1 Stansbury's North Carolina Evidence § 90 (Brandis Rev. 1973). A good statement of the law of evidence of subsequent conditions is found at 29 Am. Jur. 2d, Evidence § 300 (1967):

> "It has sometimes been held, in view of the general principle of inadmissibility of evidence of similar or comparable facts having no probative value, and probably also because of the circumstances of the particular case, that evidence that a condition existed at a specific time is not admissible for the purpose of showing a condition or state of affairs at some other time. However, in view of the inference or presumption of the continuance of a condition or state of facts once established by proof, it is more generally held that when the condition of premises or of an appliance at a particular time is in issue, evidence of the condition of such premises or appliance at a time prior or subsequent to the time in question is relevant and admissible, provided it relates directly to the issue in question and is not too remote in point of time. So far as such interval of time is concerned, the nature of the thing or condition and the particular circumstances of the case are controlling, and therefore no fixed rule can be laid down other than that the evidence must relate closely enough to the time in ques-

tion to make it apparent that the condition has not been changed *or it must appear that the condition is one which is so constant or permanent that lapse of time will not make a material difference.*" (Emphasis added.)

The proper inquiry in each instance is the degree of likelihood that the condition has remained unchanged. 1 Jones on Evidence § 4.8 (6th ed. 1972); 1 Stansbury's North Carolina Evidence § 90 (Brandis Rev. 1973); *Jenkins v. Hawthorne*, 269 N.C. 672, 153 S.E. 2d 339 (1967); *Shaw v. Handle Co.*, 188 N.C. 222, 124 S.E. 325 (1924); *Blevins v. Cotton Mills*, 150 N.C. 493, 64 S.E. 428 (1909).

[6] In the present case defendant sought to introduce hardness tests made on the top rails of these trailers some six years after their manufacture. While this is a significant lapse of time, we think the hardness of metal is such a constant, immutable characteristic that such a lapse of time is greatly diminished in significance, and that the tests were improperly excluded. Plaintiff had introduced evidence of hardness tests showing readings of 64 to 68, well below the desired readings of 78 to 84. Plaintiff's evidence tended to show an essential element of its case; *i.e.*, that the trailers were defective. Defendant's evidence would have tended to refute this. "Where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." 3 Strong, N. C. Index 2d, Evidence § 20, p. 629 (1967), and cases therein cited. The exclusion of this evidence was prejudicial error.

[7] Defendant assigns as error the following instruction to the jury:

> "The Court charges you that the law is that proof of a specific defect in construction or design causing a mechanical malfunction is not an essential element in establishing breach of warranty. When a semi-trailer malfunctions, it obviously lacks fitness *regardless of the cause of the malfunction.* Under the theory of warranty the sin is the lack of fitness [and] is evidenced by the malfunction itself." (Emphasis added.)

In this portion of the charge the court did not limit the malfunction necessary to constitute a breach to something done or not done by defendant in manufacturing the trailers. To the

contrary, the instruction was so broad that the jury could find that even though the malfunction was caused by accident in operating or loading the trailers independent of any acts or omissions of defendant, this would still constitute a breach of warranty by defendant. The malfunction necessary to constitute a breach should have been limited to one caused by something defendant did or did not do in manufacturing the trailer.

As stated in 63 Am. Jur. 2d, Products Liability § 9 (1972), "[T]he necessity of proving defectiveness of the product applies no matter what theory governs the particular action: negligence, breach of express or implied sales warranty, strict liability, or any other theory." Comment 13 to Pa. Stat. Ann., tit. 12A § 2-314 (1970), states: "In an action based on breach of warranty, it is of course necessary to show not only the existence of the warranty but the fact that the warranty was broken and that the breach of the warranty was the proximate cause of the loss sustained. In such an action an affirmative showing by the seller that the loss resulted from some action or event following his own delivery of the goods can operate as a defense." *See also,* White and Summers, Uniform Commercial Code 272 (1972), wherein it is stated: " . . . Once the plaintiff has proven his injury . . . [f]irst, he must prove that the defendant made a warranty, express or implied, under 2-313, 2-314, or 2-315. Second, he must prove that the goods did not comply with the warranty, that is, that they were defective at the time of the sale. Third, he must prove that his injury was caused, 'proximately' and in fact, by the defective nature of the goods (and not, for example, by his careless use . . .). Fourth, he must prove his damages . . . . "

The Pennsylvania Court recognized this in *MacDougall v. Ford Motor Company,* 214 Pa. Super. 384, 257 A. 2d 676 (1969), when it held that "the occurrence of a malfunction of machinery *in the absence of abnormal use and reasonable secondary causes . . . is evidence of* lack of fitness for warranty liability." (Emphasis added.)

Pennsylvania law does not require proof of a *specific* defect, but there still must be proof of general defective condition existing at the time of sale. *See Greco v. Bucciconi Engineering Co.,* 283 F. Supp. 978 (W.D. Pa. 1967), aff'd 407 F. 2d 87 (3d Cir. 1969); *Jarnot v. Ford Motor Co.,* 191 Pa. Super. 422, 156 A. 2d 568 (1959); *Frigidinners, Inc. v. Branchtown Gun Club,* 176 Pa. Super. 643, 109 A. 2d 202 (1954).

Defendant's evidence tended to show that after the modification of the trailers by the installation of the reinforced rail, no further trouble was experienced with the trailers for some two and one-half years; that thereafter the nine failures which plaintiff contends occurred between May 1970 and June 1973 were caused by reason of the fact that many of the side posts of the trailers were either totally destroyed or severely damaged by forklifts, hand trucks, loading crates and general freight cargo; and that when these posts were knocked out or severely damaged the structural integrity of the unit was destroyed causing failure in either the top or bottom rail, or both. The quoted portion of the charge erroneously deprived defendant of the benefit of this explanation as to why those trailers failed.

We do not deem it necessary to discuss defendant's other assignments of error since the questions there presented may not arise at another trial.

For the reasons stated, this case is remanded to the Superior Court of Mecklenburg County for a new trial in accordance with this opinion.

New trial.

RAYMOND L. DUKE v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (A NEW YORK CORPORATION)

No. 101

(Filed 11 December 1974)

1. **Insurance § 6— unambiguous terms of policy — enforcement**

   Where the language of an insurance policy is plain, unambiguous and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms.

2. **Insurance § 42— disability insurance — regular care of physician requirement**

   In an action for disability insurance benefits, under an extended coverage clause which required the insured to be under the regular care and attendance of a legally qualified physician, a jury finding that the claimant's disability did not require him to be under such care excluded the coverage and required the court to dismiss the claim.

ON *certiorari* to the North Carolina Court of Appeals to review its decision filed July 17, 1974, awarding a new trial in

the action which *Judge Hobgood* dismissed by reason of the jury's verdict returned at the October 1, 1973 Session, WAKE Superior Court.

The plaintiff, Raymond L. Duke, instituted this civil action against the defendant, The Mutual Life Insurance Company of New York, to recover insurance benefits on account of injury by accident resulting in his total disability. The facts are not in dispute. The total disability provisions in the policy provided payments of $400.00 per month for twenty-four months. The policy by rider attached, provided that if at the end of the temporary disability period, as provided in the policy, the insured is totally and continuously disabled, directly and independently of all other causes, as a result of the same accidental bodily injury which has caused his total disability so that he can perform no duties pertaining to any occupation for remuneration or profit for which he is or may be qualified by education, training, or experience, the company will continue to pay disability income benefits in the same amount during the further continuation of the disability described in paragraph (3) of the policy, provided that "(a) such disability requires the insured to be under the regular care and attendance of a legally qualified physician other than himself."

The record discloses that the insurance policy was issued in 1961. Some time later the rider, extending the coverage, was attached. The insured sustained disabling injuries in two accidents occurring on June 9, 1967, and on January 8, 1968. The insured at the time of the accidents was fifty-five years of age. The injuries involved the plaintiff's left knee. The medical treatment culminated in the removal of his kneecap. Thereafter, the plaintiff was unable to follow his former occupation of railroading. As his medical treatment tapered off, his condition became static. The defendant stopped the payments, and the plaintiff then instituted this action. After the plaintiff's condition became static, his doctor testified that he had talked to the plaintiff on occasion over the telephone, but had no record of the nature of the call or the advice given. He had not prescribed any medication, provided any treatment, or attended the insured during the period following October 1, 1969.

The parties agreed on these issues to be submitted to the jury:

"1. During the period April 12, 1970 to September 12, 1972 was the plaintiff wholly and continuously disabled,

directly and independent of all other causes as the result of accidental injuries so that he could perform no duties pertaining to any occupation for remuneration or profit for which he was, or might have been, reasonably qualified by education, training or experience?

"2. If so, did plaintiff's disability require him to be under the regular care and attendance of a legally qualified physician during the period from April 12, 1970, to September 12, 1972?"

The jury answered issue No. 1 "Yes" and issue No. 2 "No." From the judgment on the verdict dismissing the action and taxing the plaintiff with the costs, the plaintiff appealed.

The Court of Appeals, 22 N.C. App. 392, 206 S.E. 2d 796, awarded a new trial. This Court granted certiorari.

Dixon and Hunt by Daniel R. Dixon, Blanchard, Tucker, Denson & Cline by Charles F. Blanchard for plaintiff appellee.

Smith, Anderson, Blount & Mitchell by Michael E. Weddington for defendant appellant.

HIGGINS, Justice.

The parties agreed that two questions of law are involved in this appeal. The first question (involving exceptions and assignments of error) is procedural and in view of our decision on the second question, becomes immaterial and need not be discussed. The second issue is determinative of the controversy: Did plaintiff's disability require him to be under the regular care and attendance of a legally qualified physician during the period from April 12, 1970, to September 12, 1972? The jury answered "No." The finding is conclusive and establishes the fact that the plaintiff was not under the care of a qualified physician during the critical period. On the basis of the jury's finding, Judge Hobgood entered judgment dismissing the action.

The Court of Appeals reversed the judgment of the superior court on this ground: A clause in an insurance policy requiring regular medical treatment is inapplicable when such treatment would not improve the insured's condition. The Court of Appeals cites considerable authority and advances somewhat appealing argument why medical care and attendance should not be required if the treatment does not improve insured's condi-

tion. This argument meets itself coming back, in view of the plain words of the contract. The insured's disability is not compensable unless "such disability requires the insured to be under the regular care and attendance of a legally qualified physician other than himself." The lack of need, whether based on recovery, or on a static condition rendering care and attention of no efficacy, places the insured beyond the field of coverage.

Plaintiff's counsel argues that this Court should join the Court of Appeals and a number of other courts in striking from the policy the provision which requires the insured to be under the regular care and attendance of a legally qualified physician.

Appellate courts generally, including this Court, hold that insurance policies, when construction is required, should be construed most strongly against the insurance company. Lawyers write policies for their companies. They are skilled in insurance law. Consequently, it is proper that in cases of ambiguity, contradiction, or uncertainty of the language used, the terms should be construed most strongly against the insurer. If a provision in the policy is reasonably susceptible of different interpretation, that which is most favorable to the insured should be accepted. *Insurance Co. v. Insurance Co.*, 269 N.C. 358, 152 S.E. 2d 513; *Electric Co. v. Insurance Co.*, 229 N.C. 518, 50 S.E. 2d 295.

[1] After all, an insurance policy is a contract between two parties—the insurer and the insured. The intention of the parties is the controlling guide to its interpretation. This intention must be found in the language used by the parties to the contract. *Gaulden v. Insurance Co.*, 246 N.C. 378, 98 S.E. 2d 355. The rule for interpretation applies where the language of the policy is ambiguous or susceptible of more than one interpretation. "However, it is generally held, certainly by this Court, that where the language of an insurance policy is plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms." *Walsh v. Insurance Co.*, 265 N.C. 634, 144 S.E. 2d 817. 84 A.L.R. 2d 375; *Hardin v. Insurance Co.*, 261 N.C. 67, 134 S.E. 2d 142; *Parker v. Insurance Co.*, 259 N.C. 115, 130 S.E. 2d 36; *Suits v. Insurance Co.*, 249 N.C. 383, 106 S.E. 2d 579.

[2] The Court of Appeals reversed the judgment of the superior court in this case upon the ground that the trial court

should have instructed the jury that plaintiff was not required to be under the regular care and attendance of a physician unless regular medical care could have brought about an improvement in his condition. Such instruction would change the provision of the contract which is stated in plain, simple, and unambiguous language. The coverage for twenty-four months had expired and the defendant had paid without question.

Thereafter, the extended coverage provision became applicable only if the disability required the insured to be under the regular care and attendance of a legally qualified physician. Obviously, a doctor's regular care and attendance would not be required if that care and attendance were of no avail. But when need for care and attendance ceased, the coverage ceased, according to the plain language of the policy. The jury so found.

The contract of the parties limited extended coverage to a condition which required the care and attendance of a qualified physician. Both parties joined in making the condition a part of the contract. One alone cannot remove or change it. As this Court said in *Walsh v. Insurance Co., supra:* "The parties having thus agreed, so shall they be bound."

For the reasons herein discussed, the decision of the Court of Appeals is

Reversed.

STATE OF NORTH CAROLINA v. ERNEST ELDON WOOD ALIAS JOHNNY JOHNSON ALIAS WILLIAM ARTHUR ARNOLD ALIAS CHARLES WATTS

No. 65

(Filed 11 December 1974)

1. Burglary and Unlawful Breakings § 1— burglary defined

To sustain a conviction of burglary in either the first or second degree it must appear that the defendant broke into and entered a dwelling or sleeping apartment during the nighttime with intent to commit a felony therein; if the burglarized dwelling is occupied, the crime is burglary in the first degree, but if it is unoccupied, the crime is burglary in the second degree.

2. **Burglary and Unlawful Breakings § 3— burglary — time of crime — sufficiency of allegation**

Although the common law required a burglary indictment to allege the hour the crime was committed, today it is sufficient to aver that the crime was committed in the nighttime.

3. **Burglary and Unlawful Breakings § 5— first degree burglary — entry during nighttime — sufficiency of evidence**

The State's evidence in a first degree burglary case was sufficient to support a jury finding that the breaking and entering occurred during the nighttime where it tended to show that defendant told officers that he entered the victim's motel room while the shower was running and that he left town "that night" for California, and that the victim took a shower at 11:00 p.m. on the night in question.

Chief Justice BOBBITT not sitting.

APPEAL by defendant from *Braswell, J.*, 10 June 1974 Criminal Session, Superior Court of CUMBERLAND.

In a bill containing two counts defendant was indicted for (1) first degree burglary and (2) felonious larceny.

The first count charged that on 20 November 1971, "during the nighttime between the hours of 11:00 p.m. and 6:00 a.m.," Ernest Eldon Wood, alias Johnny Johnson, alias William Arthur Arnold, alias Charles Watts, with the felonious intent to steal, take and carry away the chattels of William A. Arnold, did feloniously break and enter room 323 of the Downtowner Motel in Fayetteville, North Carolina, which room was used as a sleeping apartment and then actually occupied by William A. Arnold.

The second count charged that on 20 November 1971 in Fayetteville, North Carolina, Ernest Eldon Wood (aliases omitted here), with the intent to steal, feloniously broke into and entered room 323 of the Downtowner Motel at a time when the room was occupied by William A. Arnold, and did feloniously steal, take and carry away $150.00 in money, a man's gold Gruen watch, an American Express credit card issued to William A. Arnold, and one 1972 Buick automobile, serial number 4D37H26105179, the personal property of William A. Arnold of the value of $3,200.00.

The State's evidence tends to show the facts summarized below:

On 20 November 1971, William A. Arnold, a resident of Tucson, Arizona, and a field service engineer for an electrical

corporation providing service and training to the Army, was the only occupant of room 323 at the Downtowner Motel in Fayetteville. He had been in the room for about two weeks. At approximately 11:00 p.m. Mr. Arnold took a shower and went to bed after folding the bedspread "down to the foot of the bed." When he went to sleep his Gruen watch, worth about $50.00, his billfold containing about $150.00 in cash, a cashier's check for $425.00 made payable to William A. Arnold, an American Express credit card, his Arizona driver's license, and the car keys to a two-door, 1972 Buick Sky Lark were on the nightstand. The Buick automobile, which carried Pennsylvania license plates, was leased to Arnold's employer, and he had it with him at the motel. When Arnold went to bed the motel room door, which locked automatically, was closed. The window was also closed.

When he awoke the next morning at approximately 7:30, Arnold noticed that his billfold, watch, and car keys were gone. The bedspread was in the area toward the bathroom; it had been moved approximately fifteen feet. The door to the room was closed. The 1972 Buick Sky Lark was also gone. Arnold had given no one permission to come into his room or to take the automobile.

Arnold immediately reported the thefts to the motel management and to the Fayetteville Police Department, which sent officers to investigate. He also reported the theft of the Buick automobile to the FBI for the reason that it contained property belonging to the government.

On 7 June 1973, Donald McMullen, a special agent for the FBI and two other agents (Yates and Thom) assigned to the Los Angeles FBI office, talked with defendant in the Los Angeles County Jail, where he was being detained upon a "burglary and weapons charge." At that time these agents were unaware of the events which had occurred in Fayetteville on 20 November 1971. They had come to question defendant about his identity and certain other charges they thought might be pending against him in Los Angeles and North Carolina.

Before permitting Agents McMullen and Yates to testify before the jury as to the statement which defendant made to them, Judge Braswell conducted a *voir dire,* on which the testimony of Agent McMullen tended to establish the following facts:

After Agents McMullen, Yates, and Thom had identified themselves to defendant as FBI agents and shown him their

credentials, McMullen advised him of his constitutional rights in the words of the Miranda formula. Defendant then informed the agents that he had finished high school; that he could read and knew his rights. Notwithstanding, they had him read aloud a portion of the FBI form entitled "Interrogation Advice of Rights, Your Rights." After doing so, defendant said that he wished to talk to the agents and that he did not want a lawyer at that time. He then signed a "Waiver of Rights" using the name "William Arthur Arnold," and the three agents witnessed his signature. No threats or promises of any kind were made to defendant, and the agents detected no odor of alcohol about defendant and no evidence that he was under the influence of any drug or stimulant.

At the time the agents interviewed defendant they had with them "an FBI flyer." This was an identification order containing a photograph which Agent McMullen recognized as being that of defendant. The name on the flyer was Ernest Eldon Wood, but it showed the following aliases: John Junior Johnson, Charles Arnold Rivenbark, Charles Arnold Watts, and Butch. Before McMullen had asked defendant his name, defendant told him it was William Arthur Arnold, and that he had been born on 30 May 1939 at Tucson, Arizona. When McMullen showed him the flyer, defendant looked at the picture and said, "That is me." He also said he did not know that "one of these had been put out." After the interview McMullen asked defendant if he still had the scars shown on the flyer. Defendant showed him the scars.

Defendant offered no evidence upon the *voir dire*. At the conclusion of the State's evidence Judge Braswell found as a fact (1) that during McMullen's interview with defendant he used the name William Arthur Arnold; and (2) that defendant's statements to the FBI agents were freely and voluntarily given after he had been warned of his constitutional rights in full conformity with all the requirements "currently known to the law."

Before the jury McMullen repeated in substance the testimony he had given on *voir dire*. In addition he testified that defendant gave him and the other two FBI agents the following account of his activities since October 1971:

Defendant came to Fayetteville in October 1971 from Louisiana. From then until the latter part of November 1971

he sojourned in Fayetteville at a "boarding room" under the name of Johnny Johnson. During that time he sustained himself by committing several burglaries. Shortly after his arrival in Fayetteville, he had walked through the Downtowner Motel and "observed a key in a room." He took it with the idea of returning later to remove "certain items from the room" and, for about two weeks, he observed the occupant of the room coming and going. Thereafter defendant was in his aunt's cafe in Fayetteville when two men came in and inquired for Johnny Johnson. He thought they were looking for him "and that he should leave town." At that time he decided to use the motel key.

Defendant then went to the Downtowner Motel and entered the room from which he had taken the key. "He said he went to the motel after nighttime, after the sun had gone down." When he entered the room he knew it was occupied because he thought he heard a shower running. From a dresser he took a watch, some money, a billfold, and a set of car keys. Upon leaving the room (defendant said) he used the car keys "that night" and proceeded out of town. He drove the 1972 Buick Sky Lark to Hollywood, California, where he abandoned the automobile. Taking advantage of the necessary identifications contained in the billfold, defendant assumed the name of William Arthur Arnold because "they were nearly the same age and the same physical description." He had used "that identification until he was picked up in June of 1973."

At the end of the interview defendant told the FBI agents that his real name was Ernest Eldon Wood; that he had also used the name Charles Arnold Rivenbark, Charles Arnold Watts, Johnny Johnson, and William Arthur Arnold; that he was born on 30 April 1944 in Fayetteville. He showed McMullen three small scars on the inside of his left wrist and a three-inch scar across his inner right palm. After the interview with defendant, McMullen reported defendant's statement by telephone to W. A. Newsom, who was then a member of the Fayetteville Police Department.

Mr. Ray Davis, an agent of the North Caroina State Bureau of Investigation, testified that about midnight on Friday, 19 November 1971, he and Captain Studer of the Fayetteville Police Department, went to a restaurant which was operated by Mrs. Geneva Grice, and inquired of her manager if Johnny Johnson was employed there. At that time they observed two white males seated on the right side of the restaurant as they

went in, but the officers paid no particular attention to them. They had no picture of Johnny Johnson, and were able to obtain no information about him at the cafe.

Defendant offered no evidence. At the conclusion of the State's evidence, he moved to nonsuit each count in the bill of indictment upon the ground that "there was no evidence of a break-in" and that "there was no evidence that any entry was made during the nighttime." The motion was overruled and defendant excepted.

The jury returned a verdict finding defendant guilty as charged in each count. The crimes charged having been committed prior to 18 January 1973, the date of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, upon defendant's conviction of first degree burglary, the court imposed the sentence of life imprisonment, from which defendant appealed to the Supreme Court under G.S. 7A-27(a). His appeal from the ten-year sentence imposed for felonious larceny was certified for initial appellate review by the Supreme Court under G.S. 7A-31(a).

James H. Carson, Jr., Attorney General, and Lester V. Chalmers, Jr., Assistant Attorney General, for the State.

James C. MacRae for defendant.

SHARP, Justice.

Defendant's assignments of error raise only the question whether the trial judge erred in refusing to grant his motions for nonsuit. In his brief, however, defendant advances no reason or argument in support of his exception to the judge's refusal to dismiss the charge of felonious larceny. He states the question presented to be "whether or not there was sufficient evidence of defendant's guilt of the offense of first degree burglary to be submitted to the jury."

[1] To sustain a conviction of burglary in either the first or second degree it must appear that the defendant broke into and entered a dwelling or sleeping apartment during the nighttime with intent to commit a felony therein. If the burglarized dwelling is occupied the crime is burglary in the first degree; if unoccupied, it is burglary in the second degree. G.S. 14-51; *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972).

Defendant contends that the burglary charge should have been dismissed because the State's proof does not conform to the allegation in the indictment that the breaking and entering occurred "during the nighttime between the hours of 11:00 p.m. and 6:00 a.m."; that the time of the entry is left to conjecture; and that the State offered no evidence as to when nighttime ended and daylight began on 20 November 1971. This contention is without merit.

[2] Although the common law required an indictment for burglary to allege the hour the crime was committed, today "it is sufficient to aver that the crime was committed in the nighttime." 13 Am. Jur. 2d, *Burglary* § 34 (1964). The allegation is sustained by proof beyond a reasonable doubt that the breaking and entering occurred "during the nighttime," and the time of the offense may be proved by circumstantial evidence. 12 C.J.S., *Burglary* §§ 13, 60 (1938). *See State v. Frank, supra; State v. Whit,* 49 N.C. 349 (1857).

[3] The State's evidence was sufficient to establish that defendant broke into Mr. Arnold's bedroom sometime after 11:00 p.m. and took, among other things, Arnold's driver's license and the keys to the Buick automobile in which he left Fayetteville *"that night"* for California. Defendant's statement, that at the time he entered the motel room he knew it was occupied because he thought he heard a shower running, is evidence tending to show the burglary occurred shortly after 11:00 p.m., the time Arnold testified he took a shower. However, SBI Agent Davis testified that his inquiry at the cafe for Johnny Johnson was made about midnight. This was the occurrence which prompted defendant's decision to burglarize the motel room and then leave town. In any event, defendant himself said that, after entering the motel room, he left Fayetteville *that night.*

In our view the evidence set forth in the preliminary statement supports the verdict rendered and is consistent only with a breaking and entering during the nighttime. In defendant's trial we find

No error.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. BARRY DEAN LINDLEY

No. 110

(Filed 11 December 1974)

1. **Criminal Law § 50— opinion evidence — admissibility generally**

Opinion evidence is generally inadmissible whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts.

2. **Criminal Law § 64— defendant under influence of drugs or intoxicants — opinion testimony**

In this jurisdiction a lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants or drugs.

3. **Automobiles § 126; Criminal Law § 64— defendant under influence of drugs — opinion testimony of arresting officer admissible**

A patrol officer with five years experience in enforcement of the motor vehicle laws, including the statutes condemning operation of a motor vehicle while under the influence of either intoxicants or drugs, was competent to express an opinion that defendant was under the influence of some drug where the officer observed the erratic manner in which defendant operated his car, observed his personal demeanor, a white substance on his lips, his pinpoint pupils, the absence of alcohol on his breath, his lack of muscular coordination, his mental stupor, the way he walked, talked and acted, and where the officer, by interrogating defendant, eliminated many other causes which might have accounted for defendant's condition.

4. **Automobiles § 127— driving under influence of drugs — sufficiency of evidence**

Evidence consisting of testimony by the arresting officer as to defendant's condition was sufficient to be submitted to the jury in this prosecution for operating a motor vehicle on a public highway while under the influence of drugs.

5. **Criminal Law § 128— motion to set aside verdict — discretionary matter**

Motions to set aside the verdict are addressed to the discretion of the trial court and refusal to grant them is not reviewable in the absence of abuse of discretion.

6. **Criminal Law § 127— arrest of judgment — fatal defect on face of record required**

Unless some fatal defect appears on the face of the record proper, judgment may not be arrested.

DEFENDANT appeals from decision of the Court of Appeals, 23 N.C. App. 48, 208 S.E. 2d 203 (1974), upholding judgment of *Crissman, J.*, 11 March 1974 Session, RANDOLPH Superior Court.

Defendant was charged in a warrant, proper in form, with operating a motor vehicle on a public highway while under the influence of drugs in violation of G.S. 20-139(b). He was initially tried and convicted in the district court and appealed to the Superior Court of Randolph County for trial *de novo*. There, the only witness to testify was R. L. Thompson, the arresting officer, who had been a member of the State Highway Patrol for five years. The testimony of this witness is narrated in the following paragraphs.

At approximately 4 p.m. on Sunday afternoon, 13 May 1973, Officer Thompson saw defendant driving a car on Rural Road #2458 near Liberty, narrowly missing a bridge railing and weaving from one side to the other. Defendant stopped at the officer's request and got out of his car. He was "very wobbly, unsteady on his feet," the pupils of his eyes were contracted, "almost pinpoint," and there was a white substance on his lips. Two boys and a girl in the car with defendant were in the same condition. Defendant was arrested for driving under the influence of alcohol and taken in the patrol car to the Randolph County Jail in Asheboro. On the way to Asheboro Officer Thompson was unable to smell any odor of intoxicants on defendant's breath and decided he was not under the influence of alcohol. Defendant said he had consumed two and a half to three cans of beer that afternoon and requested a breathalyzer test. This request was refused. At the jail in Asheboro defendant was given physical dexterity tests (standing with feet together and eyes closed, touching the tip of his nose with the tip of his index finger, walking a straight line, etc.) which he was unable to perform. When asked where he thought he was, defendant said he was in Siler City.

Officer Thompson then testified, over objection, that he had an opinion satisfactory to himself, based on defendant's manner of driving, his personal demeanor, his eyes and the way he performed the dexterity tests, that defendant was under the influence of some drug at the time he saw defendant driving his motor vehicle. Summarizing his answer, the officer said he based his opinion on: "The way he drove his car, the way he walked, acted, talked. He was incoherent at times. His eyes were contracted. His pupils rather were contracted. He seemed to be in a daze, in a stupor."

On cross-examination, Officer Thompson testified that he asked defendant what he had been taking and he said nothing.

"I asked him if he had diabetes and he said no and I eliminated that possibility in my mind. . . . I asked him if he had any physical defects. He said 'no.' I asked him was he sick. He said 'no.' I asked him if he limped. He said 'no.' I asked him if he had been injured lately. He said 'no.' I asked him had he been to a doctor or dentist lately. He said 'no.' I asked him if he had been taking any kind of medication."

Defendant's automobile was not searched for drugs and no drugs were found on his person.

The jury found defendant guilty and the court imposed a prison sentence of three months, suspended for three years upon conditions named in the judgment. The Court of Appeals found no error in the trial with Vaughn, J., dissenting. Defendant appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2). Errors assigned will be discussed in the opinion.

James H. Carson, Jr., Attorney General; H. A. Cole, Jr. and Thomas B. Wood, Assistant Attorneys General, for the State of North Carolina.

Phil S. Edwards of the firm of Dark & Edwards, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant contends the court erred in allowing Officer R. L. Thompson, a lay witness, to testify that after observing defendant at the time of his arrest and on the way to jail he formed an opinion satisfactory to himself that defendant was under the influence of some drug. Admission of such testimony over objection constitutes defendant's first assignment of error.

[1] Opinion evidence is generally inadmissible "whenever the witness can relate the facts so that the jury will have an adequate understanding of them and the jury is as well qualified as the witness to draw inferences and conclusions from the facts. If either of these conditions is absent, the evidence is admissible." Stansbury, North Carolina Evidence, § 124 (Brandis Rev. 1973). *Accord, Beanblossom v. Thomas,* 266 N.C. 181, 146 S.E. 2d 36 (1966); *Wood v. Insurance Co.,* 243 N.C. 158, 90 S.E. 2d 310 (1955); *State v. Cuthrell,* 233 N.C. 274, 63 S.E. 2d 549 (1951).

Although a lay witness is usually restricted to facts within his knowledge, "if by reason of opportunities for observation he

is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion. McKelvey on Evidence, 172, 231; *Greensboro v. Garrison,* [190 N.C. 577, 130 S.E. 203 (1925)]; *Hill v. R. R.,* 186 N.C. 475 [119 S.E. 884 (1923)]; *Shepherd v. Sellers,* 182 N.C. 701 [109 S.E. 847 (1921)]; *Marshall v. Telephone Co.,* 181 N.C. 292 [106 S.E. 818 (1921)]." *State v. Brodie,* 190 N.C. 554, 130 S.E. 205 (1925).

[2] It is a familiar rule of evidence in this jurisdiction that a lay witness who has personally observed a person may give his opinion as to whether that person was under the influence of intoxicants. *State v. Flinchem,* 247 N.C. 118, 100 S.E. 2d 206 (1957); *State v. Warren,* 236 N.C. 358, 72 S.E. 2d 763 (1952); *State v. Harris,* 213 N.C. 648, 197 S.E. 142 (1938). Likewise, we have held in recent cases that a lay witness may state his opinion as to whether a person is under the influence of drugs when he has observed the person and such testimony is relevant to the issue being tried. *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *see* 31 Am. Jur. 2d, Expert and Opinion Evidence § 102 (1967).

[3] In this case Officer Thompson observed the erratic manner in which defendant operated his car, observed his personal demeanor, the white substance on his lips, his pinpoint pupils, the absence of alcohol on his breath, his lack of muscular coordination, his mental stupor, and the way he walked, acted and talked. He observed that the other occupants of the car, two girls and a boy, were in the same condition. Especially significant is the fact that Officer Thompson, by interrogating defendant, eliminated many other causes which might have accounted for defendant's condition. By such interrogation he ascertained that defendant was not a diabetic, had no physical defects, was not sick, did not limp, had not been injured, had not seen a doctor or dentist lately, and had not been taking any kind of medication. Possessed of that knowledge, Officer Thompson concluded that defendant was under the influence of some drug. We hold that under these facts a patrol officer with five years' experience in enforcement of the motor vehicle laws, including the statutes condemning operation of a motor vehicle while under the influence of either intoxicants or drugs, is competent to express an opinion, based on the conditions he observed and

on the knowledge gained from interrogation of defendant, that defendant was under the influence of some drug. Officer Thompson was better qualified than the jury to draw inferences and conclusions from what he saw and heard. Stansbury, North Carolina Evidence, § 124 (Brandis Rev. 1973).

[4] Defendant contends the State's evidence was insufficient to be submitted to the jury. Denial of his motion to nonsuit constitutes his second assignment of error. When considering a nonsuit motion the trial court is required to view the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971). Furthermore, all evidence actually admitted, whether competent or not, which is favorable to the State must be taken into account and considered by the court in ruling upon the nonsuit motion. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967). Whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Norggins,* 215 N.C. 220, 1 S.E. 2d 533 (1939). This assignment is overruled.

Finally, defendant assigns as error the denial of his motions to set aside the verdict and in arrest of judgment.

[5] Motions to set aside the verdict are addressed to the discretion of the trial court and refusal to grant them is not reviewable in the absence of abuse of discretion. *State v. Downey,* 253 N.C. 348, 117 S.E. 2d 39 (1960); *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943).

[6] Motions in arrest of judgment are ordinarily made after verdict to prevent entry of judgment and are based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503 (1940). Unless some fatal error or defect appears on the face of the record proper, judgment may not be arrested. *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). Review is ordinarily limited to a determination of whether error of law appears on the face of the record and whether the judgment is regular in form. *State v. Mallory,* 266 N.C. 31, 145 S.E. 2d 335 (1965). When error does not appear on the face of the record proper, the judgment will be affirmed. *Seibold v. Kinston,* 268

N.C. 615, 151 S.E. 2d 654 (1966). The evidence in a case is no part of the record proper, and defects appearing only by the aid of evidence cannot be the subject of a motion in arrest of judgment. *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311 (1952).

Application of the foregoing rules regulating practice and procedure in criminal actions impels the conclusion that defendant's motion in arrest of judgment was properly denied. No error appears on the face of the record proper. The judgment is regular in form and must therefore be sustained. *State v. McNeil,* 280 N.C. 159, 185 S.E. 2d 156 (1971).

For the reasons stated the decision of the Court of Appeals finding no error in the judgment appealed from is

Affirmed.

JANE PRITCHETT HARRINGTON v. GEORGE FAULKNER HARRINGTON

No. 102

(Filed 11 December 1974)

1. **Divorce and Alimony § 13— divorce based on separation — abandonment and adultery as affirmative defenses**

The affirmative defenses of abandonment and adultery can defeat an action for divorce based on separation.

2. **Divorce and Alimony § 5— recrimination recognized in N. C.**

This jurisdiction recognizes the doctrine of recrimination which allows a defendant in a divorce action to set up a defense in bar of the plaintiff's action that plaintiff was guilty of misconduct which in itself would be a ground for divorce.

3. **Divorce and Alimony § 13— divorce based on separation — acts constituting legalized separation**

Either an action for a divorce *a mensa et thoro,* an action for alimony without divorce under former G.S. 50-16, or a valid separation agreement may constitute a legalized separation which thereafter will permit either of the parties to obtain an absolute divorce on the ground of one year's separation.

4. **Divorce and Alimony § 13— divorce based on separation — child custody proceeding — no judicial separation**

A child custody proceeding in which the trial court found abandonment by the wife but in which abandonment was not the real issue involved did not constitute a judicial separation that would deprive

the innocent husband of the use of either abandonment or adultery as a defense in a divorce action instituted by the wife based on one year's separation.

ON *certiorari* to review the decision of the North Carolina Court of Appeals, reported in 22 N.C. App. 419, 206 S.E. 2d 742 (1974), which affirmed the order of *Black, J.*, at the 10 December 1973 Session of MECKLENBURG District Court.

Plaintiff and defendant were married on 29 November 1963. Two children, Bruce and Amy, were born of the marriage. Leslie, the daughter of the wife, born in February 1963, was adopted by the husband. On 29 June 1971 the wife left the home of the husband, taking the children with her.

The husband brought an action seeking custody of the children. By order dated 24 April 1972, the District Court found that the wife had abandoned the husband, but nevertheless awarded her the custody of the children. The order provided that the husband was "entitled to reasonable visitation with the minor children," and that the husband was to make child support payments of $300 per month. The husband appealed to the Court of Appeals. That court modified the order of the District Court by granting custody of Bruce to the husband and by remanding to the trial court with directions to reduce the amount of support payments. *Harrington v. Harrington,* 16 N.C. App. 628, 192 S.E. 2d 638 (1972). In all other respects, the District Court's order was affirmed.

On 6 June 1973 the wife filed a complaint against her husband seeking absolute divorce by reason of one year's separation, pursuant to G.S. 50-6. The husband answered alleging abandonment and adultery as defenses. The wife's motion to strike both defenses was allowed. The Court of Appeals affirmed this order, and we allowed *certiorari* on 24 September 1974.

Joe T. Millsaps for defendant appellant.

Farris, Mallard & Underwood by E. Lynwood Mallard for plaintiff appellee.

MOORE, Justice.

[1] Defendant first contends that the Court of Appeals erred in affirming the order of the District Court striking his defenses of adultery and willful abandonment.

G.S. 50-6 provides in part:

> "*Divorce after separation of one year on application of either party.*—Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. . . . "

The statute contains no requirement that separation of the parties be voluntary. Relative fault of the parties, therefore, is said to be irrelevant in many jurisdictions that have statutes similar to the one quoted above. Clark, Law of Domestic Relations 353 (1968); 1 Nelson, Divorce and Annulment § 4.47 (2d ed. 1945); *Gardner v. Gardner,* 250 Ala. 251, 34 So. 2d 157 (1948); *Young v. Young,* 207 Ark. 36, 178 S.W. 2d 994 (1944); *Cotton v. Cotton,* 306 Ky. 826, 209 S.W. 2d 474 (1948). However, North Carolina does not accept this reasoning, and our cases hold that the affirmative defenses of abandonment and adultery can defeat an action for divorce based on separation. *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968); *Sears v. Sears,* 253 N.C. 415, 117 S.E. 2d 7 (1960); *Pruett v. Pruett,* 247 N.C. 13, 100 S.E. 2d 296 (1957); *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492 (1945); *Byers v. Byers,* 223 N.C. 85, 25 S.E. 2d 466 (1943); *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471 (1943).

[2] As stated in *Hicks v. Hicks,* 275 N.C. 370, 167 S.E. 2d 761 (1969):

> "This jurisdiction recognizes the doctrine of recrimination, which allows a defendant in a divorce action to set up a defense in bar of the plaintiff's action that plaintiff was guilty of misconduct which in itself would be a ground for divorce. *Pharr v. Pharr,* 223 N.C. 115, 25 S.E. 2d 471. . . .
>
> "Defenses under the doctrine of recrimination are deemed controverted and the burden to establish such affirmative defense is on the defendant. *Taylor v. Taylor,* 225 N.C. 80, 33 S.E. 2d 492. . . . "

The doctrine of recrimination provides in effect that "if both parties have a right to a divorce, neither of the parties has." 27A C.J.S. Divorce § 67 (1959). Recrimination has often

been criticized and some jurisdictions have limited its application or abolished the defense. 24 Am. Jur. 2d, Divorce and Separation § 226 (1966); 48 N.C. L. Rev. 131, 133, n. 11 (1969). However, as Professor Lee says, "The doctrine of recrimination, nevertheless, is firmly established at the present time in the vast majority of the states, either in common-law or statutory form. North Carolina has no statute dealing with recrimination; but the doctrine of recrimination has been recognized and approved by court decisions." 1 Lee, North Carolina Family Law § 88, p. 338 (3d ed. 1963).

Chief Justice Stacy aptly stated the reasoning behind the North Carolina rule in *Byers v. Byers, supra:*

> "It is true, the statute under review provides that either party may sue for a divorce or for a dissolution of the bonds of matrimony, 'if and when the husband and wife have lived separate and apart for two years,' etc. [now one year]. However, it is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for a period of two years and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong. *Woodruff v. Woodruff,* 215 N.C., 685, 3 S.E. (2d), 5; *Sanderson v. Sanderson, supra* [178 N.C. 339, 100 S.E. 590]; *Whittington v. Whittington,* 19 N.C., 64. Nor is it to be ascribed as the legislative intent that one spouse may drive the other from their home for a period of two years, without any cause or excuse, and then obtain a divorce solely upon the ground of such separation created by the complainant's own dereliction. *McGarry v. McGarry,* 181 Wash., 689, 44 Pac. (2d), 816. Out of unilateral wrongs arise rights in favor of the wronged, but not in favor of the wrongdoer. One who plants a domestic thornbush or thistle need not expect to gather grapes or figs from it."

The Court of Appeals cited *Pickens v. Pickens,* 258 N.C. 84, 127 S.E. 2d 889 (1962), as support for its holding that adultery is no longer a defense to an action for divorce based on separation. It is true that based upon the evidence in that case there is dictum to the effect that in a divorce action based on two years' separation the only defense recognized by our decisions is that the separation was caused by the act of the husband in willfully abandoning her. However, as Professor Lee says, this

is "clearly a dictum statement." 1 Lee, North Carolina Family Law § 88, n. 74 (1974 Supp.). Such statement was not intended to overrule the well-settled rule in this jurisdiction that adultery, as well as abandonment, is a recriminatory defense that will defeat an action for divorce based on separation. Defendant's first assignment of error is sustained.

Defendant next contends that the Court of Appeals erred in upholding the trial court's conclusion that a custody proceeding constitutes a judicial separation such as will legalize the separation of the parties and deprive the defendant of his recriminatory defenses.

[3] Either an action for a divorce *a mensa et thoro,* an action for alimony without divorce under former G.S. 50-16, or a valid separation agreement may constitute a legalized separation which thereafter will permit either of the parties to obtain an absolute divorce on the ground of one year's separation. *Rouse v. Rouse,* 258 N.C. 520, 128 S.E. 2d 865 (1963); *Richardson v. Richardson,* 257 N.C. 705, 127 S.E. 2d 525 (1962); *Lockhart v. Lockhart,* 223 N.C. 559, 27 S.E. 2d 444 (1943).

A divorce from bed and board is a judicial separation—that is, an authorized separation of the husband and wife. The effect of a judgment under former G.S. 50-16 is the same. *Rouse v. Rouse, supra.* A valid separation agreement legalizes their separation from and after the date thereof. *Richardson v. Richardson, supra.* In the present case, however, the previous action in the District Court was for custody of the children only. The district judge found that the wife had abandoned her husband but nevertheless gave the wife the custody and ordered support payments for the children. The Court of Appeals in that action modified the custody and support order but otherwise affirmed. Abandonment was not the issue in the custody hearing. The welfare or best interests of the children in light of all the circumstances was the paramount consideration to guide the court in awarding custody of the minor children. G.S. 50-13.2; 3 Lee, North Carolina Family Law § 224 (3d ed. 1963); *Crosby v. Crosby,* 272 N.C. 235, 158 S.E. 2d 77 (1967).

[4] We hold that a finding of abandonment by the wife in the custody proceeding—where abandonment was not the real issue involved—does not constitute a judicial separation that would deprive the innocent husband of the use of either abandonment or adultery as a defense in a divorce action instituted by the wife

based on one year's separation. As stated by Chief Justice Stacy in *Byers v. Byers, supra:* " . . . [I]t is not to be supposed the General Assembly intended to authorize one spouse willfully or wrongfully to abandon the other for a period of two years [now one year] and then reward the faithless spouse a divorce for the wrong committed, in the face of a plea in bar based on such wrong." Defendant's second assignment of error is sustained.

For the reasons stated, the decision of the Court of Appeals is reversed, and the cause is remanded to that court with direction to remand to the District Court of Mecklenburg for proceedings consistent with this opinion.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES C. ROBERTS

No. 85

(Filed 30 December 1974)

1. **Kidnapping § 1— kidnap defined**

The word "kidnap," as used in G.S. 14-39, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation.

2. **Kidnapping § 1— elements of offense**

To constitute the crime of kidnapping, the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment.

3. **Kidnapping § 1— insufficiency of evidence**

The State's evidence was insufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping where it tended to show that defendant grabbed a seven-year-old girl by the arm and pulled her a distance of 80 to 90 feet from the driveway of a nursery to steps leading into the nursery building.

4. **Constitutional Law § 20; Criminal Law § 134— imprisonment for nonpayment of fine — indigent defendant — equal protection**

Where the trial court imposed the maximum permissible sentence of six months and the maximum permissible fine of $500 on an indigent defendant convicted of assault on a child under twelve years of age, the indigent defendant could not be imprisoned beyond the statutory maximum of six months on account of his involuntary non-

payment of the fine and court costs since such imprisonment would constitute impermissible discrimination based on ability to pay in violation of the Equal Protection Clause of the Fourteenth Amendment.

Justice LAKE concurs in result.

Justice HUSKINS dissenting in part.

Justice HIGGINS joins in the dissent.

ON *certiorari* to review the decisions of the Court of Appeals reported in 18 N.C. App. 388, 197 S.E. 2d 54 (1973), and in 22 N.C. App. 579, 207 S.E. 2d 373 (1974).

Defendant was tried at the 18 September 1972 Session of DURHAM County Superior Court on the following two-count bill of indictment, *viz:*

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT, That James Clifford Roberts late of the County of Durham on the 18th day of July, 1971, with force and arms, at and in the county aforesaid, did unlawfully, wilfully, and feloniously assault a minor child under the age of twelve years (to wit: seven (7) years of age) with the intent to rape and carnally know and abuse the said female child, Kathy Sue Cates;

"Second Count: did on the same aforesaid day and year, to wit: July 18, 1971, unlawfully, wilfully, feloniously and forcibly kidnap Kathy Sue Cates from the place and spot where she was at, against the form of the statute in such case made and provided and against the peace and dignity of the State."

Relevant events occurring prior to the 18 September 1972 Session are noted below:

On 19 July 1971, the District Court of Durham County issued a warrant charging that defendant, on 18 July 1971, assaulted Kathy Sue Cates, a child under the age of twelve years, by "grabbing her by the arm and attempting to take [her] inside a building," in violation of G.S. 14-33(b)(5). Defendant was arrested thereon on 19 July 1971 but was released the same day after posting an appearance bond of $1,000.00. On 4 August 1971, defendant was arrested in an unrelated case in which he was charged in a three-count bill with breaking or entering, larceny, and receiving. Defendant was unable to make bond of $8,000.00 on these charges and remained in the Durham County Jail. At the 17 August 1971 Session the grand jury returned as a true bill the above-quoted indictment. On 30 August

1971, based on defendant's affidavit of indigency, the court appointed Thomas F. Loflin III, his present counsel, to represent defendant.

At the 4 October 1971 Session, defendant was tried for the offenses for which he had been arrested on 4 August 1971. He was found not guilty of breaking or entering but guilty of felonious larceny. From a judgment entered on the verdict imposing a prison sentence of six to ten years, defendant appealed. Pursuant to this judgment, defendant was committed to the State's prison on 9 October 1971. On 24 May 1972, the Court of Appeals arrested judgment in the larceny case on account of a fatal defect in the bill of indictment. 14 N.C. App. 648, 188 S.E. 2d 610 (1972). Defendant remained in custody to await trial on the indictment charging (1) an assault with intent to commit rape, and (2) kidnapping, which had been returned at the 17 August 1971 Session.

At 18 September 1972 Session, prior to the commencement of the trial, defendant moved to dismiss the charges in the quoted indictment on account of the State's failure to grant him a speedy trial thereon, the grounds therefor having been set forth in a motion he had filed on 25 August 1972. The court refused defendant's request that a hearing be conducted and findings of fact made with reference thereto and denied the motion. Defendant then pleaded not guilty to the charges and the trial of defendant thereon proceeded.

The State offered evidence which, summarized except when quoted, tends to show the following:

On Sunday, 18 July 1971, Kathy Sue Cates (Kathy), a seven-year-old girl, was living with her parents, two older sisters (Patricia and Mary Elizabeth), and an older brother (Freddy), at 611 North Hyde Park Street in Durham, N. C. A children's day care nursery was located at 605 North Hyde Park Street, on the same side of the street and two doors down from the Cates home. Behind the nursery building there was a "play area," with recreation equipment, sandbox, etc., which was completely enclosed by a low wire fence. A house at 609 North Hyde Park Street was between the Cates home and the nursery building.

On this particular Sunday afternoon the Cates family had an outdoor birthday party for one of the daughters. In addition to the members of the family, two of Kathy's friends, Sue,

age 9, and Larry, age 10, were at the Cates house during this party. Sue and Larry were visiting their aunt who lived across the street from the Cates home. Following the birthday party, Kathy and her two friends asked Mr. Cates, who had been out in the backyard making ice cream, if they could go over to the nursery and play on the swings and sliding boards. He gave them permission and they proceeded to the nursery playground.

The three children had been playing on the various playground equipment for approximately an hour when they first noticed defendant. Defendant was then standing beside an old abandoned automobile in the backyard of 609 North Hyde Park Street, on the other side of the fence enclosing the "play area" of the nursery. Prior to this time, Kathy's father had been sitting on his back doorsteps (approximately ten or twelve steps above ground level) where he could see the children playing in the nursery yard. During this time, the children and Kathy's father had been "hollering" back to one another. However, when the children first noticed defendant, Kathy's father was sitting in a chair in his backyard cutting watermelon with a large butcher knife. From this position, he could not see the nursery "play area" but could still hear the children's voices.

When the children first saw defendant, Larry (the ten-year-old boy) thought defendant was Kathy's brother Freddy and yelled out, "There is Freddy" or "Hey, Freddie." Defendant did not respond. Then Sue (the nine-year-old girl) said, "That is not Freddie." The children then kept on playing and did not pay any more attention to defendant.

Later, while the children were all playing in the sandbox, they looked up and saw defendant running toward them. At that time the children got up and began running. They did not scream. They just ran. They ran out a gate on the side of the nursery farthest from the place defendant was first observed; ran up a path outside of the fenced-in "play area"; and then ran around the front of the building to the other side where they reentered the "play area" through a little tunnel under the fence. At this point, thinking defendant had gone, the children began playing on the merry-go-round.

After a short while, the children again saw defendant. This time defendant was inside of the fenced-in "play area," standing on the patio that led to the back entrance of the nursery building. At this time the children were afraid of defend-

ant and started running and screaming. They ran up to and crawled through the same tunnel, which led out to the driveway of the nursery. Larry crawled through the tunnel first; then Sue; finally Kathy. The children were attempting to run to Kathy's home. Since the driveway to which the tunnel led was covered with rocks, Kathy, who was barefooted, could not run as fast as Larry and Sue and was lagging behind the other two. At this point, as the children were running on the rocky nursery yard driveway (outside of the enclosed "play area" and on the side of the nursery building closest to the Cates home), defendant "jumped out in front" of Kathy and grabbed her by the "hand." Kathy testified that "[f]rom the driveway where the nursery is located I could see the backyard of our house. I could see my daddy in the backyard. My big sister was there, too. When Mr. Roberts stepped in front of me he still didn't say anything [defendant had said nothing to any of the children prior to this time]. I said, 'What you want, man, let me go.' He said 'Shut up,' and took my hand and took me on through the gate, then through the patio, and then towards the steps." The steps referred to are located at the back of the nursery building and lead up to the back door.

During the above-described events Kathy's father was sitting in his backyard cutting watermelon. He first became aware of a possible problem when he "heard children screaming." He stated that he "heard two or three screaming to the top of their voices." Regarding his subsequent actions, he testifed as follows:

"I jumped, ran around my house, and met the other two children in the front yard, and they were screaming to the top of their voices. I didn't see my little girl, so I ran to the back of the nursery, thinking she had fallen off a swing or something. I didn't see her anywhere and glanced to my left, and saw him pulling her towards the steps.

"The 'him' I am referring to is Mr. Roberts, the defendant. I still had the knife that I was cutting the watermelon with in my hand. Mr. Roberts had Kathy Sue by her left arm, and her tugging back and he was pulling her. He was at the patio door at the bottom steps that led up to the nursery. . . . After I saw Mr. Roberts pulling on my daughter's arm, I looked, ran and grabbed him by the collar and whirled him around and stuck the knife to his throat and asked him what he was doing with my daughter. Then he let go of her. She ran home."

Mr. Cates further testified that, after letting go of Kathy Sue, the following occurred: "[Defendant] said 'Wait a minute,' and 'What are you doing' I said 'What are you doing with my daughter?' He said 'I am just taking her to show her where somebody broke in.' I said 'Well, why, do you work here?' He said 'No, I was just passing here and thought I would stop and check to see if everything was all right.' At that point my daughter went towards home."

Ben H. Hamlet, a uniformed police officer, was conducting a mobile routine patrol nearby when he received a call at about 6:15 p.m. It took him about three minutes to arrive on the scene. When he arrived, he "found the defendant and Mr. Cates standing in the backyard at the steps leading up to the rear door to the nursery, and some other people." Hamlet testified as follows: "I asked a few questions on the scene, but there were so many people beginning to gather, I ascertained the best thing to do was to clear the area before I had any more problems." Thereafter, Officer Hamlet took the defendant down to the office of Captain Seagroves at Durham police headquarters. No warrant was issued at this time and defendant was released. However, the case was held for further investigation.

Following defendant's release, Officer Hamlet went back to the nursery and discovered that the lock had been removed from the back door of the building and that the door could be easily entered. He found the lock at the bottom of the stairs, the same place where defendant had been apprehended earlier. The lock had been forcibly broken off.

On Monday, 19 July 1971, Detectives Martin and Moore of the Durham Police Department were assigned to the case. These detectives immediately went out and interviewed Kathy and her father. At the trial their testimony tended to corroborate that given by both Kathy and her father concerning the events narrated above. Detective Martin estimated that defendant "took Kathy approximately 80 to 90 feet" before Kathy's father intervened.

After these detectives terminated their investigation on 19 July 1971, they came in and told an assistant solicitor what they had discovered. He advised them to get a warrant. They procured a warrant charging defendant with the misdemeanor offense of assault on a child under the age of twelve. The above-quoted bill of indictment was returned at the 17 August 1971 Session.

Defendant did not testify or offer evidence.

In respect of the first count, the court allowed defendant's motion to dismiss as to assault with intent to commit rape and submitted this count to the jury for determination as to whether defendant was guilty or not guilty of an assault upon a child under the age of twelve years, an offense punishable as provided in G.S. 14-33(b)(5). As to this offense, the jury returned a verdict of guilty.

In respect of the second count, the court denied defendant's motion to dismiss as in case of nonsuit and submitted this count for the jury to determine whether defendant was guilty or not guilty of kidnapping as charged. As to kidnapping, the jury returned a verdict of guilty.

Upon the verdict of guilty of kidnapping as charged in the second count, the court pronounced judgment "that the defendant be imprisoned for the term of sixty (60) years in the custody of the Commissioner of Correction."

Upon the verdict of guilty of the offense of assault upon a child under the age of twelve years, the court pronounced judgment "that the defendant be imprisoned for the term of six (6) months in the custody of the Commissioner of Correction," this sentence "to begin at the expiration of the sentence imposed on the Kidnapping count in the bill of indictment" and that defendant "pay a fine of $500.00 and cost of court" and "remain in prison until fine and costs are paid." The judgment in the kidnapping case provided that defendant "is entitled to credit on said sentence from August 17, 1971, until September 22, 1972, for time spent in custody awaiting trial."

In his first appeal to the Court of Appeals, defendant's assignments of error related to the denial of his motion to dismiss on the ground that the State had denied his constitutional right to a speedy trial and to asserted errors in the conduct of the trial at 18 September 1972 Session. The Court of Appeals found "the trial to be free from prejudicial error," but that "the trial judge committed error in failing to hear evidence and find facts upon defendant's motion to dismiss the indictment for failure to grant a speedy trial, [which] error did not affect the guilt finding process of the trial." Accordingly, the Court of Appeals did not order a new trial but remanded the case to the superior court for further hearing on defendant's motion to dismiss the indictment for failure to grant a speedy trial,

at which hearing defendant and the State would be permitted "to offer evidence upon the question of the delay between defendant's indictment and trial." The order of remand concluded as follows: "If the presiding judge determines that defendant's constitutional right to a speedy trial has been denied, he shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment. If the presiding judge determines that defendant's constitutional right to a speedy trial has not been denied, he shall find the facts and enter an order denying the defendant's motion to dismiss, *and order commitment to issue in accordance with the judgment entered at the 18 September 1972 Session of Superior Court held in Durham County. See State v. Tart,* 199 N.C. 699, 155 S.E. 609." (Our italics.) 18 N.C. App. 388, 392-93, 197 S.E. 2d 54, 57-58. Defendant gave notice of appeal and also petitioned for *certiorari.* On 31 August 1973, this Court denied defendant's petition for *certiorari,* and, on motion of the Attorney General, dismissed defendant's appeal. 283 N.C. 758, 198 S.E. 2d 728 (1973).

At the hearing before Judge Clark at 3 December 1973 Session, evidence was offered by the State and by defendant pertinent to defendant's motion to dismiss on the ground that he had been denied his constitutional right to a speedy trial. Based upon his findings of fact, Judge Clark entered a judgment which denied defendant's motion to dismiss and further provided: "[T]hat commitment issue in accordance with the Judgment entered at the September 18, 1972, Session of this Court; and that the defendant received credit on his sentence for the period from the date of the original Judgment and Commitment, September 22, 1972, to this date; he not being entitled to any other credit on his sentence in this case for that this Court has already ORDERED that he be given credit on other sentences for the time spent in jail from the date of his original arrest and confinement, August 4, 1971."

In his second appeal to the Court of Appeals, defendant assigned as error the said judgment entered by Judge Clark at 3 December 1973 Session.

The Court of Appeals affirmed the judgment of Judge Clark subject to modification in respect of the credit to which defendant was entitled on account of pre-trial time spent in custody. Judge Clark's order was modified in this respect as follows: "The order entered on 3 December 1973, directed that commit-

ment issue in accordance with the judgment entered at the 18 September 1972 Session of that court. It then provided that he receive credit on his sentence for the period from the date of the original judgment and commitment 22 September 1972, until 3 December 1973, and no other credit. The defendant was previously sentenced and credit was given under the provisions of G.S. 15-176.2. The pre-trial custody statute in effect at the time the later order was entered was G.S. 15-196.1, effective 1 March 1973. The defendant should have been committed in accordance with the previous sentence pronounced 22 September 1972. Under its provisions, the defendant would have been given credit for all pre-trial time spent in custody from 17 August 1971, to 22 September 1972, and the judgment must be modified to this effect." 22 N.C. App. 579, 583, 207 S.E. 2d 373, 376-77.

On 21 October 1974 we allowed defendant's petition for a writ of *certiorari* to review both decisions of the Court of Appeals.

Attorney General James H. Carson, Jr., and Associate Attorney John R. Morgan for the State.

Thomas F. Loflin III for defendant.

BOBBITT, Chief Justice.

There was ample evidence to support the verdict of guilty of assault on a child under twelve years of age, which on 18 July 1971 was a misdemeanor "punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment not to exceed six (6) months, or both such fine and imprisonment. . . ." G.S. 14-33(b)(5) and (c)(3). Defendant did not move to nonsuit this charge. Nor does he now contend the evidence was insufficient to support his conviction thereon. With reference to this charge, Judge Bailey instructed the jury as follows: "[I]f you find from the evidence and beyond a reasonable doubt that on or about the 18th day of July, 1971, James Clifford Roberts *intentionally and without justification or excuse grabbed Kathy Cates by the arm and pulled her any distance against her will and against her wishes,* and further find that at that time Kathy Cates had not reached her 12th birthday, and further find that at that time Clifford Roberts was a male person, it would be your duty to return a verdict of guilty of an assault on a child under the age of 12." (Our italics.)

On defendant's first appeal, the Court of Appeals affirmed Judge Bailey's denial of defendant's motion to nonsuit the kidnapping (second) count. 18 N.C. App. 388, 197 S.E. 2d 54 (1973). Because of the interlocutory aspects of that decision, defendant's application for *certiorari* for immediate review thereof was denied by this Court. 283 N.C. 758, 198 S.E. 2d 728. Whether defendant's motion should have been granted is now presented for decision.

With reference to the kidnapping (second) count, Judge Bailey charged the jury as follows: "[I]f you find from the evidence and beyond a reasonable doubt that on or about the 18th of July, 1971, James Clifford Roberts *wilfully and intentionally took Kathy Cates and carried her from a place in the driveway of this nursery to the foot of the steps leading into the nursery against her will and without lawful authority, by the use of force such as the grabbing of her arm and the forcible tugging her along,* it would be your duty to return a verdict of guilty of kidnapping." (Our italics.)

"Kidnapping" was a criminal offense at common law, a misdemeanor. By virtue of the statute now codified as G.S. 4-1, the common law with reference to kidnapping became the law of this State. There had been no statutory modification thereof prior to the effective date (14 March 1901) of Chapter 699, Public Laws of 1901. Nor does it appear that any prosecution for "kidnapping" had been reviewed by this Court.

The 1901 Act provided that "any person who shall *forcibly or fraudulently kidnap* any person shall be guilty of *a crime,* and upon conviction may be punished *in the discretion* of the court not exceeding twenty years in the State's prison." (Our italics.) When codified, the wording of the 1901 Act was modified by substituting the word "felony" for the word "crime." Revisal (1905), Sec. 3634, C.S. 1919, Sec. 4221.

"[W]hen a statute punishes an act giving it a name known to the common law, without otherwise defining it, the statute is construed according to the common-law definition." 22 C.J.S., Criminal Law § 21. Based thereon, indictments charging simply that the accused kidnapped a named person have been upheld as sufficient. *State v. Lowry,* 263 N.C. 536, 539-40, 139 S.E. 2d 870, 873 (1965). However, elements of the common law crime of kidnapping had been stated differently by well recognized commentators. *State v. Harrison,* 145 N.C. 408, 417-18, 59 S.E.

867, 870-71 (1907); *State v. Gough*, 257 N.C. 348, 352-53, 126 S.E. 2d 118, 121-22 (1962); *State v. Lowry, supra*, at 539-40, 139 S.E. 2d at 873-74; *State v. Dix*, 282 N.C. 490, 493, 193 S.E. 2d 897, 899 (1973).

Our research indicates that the first prosecution for kidnapping reviewed by this Court was *State v. Harrison, supra*. The opinion of Justice Brown quoted among others the definition of kidnapping found in 4 Blackstone's Commentaries 219, to wit: "[T]he forcible abduction or stealing away of a man, woman, or child, from their own country, and sending them into another. . . ." This Court held that kidnapping did not require (or no longer requires) that the victim be carried away from his own country to another. Harrison's conviction for kidnapping an eight-year-old neighbor boy in Currituck County was upheld. There was no evidence that the victim was ever found alive or that a body identified as that of the victim was found.

Our research indicates the only other decision of this Court which reviewed a conviction for kidnapping alleged to have been committed when our statute law consisted of the 1901 Act is *State v. Marks*, 178 N.C. 730, 101 S.E. 24 (1919). In *Marks*, the defendant was indicted for kidnapping but convicted of an assault on a woman. In upholding the verdict and judgment, Chief Justice Clark, for the Court, noted that the evidence justified the action of the trial judge in submitting the kidnapping charge to the jury.

Our present statute was enacted as Chapter 542, Public Laws of 1933. It became effective 15 May 1933 and is now codified as G.S. 14-39. It superseded the 1901 Act.

The 1933 Act, in pertinent part, provided that "[i]t shall be unlawful for any person . . . to kidnap . . . any human being, or to demand a ransom of any person . . . to be paid on account of kidnapping, or to hold any human being for ransom . . ."; and that any person convicted of a violation of the statute *"shall be punishable by imprisonment for life."* (Our italics.)

Seemingly, the Lindbergh tragedy prompted the enactment of the 1933 Act. As interpreted by this Court, the 1933 Act leaves the term of imprisonment in the discretion of the court, imprisonment for life being the maximum punishment. *State v. Kelly*, 206 N.C. 660, 663, 175 S.E. 294, 296 (1934); *State v.*

Lowry, supra, at 541, 139 S.E. 2d at 874; *State v. Bruce,* 268 N.C. 174, 184, 150 S.E. 2d 216, 224 (1966).

In *State v. Smith,* 210 N.C. 63, 185 S.E. 460 (1936), the conviction of defendants for kidnapping was reversed although the convictions for conspiracy to assault and simple assault were upheld. [Note: The record in *Smith* discloses a factual situation similar in many respects to that involved in such later cases as *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962); and *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971).]

Subsequent cases involving diverse factual situations in which convictions for kidnapping have been upheld include the following: *State v. Kelly, supra; State v. Witherington,* 226 N.C. 211, 37 S.E. 2d 497 (1946); *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649 (1949); *State v. Dorsett,* 245 N.C. 47, 95 S.E. 2d 90 (1956); *State v. Gough, supra; State v. Lowry, supra; State v. Bruce, supra; State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Arsad,* 269 N.C. 184, 152 S.E. 2d 99 (1967); *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839 (1969); *State v. Woody,* 277 N.C. 646, 178 S.E. 2d 407 (1971); *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971); *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971); *State v. Barbour,* 278 N.C. 449, 180 S.E. 2d 115 (1971); *State v. Maynor,* 278 N.C. 697, 180 S.E. 2d 856 (1971); *State v. High,* 279 N.C. 487, 183 S.E. 2d 633 (1971); *State v. Murphy, supra.*

No attempt will be made to reconcile all cited cases. Suffice to say, no single common-law definition seems sufficient to cover all of the factual situations in the cases in which convictions have been upheld. In general, it appears that, subsequent to the increase in maximum punishment authorized by the 1933 Act, our decisions have tended to relax the common-law requirements for conviction of kidnapping, at least until the decision of this Court in *State v. Dix,* 282 N.C. 490, 193 S.E. 2d 897 (1973).

In *State v. Ingland, supra,* a new trial was awarded on account of error in the court's instructions to the jury. *Inter alia,* this Court held that the unlawful seizure and detention of a human being *for the purpose* of unlawfully taking and carrying him away against his will by force or fraud or intimidation was false imprisonment but not kidnapping. In so holding, the Court, in an opinion by Justice Huskins, withdrew as un-

authoritative contrary expressions in prior opinions. It was stated, "[C]ommon-law kidnapping contemplates, in addition to unlawful restraint, a carrying away of the person detained. *State v. Harrison,* 145 N.C. 408, 59 S.E. 867 (1907), quotes Bishop's definition of kidnapping as " 'false imprisonment aggravated by conveying the imprisoned person to some other place.' " See 2 Bishop, Criminal Law § 750 (9th ed. 1923). For a discussion of the elements of the common law crime of false imprisonment, see *State v. Ingland, supra,* at 51, 178 S.E. 2d at 582-83.

[1] As held in *Ingland,* the word KIDNAP, as used in G.S. 14-39, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation. In the present case, the questions are whether the evidence was sufficient to show (1) that defendant falsely imprisoned Kathy, and (2) that he unlawfully carried her away by force, in such manner as to constitute the felony of kidnapping.

[2, 3] No attempt will be made to mark out the limits of what constitutes a false imprisonment or a carrying away sufficient to satisfy these elements in the crime of kidnapping. Here, the entire incident occurred during the seconds it took defendant to pull Kathy a distance of 80 to 90 feet, at a time when Larry and Sue were screaming and running for readily available help and Kathy was resisting by word and by deed defendant's efforts to make her go along with him. To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment. We hold the evidence, when considered in the light most favorable to the State, insufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping.

The only requirement for a conviction of kidnapping under the instructions given the jury was that the State satisfy the jury from the evidence beyond a reasonable doubt that defendant "wilfully and intentionally took Kathy Cates and carried her from a place in the driveway of this nursery to the foot of the steps leading into the nursery against her will and without lawful authority, by the use of force such as the grabbing of her arm and the forcible tugging her along." These facts alone are insufficient to constitute the felony of kidnapping. Yet they

were the facts in evidence upon which the court had to base his instructions.

We note that the trial judge dismissed the charge of assault with intent to commit rape. We further note there is no evidence that defendant subdued Kathy by the use or threatened use of a deadly weapon. Nor is there any evidence that he struck her or attempted to abuse or fondle her. Nothing in the evidence suggests that defendant intended to grab Kathy rather than Larry or Sue. Although the State suggests defendant had broken the lock to the back door to the nursery, there is no evidence as to when or by whom the lock was broken. The fact that the lock had been broken off and was found at the foot of the stairs when Officer Hamlet returned to the scene an hour or more after he had taken defendant to the office of Captain Seagroves falls far short of establishing that defendant had broken the lock.

With reference to the kidnapping (second) count in the bill of indictment, the conclusion reached is that defendant's motion for judgment of nonsuit should have been granted. Hence, as to the kidnapping charge, the decision of the Court of Appeals is reversed.

The conduct of defendant cannot be condoned. An unlawful and unexplained assault by an adult male upon a seven-year-old girl must be regarded as base and contemptible. Yet, since Kathy was rescued immediately, unharmed, the offense under consideration cannot be considered the sort of conduct for which life imprisonment is permissible and for which a sentence of imprisonment for sixty years was actually imposed.

With reference to the first count, the judgment pronounced by the trial judge imposed the maximum sentence for an assault upon a child under the age of twelve years committed on 18 December 1971. We note that G.S. 14-33(b)(5) and (c)(3) as amended now provide as punishment for this offense "a fine, imprisonment for not more than two years, or both fine and imprisonment." G.S. 1B, Replacement 1969, 1973 Cumulative Supplement.

We find no error in the trial with reference to the charge of an assault upon a child under the age of twelve years. Nor do we find error in the denial by Judge Clark of defendant's motion to dismiss for alleged denial of his constitutional right to a speedy trial. There remains for consideration the status of the

judgment pronounced upon defendant's conviction of assault on a child under the age of twelve years.

In respect of pre-trial time spent in custody, and in conformity with the credit Judge Bailey had allowed in the judgment entered at 18 September 1972 Session, the Court of Appeals extended the credit provided for in Judge Clark's order of 3 December 1973 as set out above. However, we note the credit allowed by Judge Clark as well as the extended credit allowed by the Court of Appeals exceeds the period of six months for which defendant was sentenced upon conviction of assault upon a child under the age of twelve years.

In the judgment pronounced at 18 September 1972 Session for assault on a child under twelve years of age, Judge Bailey imposed the maximum permissible sentence of six months and the maximum permissible fine of $500. Defendant's indigency had been established on 30 August 1971.

In *Williams v. Illinois,* 399 U.S. 235, 26 L.Ed. 2d 586, 90 S.Ct. 2018 (1970), involving an indigent defendant, an Illinois court had imposed the maximum statutory prison sentence and in addition had ordered the payment of a fine and costs. The Supreme Court of the United States held that "the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any susbtantive offense be the same for all defendants irrespective of their economic status." *Id.* at 244, 26 L.Ed. 2d at 594, 90 S.Ct. at 2023-24. The following excerpts from the opinion of Chief Justice Burger indicate the precise limits of the decision: "[W]hen the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination that rests on ability to pay. . . ." *Id.* at 240-41, 26 L.Ed. 2d at 592-93, 90 S.Ct. at 2022. Again: "Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." *Id.* at 242, 26 L.Ed. 2d at 593-94, 90 S.Ct. at 2023.

[4] On authority of *Williams v. Illinois, supra,* we hold that the present indigent defendant may not be imprisoned further on account of his failure to pay the fine and costs. See also, *Tate v. Short,* 401 U.S. 395, 28 L.Ed. 2d 130, 91 S.Ct. 668 (1971); *Annot.,* Indigency of Offender As Affecting Validity of Imprisonment As Alternative to Payment of Fine, 31 A.L.R. 3rd 926 (1970), and supplemental decisions.

With reference to kidnapping, the decision of the Court of Appeals finding no error in the trial and affirming the judgment is reversed.

As to assault on a child under the age of twelve years, the defendant, being entitled to credit for pre-trial time spent in custody in excess of the valid sentence of six months, is entitled to his discharge from imprisonment with reference to that offense.

Accordingly, the defendant is entitled to be discharged forthwith upon a determination that there are no other criminal charges pending against him.

As to kidnapping: Reversed.

As to assault: No error in the trial and sentence of six months, but defendant entitled to discharge from further imprisonment on account of credit for pre-trial time spent in custody in excess of six months.

Justice LAKE concurs in result.

Justice HUSKINS dissenting in part.

The word "kidnapping," as used in G.S. 14-39, means the unlawful taking and carrying away of a human being against his will by force or fraud or threats or intimidation. *State v. Bruce,* 268 N.C. 174, 150 S.E. 2d 216 (1966); *State v. Lowry,* 263 N.C. 536, 139 S.E. 2d 870 (1965); *State v. Gough,* 257 N.C. 348, 126 S.E. 2d 118 (1962); G.S. 4-1. This definition of kidnapping was generally understood prior to decision of this Court in *State v. Dix,* 282 N.C. 490, 193 S.E. 2d 897 (1973).

The *Dix* decision holds that there was not a sufficient "asportation" or "carrying away" to constitute the offense of kidnapping where defendant forced a jailer at gun point to go from the front door of the jail to the jail cells, a distance of

about 62 feet, where he compelled the jailer to release three prisoners and then locked the jailer in a cell. Prior to *Dix* the distance the victim was "carried away" was immaterial. The controlling factor was whether the victim *in fact* was unlawfully taken and carried away by force or fraud or threats or intimidation. Under *Dix*, the distance seems to be the controlling factor with consideration given to whether the asportation was "merely technical" or whether the victim was removed from one "enviroment" to another. We said in our dissent to *Dix* that the majority opinion waters down the law "and creates uncertainties of unknown dimensions." The soundness of that observation is demonstrated by the majority opinion here.

Here, it is perfectly apparent that defendant went to the playground to assault and molest the children who were playing there. When they attempted to run away, defendant jumped in front of Kathy, a seven-year-old girl, and grabbed her. When she told him to let her go, defendant said "shut up" and dragged her, screaming and protesting, a distance of 80 to 90 feet to the back door of a building, the lock to which had been forcibly broken off. When Kathy's father overtook him there in response to the screams of the children and demanded to know what he was doing with Kathy, defendant said, "I am just taking her to show her where somebody broke in." The broken lock from the door was found at the same place where defendant was apprehended by Kathy's father. The only legitimate, logical inference to be drawn from these facts is that defendant knew the lock was broken (whether he did it or not) and was dragging the child into the building to assault her. The majority now decides that Kathy was neither falsely imprisoned nor kidnapped because "the entire incident occurred during the seconds it took defendant to pull Kathy a distance of 80 to 90 feet, at a time when Larry and Sue were screaming and running for readily available help and Kathy was resisting by word and by deed defendant's efforts to make her go along with him. To constitute the crime of kidnapping the defendant (1) must have falsely imprisoned his victim by acquiring complete dominion and control over him for some appreciable period of time, and (2) must have carried him beyond the immediate vicinity of the place of such false imprisonment. We hold the evidence, when considered in the light most favorable to the State, insufficient to establish either the false imprisonment or the carrying away element of the felony of kidnapping." Thus, in *Dix* the victim was carried 62 feet but he was not "carried away

enough" to constitute kidnapping. Here, the victim was dragged 80 to 90 feet but the majority holds she was not "carried away enough." Moreover, additional requisites are now prescribed. Unless the accused (1) acquires *complete dominion and control* over his victim (2) for some *appreciable period* of time, and (3) carries the victim beyond *the immediate vicinity* of the place where he acquired complete dominion and control, he is not guilty of kidnapping. Our next duty, in cases to come, will require us to define the meaning of "complete dominion and control," "appreciable period of time," and "immediate vicinity." Those definitions will only dig up more snakes.

Established law is always left more indefinite, more uncertain, and more unenforceable when courts begin to tamper with it. Such is the case here. The majority decision is the first offspring of *Dix*. There will be others; and the law of kidnapping will become, if in fact it has not already, a jumble which officers and prosecutors can neither understand nor enforce. Meter sticks and measuring tapes are strange but necessary aids in determining whether a kidnapping has been committed. Perhaps divining rods are next.

For the reasons stated here and in my dissent in *State v. Dix*, I respectfully dissent from that part of the majority opinion which holds that the evidence is insufficient to establish either false imprisonment or kidnapping. See *State v. Ingland*, 278 N.C. 42, 178 S.E. 2d 577 (1971), where those two crimes are defined and distinguished, each from the other.

Justice HIGGINS joins in this dissent.

THE HOME INSURANCE COMPANY v. INGOLD TIRE COMPANY, INC.

No. 99

(Filed 30 December 1974)

1. **Insurance § 135— fire insurance — security interest in chattels — subrogation**

When a mortgagee purchases insurance with his own funds solely for his own protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortagee against the mortgagor; accordingly, where defendant failed

to maintain insurance on chattels held by it in which B-W Acceptance Corporation had a security interest and B-WAC did maintain a blanket policy covering those chattels, plaintiff was subrogated to the rights of B-WAC against defendant to the extent plaintiff compensated B-WAC under the blanket policy for security interests held by B-WAC in property lost in a fire.

2. **Appeal and Error § 42— subrogation receipt — omission from record — no reversible error**

In an action to recover sums allegedly due plaintiff upon its subrogation claim against defendant, failure to include the subrogation receipt from insured to plaintiff in the record was a technical oversight which does not constitute reversible error, since its correction would not produce a different result.

3. **Evidence § 29; Insurance § 135— fire insurance — trust receipts — sufficiency of evidence of loss**

Trust receipts prepared by insured which showed the items sold to defendant, the amounts owed insured on each item, and the date insured received full payment from defendant, thereby indicating that the released item was no longer subject to the security agreement, were sufficient evidence to permit the trial judge legitimately to infer the nature and value of the merchandise on hand and the value of insured's security interest therein at the time of the fire.

PLAINTIFF appeals from decision of the Court of Appeals, 22 N.C. App. 237, 206 S.E. 2d 320 (1974), vacating judgment of *Clark, J.*, 4 September 1973 Session, DURHAM Superior Court and awarding defendant a new trial.

This is a civil action to recover sums allegedly due The Home Insurance Company upon its subrogation claim against defendant. Pertinent allegations of the complaint are summarized in the numbered paragraphs which follow.

1. On or about 4 August 1968 defendant entered into an agreement with Borg-Warner Acceptance Corporation (B-WAC) entitled "Finance Agreement and Power of Attorney to Expedite Wholesale Financing," commonly known as a dealer floor-planning agreement. The primary purpose of the agreement was to facilitate the financing of purchases of merchandise for inventory by defendant.

2. Under the terms of the agreement B-WAC was to take a security interest in all merchandise for inventory which it financed for the defendant. Under Paragraph Seven of the agreement defendant agreed to hold the chattels at its risk and to carry insurance thereon with a loss payable clause in favor of B-WAC; and, if defendant failed to provide insurance,

B-WAC was authorized to obtain insurance on the merchandise and charge defendant for the cost of same.

3. On various dates between 22 October 1968 and 6 March 1969 sundry items of merchandise, including color television sets, stereos, radios, air conditioners, ranges, etc., were shipped to and received by the defendant pursuant to the financing agreement. The distributor who shipped the goods was Southern Appliances, Inc. of Charlotte, North Carolina.

4. Prior to each shipment the distributor issued an invoice setting forth each item and its price. The invoices were delivered to B-WAC with copies to defendant. B-WAC then paid the distributor for the goods and, pursuant to the agreement and its power of attorney contained therein, executed a promissory note for the cost of the merchandise with the defendant as maker and B-WAC as payee. At the same time a trust receipt was prepared listing by model and serial number the articles of merchandise shipped to defendant. A copy of both documents was forwarded to defendant pursuant to the agreement.

5. On or about 11 March 1969 defendant's building and contents, including numerous items of merchandise covered by the financing agreement, were destroyed by fire. Defendant had failed to comply with its agreement with B-WAC to insure the merchandise against fire loss and had no insurance on this merchandise at the time of the fire.

6. Long before 11 March 1969 B-WAC had purchased a blanket insurance policy from plaintiff which covered all merchandise located within the continental United States and Canada in which B-WAC had an interest under a conditional sales agreement, chattel mortgage or other similar form of encumbrance. This blanket policy was purchased by B-WAC at its own expense and contained no provisions or conditions of any kind imposing an obligation or duty on B-WAC to insure the property for the benefit of defendant or any other dealer with a floor-planning agreement with B-WAC. One of the conditions of the blanket policy was that the insurance under it be considered as *excess insurance* and not apply or contribute to the payment of any loss until any and all other insurance was exhausted.

7. In accordance with the terms of the blanket policy the plaintiff Home Insurance Company paid B-WAC $12,745.01 covering the reasonable value of merchandise destroyed in the

fire on 11 March 1969 at Ingold Tire Company's place of business. Plaintiff alleges that pursuant to the subrogation clause in the blanket policy it is subrogated to all rights and claims that B-WAC had against defendant and prays judgment for the amount it paid B-WAC plus interest, attorney's fees and costs.

Defendant filed answer denying the material allegations of the complaint and specifically denying that it owed plaintiff anything by way of subrogation or otherwise.

Jury trial was waived and, following a trial before Judge Clark, the trial court made findings of fact and conclusions of law and adjudged that plaintiff recover of defendant the sum of $12,744.11 plus interest and costs. Defendant appealed and the Court of Appeals, with Campbell, J., dissenting, vacated the judgment and remanded the cause for a new trial on the basis of alleged evidentiary errors. Plaintiff thereupon appealed to the Supreme Court as of right under G.S. 7A-30(2), and we allowed defendant's petition for certiorari to bring up for review at the same time the disputed subrogation question. Errors assigned by both parties will be discussed in the opinion.

Louis A. Bledsoe, Jr., and Yates W. Faison, III of the firm Berry, Bledsoe & Hogewood, P.A., Attorneys for plaintiff appellant.

Edwards and Manson by Daniel K. Edwards, Attorneys for defendant appellee.

HUSKINS, Justice.

In the financing agreement with B-WAC defendant agreed to obtain insurance covering floor-planning merchandise and, if defendant failed to do so, authorized B-WAC to purchase such insurance at defendant's expense. The trust receipts contained a similar promise by defendant to purchase insurance with a loss payable clause. Defendant breached its promise to purchase insurance and now contends that, since the financing agreement allowed B-WAC to obtain the insurance at defendant's expense, defendant is entitled to the benefit of the insurance proceeds paid under B-WAC's *blanket* policy, thus depriving plaintiff of any right of subrogation. The trial court and the Court of Appeals rejected this contention and held that plaintiff, having paid B-WAC's loss, was subrogated to B-WAC's rights against

defendant. We allowed defendant's petition for certiorari to review the soundness of that decision.

Defendant vigorously argues that *Insurance Co. v. Assurance Co.*, 259 N.C. 485, 131 S.E. 2d 36 (1963), applies to this case and precludes subrogation. That case involved an action for declaratory judgment to determine the respective liabilities of two insurance companies which had issued separate policies insuring a building against fire loss. The appellant's policy covered the mortgagee's interest while the appellee's policy covered the interest of the mortgagor. The premiums which the mortgagee paid to the appellant were charged to the mortgagor and became a part of the total debt owed the mortgagee. The building was subsequently destroyed by fire and the appellant claimed it was subrogated to the rights of the mortgagee against the mortgagor for the amount of the fire loss. The trial court apportioned the loss between the two insurance companies and this Court affirmed, holding that when insurance is procured by the mortgagee pursuant to the authorization and at the expense of the mortgagor no right of subrogation exists and the amount paid by the insurer must be applied to reduce or discharge the mortgagor's obligation to the mortgagee. The rationale of that case is that since the policy with the appellant had been purchased by the mortgagee (the named insured) *acting under the authority and at the expense of the mortgagor*, the proceeds of that policy must be applied to the mortgagor's debt without right of subrogation. That conclusion is sound, but the underlyling facts distinguish that case from the one before us.

The plaintiff in this case issued the blanket policy to B-WAC several years prior to the time defendant and B-WAC executed the security agreement containing the insurance provision upon which defendant relies. That insurance provision reads as follows:

> "Debtor agrees to hold the chattels in which a security interest is given at Debtor's risk and to carry insurance for full value with extended coverage upon the same, in such companies as are mutually satisfactory and to provide endorsements upon all such policies of insurance providing that the loss, if any, shall be payable to you and Debtor as their interests may appear. If Debtor fails to provide insurance, *you may do so*, and any payment so advanced

shall be additional indebtedness owed by Debtor to you and secured hereunder." (Emphasis added.)

This provision means that B-WAC was authorized but not required to purchase additional insurance for the full value of the chattels when defendant failed to do so. The provision anticipates the *future* purchase of insurance by B-WAC if, and only if, defendant fails to insure the goods. The provision certainly does not contemplate defendant's liability for a portion of the premiums on B-WAC's *preexisting* blanket policy which was in effect several years prior to execution of the financing agreement. Thus B-WAC was not authorized by the financing agreement, and had no right, to charge defendant with a portion of the premiums B-WAC had paid plaintiff on the blanket policy; and no attempt was made to do so. When B-WAC purchased the blanket policy it was not acting under the authority of or at the expense of the defendant. This distinguishes the present case from *Insurance Co. v. Assurance Co., supra,* and *Buckner v. Insurance Co.,* 209 N.C. 640, 184 S.E. 520 (1936), relied upon by defendant.

Defendant further argues that the reasoning advanced by the Supreme Judicial Court of Massachusetts in *Eastern Restaurant Equipment Co. v. Tecci,* 347 Mass. 148, 196 N.E. 2d 869 (1964), should be applied to this case. There, the Massachusetts Court held that the blanket insurer who paid the fire losses of a vendor under a conditional sales contract was not subrogated to the rights of the vendor against purchasers under the sales contract. In reaching that result the Court explicitly stated that its decision did not rest upon "general grounds" but was narrowly confined to facts *which established the purchasers' liability for the insurance premiums* and "the absence of any showing that the policy required subrogation of the insurer" to the vendor's rights against the purchasers. It follows therefore that the Massachusetts case is distinguishable since, in the case before us, the facts show that (1) defendant incurred no liability under the security agreement for premiums on the blanket policy and (2) the policy expressly provides for subrogation. *See* Vance, Handbook on the Law of Insurance § 130 at p. 775 (3d Ed. Anderson 1951).

[1] Here, the blanket policy provides that the insurance it affords "shall be considered as excess insurance, and shall not apply or contribute to the payment of any loss until the amount of such other insurance shall have been exhausted . . . . " Sec-

tion C of the blanket policy, which deals with dealer floor plans and is applicable to this case, further limits coverage to "the interest of the Assured [B-WAC] only in merchandise consisting principally of appliances in which the Assured has an interest under a conditional sales agreement, chattel mortgage or other similar form of encumbrance." Moreover, Section C expressly preserves plaintiff's right of subrogation as follows:

> "Payment for loss or damage covered hereunder will be advanced by the company, not exceeding the amount of the unpaid balance except that no claim shall attach under this insurance where the value of the salvage equals or exceeds the amount of the unpaid balance due on the property. Upon making any advance, the company shall thereupon become subrogated to all rights of recovery by the Assured, but, only (1) to the extent of any other valid or collectible insurance in effect at the time of the loss, or, (2) where there is no valid or collectible insurance and the Assured has not waived rights of subrogation either prior to or after the occurrence of any loss covered by this policy."

We note that the trial court found that insurance carried by defendant was insufficient "to cover any of the merchandise" involved in this action. This finding can only mean that defendant had no insurance against loss by fire on any of the property in which B-WAC had an interest. Thus it clearly appears that the blanket policy limits plaintiff's liability to B-WAC to that portion of the loss which is not covered by other insurance and expressly provides for subrogation (1) to the extent of other insurance; or, (2) if other insurance does not exist, to all rights of recovery which B-WAC may have against defendant. The limitation of liability and preservation of subrogation rights obviously minimize the premium charges for the blanket policy which was specifically designed and rated to provide excess insurance protection for those operating B-WAC type businesses. B-WAC purchased the policy with its own funds for its own protection. In our opinion it was never contemplated by any party that the financing agreement or trust receipts would destroy plaintiff's right to subrogation under the blanket policy. We think the facts bring this case within the established rule that when a mortgagee purchases insurance with his own funds solely for his own protection, the insurer, upon payment of the mortgagee's loss as provided in the policy, is subrogated to the rights of the mortgagee against the mortgagor. *Insurance*

Co. v. Assurance Co., supra; Batts v. Sullivan, 182 N.C. 129, 108 S.E. 511 (1921); *Insurance Co. v. Reid,* 171 N.C. 513, 88 S.E. 779 (1916); *see also ABC Supermarket, Inc. v. American Employers Insurance Co.,* 283 Ala. 13, 214 So. 2d 291 (1968); *American Equitable Assurance Co. v. Newman,* 132 Mont. 63, 313 P. 2d 1023 (1957). Accordingly, we hold that plaintiff is subrogated to the rights of B-WAC against defendant to the extent it compensated B-WAC under the blanket policy for security interests held by B-WAC in property lost in the fire.

The trial court's Finding of Fact No. 19 merely quotes the "INTEREST AND PROPERTY INSURED" provision from Section C-II of the blanket policy dealing with dual interest coverage of dealer floor plans but does not attempt to apply Section C-II in this case. The words "effective May 1, 1970" appear on the face of the quoted provision and clearly show that Section C-II is inapplicable to this case since the fire occurred more than a year prior to the effective date. The only provision of the blanket policy which could apply is Section C quoted in part above and from which the trial court applied the subrogation provision set out in its Finding of Fact No. 19. Since Section C is the only applicable provision and since it supports the trial court's legal conclusion that plaintiff is subrogated to the rights of B-WAC, the mere quoting of Section C-II in Finding of Fact No. 19 is entirely harmless. *Rhodes v. Upholstery Co.,* 197 N.C. 673, 150 S.E. 193 (1929).

Having determined plaintiff's right of subrogation, we now turn to plaintiff's assignments of error in which it is asserted that the Court of Appeals improperly remanded this case for a new trial.

Defendant contends that plaintiff failed to offer in evidence the subrogation receipt it received from B-WAC for $12,745.01. Hence, defendant argues there is no evidence in the record to show that plaintiff actually paid B-WAC the amount it now seeks to recover in this action. The Court of Appeals so held and remanded the case for a new trial. That ruling is the basis for plaintiff's first assignment of error.

The subrogation receipt is plaintiff's Exhibit 6 and the record shows the following exchange concerning the exhibit

during the examination of Robert H. Daughtry, Manager of B-WAC's Greensboro office:

"Q. Mr. Daughtry, do you know what Plaintiff's Exhibit 6 is?

A. Yes sir.

Q. What is it?

A. It is a Subrogation Receipt to Home Insurance Company.

Q. Upon receipt by B-W Acceptance Corporation of the $12,745.01 payment by Home Insurance Company—

OBJECTION AND MOTION TO STRIKE

THE COURT: It speaks for itself."

The record does not reflect that plaintiff formally offered Exhibit 6 in evidence after the above response by the trial court.

On 19 March 1974 plaintiff's counsel filed an affidavit alleging that failure of the record to include Exhibit 6 was occasioned by clerical error on the part of the court reporter. In his order of 29 March 1974 settling the case on appeal, Judge Clark stated that he "did consider plaintiff's Exhibit 6 as having been introduced in evidence."

[2] The rule is well settled that in a trial without a jury, as here, the rules of evidence governing the admission and exclusion of evidence are not so strictly enforced as in a jury trial. *Mayberry v. Insurance Co.*, 264 N.C. 658, 142 S.E. 2d 626 (1965); *McCallum v. Insurance Co.*, 262 N.C. 375, 137 S.E. 2d 164 (1964); *Bizzell v. Bizzell*, 247 N.C. 590, 101 S.E. 2d 668, *cert. denied*, 358 U.S. 888, 3 L.Ed. 2d 115, 79 S.Ct. 129 (1958). The record indicates that Judge Clark thought the subrogation receipt was competent to "speak for itself" and that he in fact considered the receipt in reaching his judgment. The record discloses no facts tending to show that the exhibit was incompetent. The only legitimate inferences to be drawn are that either plaintiff's Exhibit 6 was tendered and omitted from the record by clerical error or that plaintiff's counsel inadvertently failed to make a formal tender. In either case, we decline to hold a technical oversight constitutes reversible error when its correction would not produce a different result. *Equipment Co. v. Anders*, 265 N.C. 393, 144 S.E. 2d 252 (1965); *Bizzell v. Bizzell, supra; Johnson v. Heath*, 240 N.C. 255, 81 S.E. 2d 657

(1954). Judge Clark considered the subrogation receipt as having been offered in evidence, and so do we. Plaintiff's first assignment of error is therefore sustained.

Defendant contends that plaintiff's evidence concerning the nature and value of merchandise destroyed by fire and covered by plaintiff's blanket policy with B-WAC is insufficient to support the findings of the trial judge on that point.

To prove the value of merchandise destroyed in which B-WAC had a security interest, plaintiff offered various trust receipts prepared by B-WAC in the ordinary course of business from invoices of floor-planning items shipped to defendant by the distributor. The invoices showed the items sold, the quantity, and the price of each item. One column on the trust receipts contained the items taken from the invoices. An adjoining column headed "Release Amount" contained the amounts defendant owed B-WAC on each item. In another column headed "Date of Release" an employee of B-WAC would enter the date of payment when defendant sold an item and paid B-WAC for it and would draw a line through the model and serial number of the item released, thereby indicating that the released item was no longer subject to the security agreement. The evidence further tends to show that B-WAC made monthly physical inventories by model and serial number of all floor-planning merchandise to determine if the dealer actually had the merchandise in inventory and was paying for it as he sold it. Defendant's store was inventoried the latter part of February 1969.

Over defendant's objections plaintiff made out its claim for $12,745.01 by showing the items listed on each trust receipt (B-WAC's wholesale floor plan sheet) that had not been released and lined out by B-WAC. The Court of Appeals held that the trust receipts were admissible in evidence but were insufficient, standing alone, to prove that the chattels which had not been "released" were destroyed by fire and to prove their value. The reasoning was that some of the chattels might have been sold immediately before the fire without time for defendant to remit payment to B-WAC or that some of the chattels may have been removed from defendant's building prior to the fire. Since the trust receipts would not reflect such transactions, the Court of Appeals was persuaded that the trust receipts were insufficient to establish the fire loss. Plaintiff's second assignment of error is grounded on that holding. We now examine the validity of that assignment.

[3] Plaintiff's blanket policy covered B-WAC's interest in merchandise received by defendant under the floor-planning arrangement. Plaintiff insured B-WAC's interest in this merchandise against loss by fire and other perils enumerated in the policy. If B-WAC's security interest in an item was lost other than by an insured peril, *e.g.*, due to a sale in the ordinary course of business or due to removal from the building, then B-WAC would have no claim against plaintiff under the policy and plaintiff would have no right of subrogation for any amount paid to B-WAC under the mistaken belief that the item had been destroyed by fire or other insured peril. Therefore, it was incumbent on plaintiff to offer evidence at trial which would permit the fact finder (judge or jury) to legitimately infer the nature and value of the merchandise destroyed in the fire and covered by the blanket policy with B-WAC. In our opinion the trust receipts were sufficient for this purpose.

Fire loss can seldom be established with absolute certainty. Oftentimes the jury must rely on circumstantial evidence which logically aids the formation of a correct estimate of property loss. When, as here, a recent inventory is available, one accepted method of estimating fire loss is to supplement that inventory with evidence of the amount of goods placed in the store and the amount removed from the store between the time of the inventory and the date of the fire. *Berkshire Mutual Insurance Co. v. Moffett,* 378 F. 2d 1007 (5th Cir. 1967) ; *Worcester Mutual Fire Insurance Co. v. Eisenberg,* 147 So. 2d 575 (Fla. App. 1962) ; *Association of Credit Men v. Insurance Co.,* 44 Idaho 491, 258 P. 362 (1927) ; *Williams v. Southern Mutual Insurance Co.,* 312 Pa. 114, 166 A. 582 (1933) ; *DiFoggi v. Commercial Union Assurance Co.,* 83 Pa. Super. 518 (1924) ; *St. Paul Fire and Marine Insurance Co. v. Stell,* 20 S.W. 2d 399 (Tex. Civ. App. 1929) ; *see* 21 Appleman, Insurance Law and Practice § 12402 (1947) ; 19 Couch, Cyclopedia of Insurance Law § 79 :231 (2d Ed. Anderson 1968).

The trust receipts list all floor-planning items which the distributor shipped to defendant prior to the fire, and the evidence tends to show that B-WAC conducted a physical inventory of the items each month. This permits the reasonable inference that defendant received all items listed on the trust receipts and placed them in its inventory prior to the fire. Furthermore, the trust receipts reflect those items which were sold by defendant and released from the floor-planning agreement. In effect, the

system used here maintained a continuing inventory of the floor-planning merchandise held by defendant so that the only items that could possibly be unaccounted for at the time of the fire were items which might have been sold immediately before the fire and not released by B-WAC because payment had not been received from defendant, and items which possibly could have been removed, by theft or otherwise, from defendant's building during the period from B-WAC's last physical inventory to the time of the fire. These remote possibilities, however, do not affect the sufficiency of the information contained on the trust receipts to carry the case to the jury. Defendant agreed in the financing agreement to display the floor-planning merchandise at its place of business and not to use it in any other way without B-WAC's consent. Defendant further agreed to pay for the merchandise as it was sold. Defendant had sole possession and control of the merchandise at the time of the fire. As between the parties to this suit, only defendant's records (which were apparently destroyed in the fire) and the knowledge of defendant's employees could account for sales immediately before the fire or for other removal of merchandise from the building. Under such circumstances, if part of the property, ostensibly destroyed by fire, had been recently sold or otherwise removed from defendant's store, then defendant is the party having peculiar knowledge of such facts and therefore the better means of proving it. *Jordan v. Storage Co.*, 266 N.C. 156, 146 S.E. 2d 43 (1966); *Joyce v. Sell*, 233 N.C. 585, 64 S.E. 2d 837 (1951); *Ange v. Woodmen*, 173 N.C. 33, 91 S.E. 586 (1917); *Cook v. Guirkin*, 119 N.C. 13, 25 S.E. 715 (1896); *see* 2 Stansbury's North Carolina Evidence § 208 (Brandis Rev. 1973). Since no evidence was offered tending to impair the correctness of the information contained on the trust receipts, the trial judge was entitled to draw the legitimate inference that the trust receipts correctly reflected the inventory on hand and the value of B-WAC's security interest therein at the time of the fire. Therefore, plaintiff's second assignment of error must be sustained.

For the reasons stated the decision of the Court of Appeals is reversed with directions that the case be certified to the Superior Court of Durham County for reinstatement of the judgment of the trial court in accordance with this opinion.

Reversed.

JUNE MELODY BALLANCE, A MINOR v. DR. IRL J. WENTZ, DR. J. R. DINEEN AND NEW HANOVER MEMORIAL HOSPITAL, INC.

No. 61

(Filed 30 December 1974)

1. **Physicians and Surgeons § 17— negligence in installing traction — insufficiency of evidence**

In an action based on negligence of defendant physicians and defendant hospital in the installation and maintenance of a traction rig on plaintiff's broken arm which collapsed and allegedly caused a refracture, plaintiff's evidence was insufficient for the jury where there was a total absence of expert or other testimony that the procedure in attaching the traction rig was other than in strict conformity with approved medical and surgical practice.

2. **Rules of Civil Procedure § 43; Witnesses § 4— adverse party called as witness — impeachment**

Under G.S. 1A-1, Rule 43(b), a defendant called by plaintiff as her witness could be impeached by a letter written by such defendant.

3. **Physicians and Surgeons § 15— necessity for expert testimony**

In cases of diseases or injuries with respect to which a layman can have no knowledge at all, the court and jury must be dependent on expert evidence.

Chief Justice BOBBITT not sitting.

ON appeal from the decision of the North Carolina Court of Appeals affirming the judgment of *Peel, J.*, entered in the Superior Court of NEW HANOVER County, September 4, 1973 Session, allowing defendants' motions for directed verdicts and dismissing the action. On the basis of Judge Carson's dissent, the plaintiff brought the case here for further review.

In material part, the complaint alleged:

"VII. That on or about October 15, 1969, the minor plaintiff, June Melody Ballance, suffered a fracture, with displacement, of her upper right arm and was admitted as an in-patient in the corporate defendant's hospital under the care and treatment of the defendants; that the fracture was treated by traction.

"VIII. That on or about the 2nd day of November, 1969, while the minor plaintiff was still hospitalized at the hospital under the care and treatment of the defendants and their staffs and while the minor plaintiff's right arm was in traction, and after the fracture of the right arm

had properly relocated and was properly healing, the traction apparatus broke or came loose causing the minor plaintiff to suffer a refracture with displacement of the right arm.

"IX. That the defendants and their agents were careless and negligent in that:

(1) They failed to properly place the arm in traction and failed to install the traction so that it would not break or come loose from the arm;

(2) They failed to maintain proper care and supervision over the traction and the arm;

(3) They neglected to take necessary steps to correct defects in the traction after being warned that the traction was coming loose; and

(4) They taped the arm of the plaintiff to the traction in a negligent and careless manner.

"X. That the joint and concurrent negligence of the defendants and their staffs was the proximate cause of the injury to the plaintiff as herein stated.

"XI. That, as a result of the carelessness and negligence of the defendants and their agents, and, as a result of the arm falling from traction, surgery had to be performed on the plaintiff, leaving the plaintiff with a permanent and extremely noticeable scar, additional hospitalization and hospital and medical expenses were required, the plaintiff had to and will have to suffer severe pain which she would not otherwise have had to suffer, the plaintiff has and will suffer extreme embarrassment and mental anguish from the scar for the remainder of her life and her suffered damages are in the amount of $45,000.00."

The defendants, by answer, denied allegations of the complaint Nos. VIII through XI, and moved to dismiss under Rule 50 upon the ground the plaintiff had failed to state any claim upon which relief may be granted.

The plaintiff offered defendant Dr. Wentz as her principal witness. Dr. Wentz testified that on October 15, 1969, he undertook the treatment of the plaintiff's injuries.

" . . . I made a diagnosis based upon her complaints and my findings in the x-rays. My diagnosis at that time was that she had a severe fracture with displacement upper shaft of the humerus, right shoulder. The humerus is the tubular bone that articulates with the shoulder bone. The fracture was near the shoulder joint. The distal or far end of the fracture was jammed up into the axillary aspect of the joint.

* * * * * *

"After I rendered my diagnosis, I recommended that skeletal traction be utilized by placing a steinmann pin through the ulna. That is, through the skin on one side and out the skin on the other side so that we could apply a traction bow instrument used to attach to a pin while it is through a bone. When I say the ulna, I am talking about the ulna as it nears the shoulder joint. The pin which I have described goes into the elbow joint both from outside to inside and from inside to outside. I had protrusion of this pin on either side. This was done under local anesthesia, using a drill. The pin had small threads so that you can put it in by drilling. This was done in the emergency room.

"After this was done, she was put in a hospital bed, the traction was rigged. In other words, we attached a rope to the traction bow and the rope went through some pulleys and a weight was attached to the pin, to the rope leading from the pin. We also applied some other traction material to the forearm. This material is a sticky, porous type bandage that sticks very readily to the skin and is wrapped with an elastic bandage to help hold it in place. Through this traction bandage another rope is attached again to other pulleys and a much lesser amount of weight is attached simply to keep the arm upright. In the neighborhood of two pounds is attached."

The rig with the heavy weight was attached by a pin through the bone and by traction (and continuing pull) was intended to restore contact between the ends of the bone so that the healing process would leave the arm straight and the broken ends in proper contact. The rig with the small weight was attached by adhesive tape and elastic bandages around the arm to keep the arm elevated for the patient's comfort and to prevent any rotating movement.

The plaintiff testified that on Sunday morning, November 2nd, while she was eating breakfast and was in a turned position in bed, the traction fell. The collapse resulted from the failure of the adhesive tape and the elastic bandage around her arm to support the light weight. When the bandage gave way, the arm fell across her body. "I did experience pain in my arm. It hurt terribly. . . . [A]fter I got it back in the position it was before, it did not hurt as much but it did hurt a little bit."

A few days before the light rig collapsed, the adhesive tape holding the attachment to the arm became loose. When this was called to the attention of the nurse, new tape was attached. Dr. Wentz examined the repairs. "I believe I rewrapped the elastic bandage on one occasion. . . . This would have been about five days before we took it off."

The evidence disclosed that after the rigs were installed, the many x-ray pictures taken were made by a portable x-ray machine. The patient, because of the rigs, could not be moved through the door of her hospital room. As a result of the plaintiff's position in bed and the manner in which the rigs were set up, the portable x-ray machine was used, showing the alignment at the point of the fracture to be good. However, what the film did not show was that at the point of the fracture, viewed from different angles, the connection was not good.

The plaintiff contends the defendants were negligent in failing to attach and maintain the light rig on the plaintiff's broken arm and as a result of such negligence the rig gave way causing a fracture at the point of the original break. By her pleadings, the right to recover in this action required her to offer evidence sufficient to permit a legitimate inference that the light or auxiliary rig was negligently installed and maintained and as a result of its collapse, there was a refracture of the bone at the place of the original break.

The defendants contend the light rig was not negligently installed and its collapse did not result in a refracture and did not have any adverse effect on the bone alignment or the healing process. The x-ray pictures taken on October 29th before the rig collapsed and on November 3rd after the collapse, disclosed that there was no refracture and no change in the bone alignment. These x-rays were introduced in evidence. The discovery that the bone contact was only partial and not complete was made only after the patient was taken to the x-ray room where

photographs of the break could be taken from different angles. These disclosed the misalignment necessitating the November 5, 1969 operation. That operation, according to the testimony of Dr. Wentz, clearly showed there had been no refracture. It was stipulated and agreed between the parties that Dr. Wentz is a medical expert specializing in the field or orthopedic surgery.

The plaintiff's witness Dr. Dorman, also a specialist in orthopedics, in answer to a hypothetical question stated that the collapse of the light rig could, or might have caused a refracture. The hypothetical question failed to include the pertinent fact testified to by Dr. Wentz, corroborated by the operation, that the original fracture had healed sufficiently to make it necessary for him to use a hammer and cutting instruments to disconnect that part of the fracture where the broken ends had been in contact and had partially healed, though out of alignment. When Dr. Wentz's testimony about the partial healing of the break was called to Dr. Dorman's attention, he answered that if there was a partial healing, he would say that the collapse of the rig did not cause any refracture.

The plaintiff sought to connect the collapse of the rig and a refracture by Exhibit No. 27, a letter written by Dr. Wentz on July 22, 1970, stating that in his operation of November 5, 1969, he "was . . . surprised to see that a complete separation of this healing fracture had occurred . . . . I think that we cannot be certain as to when fracture position was lost. It could have occurred when the skin traction slipped off . . . . " On cross-examination Dr. Wentz testified: "The letter has some erroneous portions. This letter was dictated a year after surgery and I had the impression that this fracture had slipped or rotated when I saw the x-ray on November 3, 1969. [The x-ray taken in the x-ray room where full exposure was permitted.] At that time of the operation, I found that the fracture had not slipped. It was indeed quite firmly attached in a side-to-side position, and the fracture had to be disrupted using a sharp, strong instrument, and this time including a hammer to relocate . . . the fractured ends." This letter was written without review of the many x-ray pictures taken during the treatment. "In my opinion, there was not time between November 2, 1969, the date the traction is alleged to have slipped, and November 5, 1969, the date I performed the operation for the callous that I found to have formed." The letter stated: "Callous representing healing was present on 10-29-69."

At the close of the evidence, Judge Peel ruled as a matter of law that the plaintiff's evidence, considered in the light most favorable to her, was insufficient to raise a jury question and summary judgment was entered dismissing the action.

On plaintiff's appeal, the Court of Appeals by a vote of two to one, affirmed the judgment of the superior court. By reason of Judge Carson's dissent, the plaintiff has brought the case here for our further review.

Chambliss, Paderick, Warrick & Johnson, P.A. by Joseph B. Chambliss for plaintiff appellant.

Poisson, Barnhill & Butler by M. V. Barnhill, Jr., for defendants Dr. Irl J. Wentz & Dr. J. R. Dineen.

Hogue, Hill, Jones, Nash & Lynch by William L. Hill II for defendant New Hanover Memorial Hospital, Inc.

HIGGINS, Justice.

In order to make out her case, the plaintiff was required to offer competent evidence sufficient to permit the jury to make legitimate findings: (1) The defendants negligently failed properly to install and to maintain the small or auxiliary rig attached to plaintiff's arm; (2) the failure resulted in the rig's collapse; (3) the collapse caused a refracture of the bone in the arm; (4) the plaintiff suffered damages as a result of the negligence. A failure to establish any link in the above chain would break continuity and would be sufficient legal ground to defeat plaintiff's claim and to require the court to sustain the motion to dismiss.

All the evidence came from the witnesses called by the plaintiff. Dr. Wentz, a defendant, testified describing the diagnosis, operation, treatment, and the installation and purpose of two rigs designed to aid in restoring and keeping proper bone alignment. He identified x-ray photographs taken four days before and three days after the small rig collapsed. These photographs showed there was no change in the bone position at the point of the break between the dates October 29th and November 5th. He testified unequivocally that at the time he performed the operation on the latter date, he found the broken ends of the bone, though out of exact alignment, had healed to the extent that he was required to use heavy instruments, including a hammer, to separate the joinder in order that he might re-

position the ends of the bone, restoring proper alignment. He testified that in the diagnosis and treatment he followed approved medical and surgical procedures.

There is a total absence of expert or other testimony that the procedure followed in attaching the light rig to the patient's arm was other than in strict conformity with approved medical and surgical practice. There was evidence the adhesive tape which held the light rig, after several days, began to come loose from the skin. When this fact was called to the attention of the nurse, she applied additional tape. Dr. Wentz checked and rewound the elastic bandage after the repairs were made by the nurse. Thereafter, the weight, though light, caused the bandage to break loose from the arm resulting in the collapse. A showing the rig collapsed is not enough to show negligence. Something more must be shown before negligence may be inferred. *Boyd v. Kistler,* 270 N.C. 744, 155 S.E. 2d 208; *Galloway v. Lawrence,* 266 N.C. 245, 145 S.E. 2d 861; *Hunt v. Bradshaw,* 242 N.C. 517, 88 S.E. 2d 762; *Hawkins v. McCain,* 239 N.C. 160, 79 S.E. 2d 493.

Plaintiff argues she has offered sufficient evidence to justify the jury in finding the collapse of the rig caused a refracture, notwithstanding the testimony of Dr. Wentz to the contrary. In support of her contention, her counsel produced and Dr. Wentz identified a letter he wrote on July 22, 1970. The letter stated: "I . . . was, of course, surprised to see that a complete separation of this healing fracture had occurred, making it mandatory that some surgical treatment be instituted. . . . In summary, I think that we cannot be certain as to when fracture position was lost. It could have occurred when the skin traction slipped off . . . . " The letter was introduced as plaintiff's Exhibit No. 27.

On cross-examination, Dr. Wentz by way of explanation testified: "The letter has some erroneous portions. This letter was dictated a year after surgery and I had the impression that this fracture had slipped or rotated when I saw the x-ray on November 3, 1969. At that time of the operation, I found that the fracture had not slipped. It was indeed quite firmly attached in a side-to-side position, and the fracture had to be disrupted using a sharp, strong instrument, and this time including a hammer . . . . It had to be disrupted to relocate the fractured ends, and then put them in a better position, using a Rush pin. . . . The terms that I used in this letter, including the term 'complete

separation of this healing fracture,' I will repudiate at this time. . . . Yes, I would also repudiate the statement 'In summary, I think that we cannot be certain as to when fracture position was lost.' "

In a further effort to show the collapse caused a refracture the plaintiff called Dr. Dorman, also a qualified expert in orthopedics. In answer to a hypothetical question, Dr. Dorman stated that the collapse of the rig could, or might have caused a refracture. However, when the extent of the healing process disclosed by the x-rays and the operation was included in the question, Dr. Dorman said that his opinion would be the collapse did not cause a refracture.

[1] The plaintiff was without expert or other testimony showing negligence in installing or maintaining the light rig. All the testimony was to the contrary. All the damages and all liability alleged in the complaint are grounded on negligence in the installation and maintenance of the auxiliary rig resulting in a refracture. "A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader." *Davis v. Rigsby,* 261 N.C. 684, 136 S.E. 2d 33. Rule 15(b), Rules of Civil Procedure is inapplicable in this case. Here the pleadings specifically raise the issues. *Roberts v. Memorial Park,* 281 N.C. 48, 187 S.E. 2d 721.

[2] Prior to the adoption of the new Rules of Civil Procedure, the plaintiff would have been precluded from offering Exhibit No. 27 for the purpose of impeaching the testimony of her witness Dr. Wentz. The old rule is stated in 7 Strong N. C. Index 2d, Witnesses, § 4, page 694: "Since a party calling and examining a witness represents him to be worthy of belief, he may not impeach the credibility of such witness, even though the witness is the adverse party." *Powell v. Cross,* 263 N.C. 764, 140 S.E. 2d 393. However, the new Rules of Civil Procedure have made significant changes. Rule No. 43(b) provides: "*Examination of hostile witnesses and adverse parties.*—A party may interrogate any unwilling or hostile witness by leading questions and may contradict and impeach him in all respects as if he had been called by the adverse party."

Under the new rule, Dr. Wentz, though called by the plaintiff as her witness, nevertheless may be impeached by his letter. Apparently the letter could be treated as an admission against

interest. *Board of Education v. Lamm,* 276 N.C. 487, 173 S.E. 2d 281.

Even if it be found the letter (Exhibit No. 27) is an admission against interest, nevertheless the letter in no wise suggests there was negligence in the use or maintenance of the light rig, causing its collapse. A showing of negligence in such matters was vital to the plaintiff's case. By failure to show the negligence alleged in the complaint, the plaintiff has failed to carry the burden of proof.

The judgment in the superior court and the decision of the Court of Appeals are supported by the record and are in accordance with our case law. This conclusion is sustained by the following and many other authoritative decisions of this Court. In the light of the pleadings, the evidence, and the principles of law hereinafter discussed, no issue of fact triable by a jury was presented. Hence, Judge Peel was required to grant defendants' motion to dismiss. *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297; Rule 50(a), Rules of Civil Procedure, G.S. 1A-1.

[3] In this, as in all cases involving negligent failure of the surgeon or physician to render professional treatment for diseases or injuries, the plaintiff cannot rely on common knowledge or lay testimony to make out a case for the jury. In cases of diseases or injuries "with respect to which a layman can have no knowledge at all, the court and the jury must be dependent on expert evidence. There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury." *Smith v. Wharton,* 199 N.C. 246, 154 S.E. 12.

"Thus, it is not enough to absolve the physician from liability that he possesses the required professional knowledge and skill. He must exercise reasonable diligence in the application of that knowledge and skill to the particular patient's case and give to the patient such attention as the case requires from time to time. *Galloway v. Lawrence, supra.* On the other hand, a qualified physician, who forms his judgment after a careful and proper examination or investigation of the particular patient's condition, is not an insurer of his diagnosis or of the success of his treatment and is not liable for an honest error of judgment." *Dickens v. Everhart,* 284 N.C. 95, 199 S.E. 2d 440.

"In order to warrant a jury in finding liability on the part of the surgeon, negligence must be established by the evidence. In order to escape nonsuit, evidence sufficient to permit a legitimate inference of facts constituting negligence must be offered. *Nash v. Royster,* 189 N.C. 408, 127 S.E. 356. Ordinarily, the Court must determine as a matter of law whether the evidence in its light most favorable to the plaintiff is sufficient to permit legitimate inference of the facts necessary to be proved in order to establish actionable negligence. *Construction Co. v. Board of Education,* 262 N.C. 295, 136 S.E. 2d 635. 'It is the duty of the court to allow the motion (nonsuit) in either of two events: First, when all the evidence fails to establish a right of action on the part of the plaintiff; second, when it affirmatively appears from the evidence as a matter of law that the plaintiff is not entitled to recover.'" *Lentz v. Thompson,* 269 N.C. 188, 152 S.E. 2d 107.

"Proof of what is in accord with approved surgical procedure and what constitutes the standard of care required of the surgeon in performing an operation, like the advisability itself, are matters not within the knowledge of lay witnesses but must be established by the testimony of qualified experts." *Hunt v. Bradshaw, supra.*

When tested by the foregoing rules, the evidence of actionable negligence on the part of either of the physicians or the hospital was insufficient to be submitted to the jury. This record leaves the impression that a competent and skillful orthopedic surgeon gave expert treatment to a patient, age thirteen, for an extremely serious injury. The lower end of the broken bone in her upper right arm was jammed into her shoulder. The ends of the broken bone overlapped by as much as one inch. Dr. Wentz concluded that on account of her tender age, a cutting operation to realign the broken ends so soon after the injury might so disturb and disrupt the tendons, nerves, and blood vessels that continued growth of the arm would be endangered leaving it shorter and smaller than the left. Hence, he decided to apply traction to the lower arm and by the pulling force of the weight, gradually extend the lower arm until the broken bone was properly joined and realigned. However, x-rays taken after the rig was removed, disclosed the misalignment necessitating the operation. In the meantime, however, the ligaments, tendons, blood vessels, etc. had approached their normal condition. The opera-

tion turned out to be successful, leaving the arm as good as new except for the scar.

Judge Peel was correct in entering judgment dismissing the action. The decision of the Court of Appeals was correct in affirming the judgment. That decision is now

Affirmed.

Chief Justice BOBBITT not sitting.

STATE OF NORTH CAROLINA v. MAMIE LEE WARD

No. 88

(Filed 30 December 1974)

1. **Jury § 7— jurors opposed to death penalty — challenge for cause proper**

Defendant who was on trial for first degree murder was not denied a fair trial or due process or equal protection of the laws where the solicitor was allowed to challenge eighteen jurors for cause upon their statements on voir dire that they would not under any circumstances vote for a verdict requiring imposition of the death penalty.

2. **Criminal Law § 112— reasonable doubt — definition proper**

The trial court's definition of reasonable doubt which first stated ten things that are not sufficient to constitute a reasonable doubt did not confuse or mislead the jury where the court gave equal stress to the affirmative aspects of the definition.

3. **Criminal Law § 130— notes taken by jury — no prejudice**

Defendant was not prejudiced where three jurors took notes during the trial and carried them into the jury room for use during their deliberations.

4. **Homicide § 30— intentional shooting — no involuntary manslaughter**

The trial court in this first degree murder prosecution did not err in failing to instruct the jury on the lesser included offense of involuntary manslaughter where defendant, by her own statement, intentionally discharged a gun under circumstances naturally dangerous to human life.

5. **Homicide § 30— shooting of boyfriend — no voluntary manslaughter**

When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearly indicating that the act has just been completed or is proximate, and the killing follows, it is manslaughter, but that rule does not apply when a defendant and deceased are not husband and wife; therefore, defendant, who shot

her boyfriend as he sat and talked with defendant's rival in his home, was not entitled to have the issue of her guilt of voluntary manslaughter submitted to the jury.

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

APPEAL by defendant under G.S. 7A-27(a) from *James, J.*, 17 September 1973 Criminal Session of EDGECOMBE, docketed and argued at the Spring Term 1974 as Case No. 30.

Defendant was tried and convicted of first degree murder upon an indictment, drawn under G.S. 15-144, which charged that on 19 July 1973 she "did kill and murder Frank Parker."

The State's evidence tends to show: About 8:00 p.m. on 19 July 1973 Frank Parker was seated in the den of his residence talking to Lucy Taylor, his girl friend of five months. Lucy had been there approximately thirty minutes when the phone rang. She answered it by saying, "Parker's residence." The person calling immediately hung up without speaking. Approximately ten minutes later, as she and Parker were talking, Lucy heard someone leave the front porch and walk around to the back door. She heard the back doorknob turn but did not hear anyone come inside. However, she told Parker he should see who was coming in. He got up, moved to a spot in the den from which he could see both the front and the back door, and reported he saw no one; that if "somebody was out there they had nothing to do but knock." He then sat back down and, at Lucy's request, dialed a telephone number for her.

Lucy had been talking on the phone a minute or two when the front door opened, and defendant appeared with "a shotgun lifted at an angle ready to fire." She fired the gun toward Frank Parker, who was "sitting relaxed on the couch." He was hit on the chin. As defendant broke the gun open and attempted to reload it, Lucy fled from the room and jumped out the back window. In her opinion, Parker had been fatally wounded. He said nothing before or after he was shot.

In response to a call, received about 8:15 p.m., William L. Melton, a police officer of the City of Rocky Mount, went to Parker's home. Upon entering the living room through the front door he observed a live shotgun shell on the floor in direct line with the door. To the left, towards the door into the den, he saw a spent shell on the floor. In the den he found a black male sitting on the couch, a large amount of blood about his person, and a

hole to the right of the center of his face about his mouth. In Melton's opinion the man was dead at the time. There was no living person in the house at the time Melton arrived. In the middle bedroom he saw three rifles or shotguns over in the corner.

At 8:25 p.m., S. F. Watson, detective sergeant of the Rocky Mount Police Department, interviewed defendant at the police station. After she had been fully advised of all her constitutional rights, and had signed the standard waiver of rights, she told the officers that she had shot Frank Parker at his house. In answer to Watson's questions she made the statement summarized below.

Defendant and Frank had been having trouble a little over a month. She walked over to Frank's house, went to the rear door, and entered through the kitchen. Frank saw her and motioned her into the rear bedroom, adjacent to the kitchen. From there she went into the adjoining bedroom where Frank kept his guns. She got a gun from a rack on the wall and then walked through the bedrooms into the living room. There she aimed the gun at Frank Parker and shot it. She then left the house through the front door, called a cab from a friend's house and came to the police station.

After she had made the foregoing statement she told the officers that she was upset and would like time to think before answering any more questions. The interrogation ended, and Watson accompanied Detective Mullen to Parker's home, where they joined Officer Melton. They entered the living room and found a single-barrel shotgun in the corner just right of the door. The gun smelled of fresh gun powder and was about three feet from the spent shell on the living room floor.

The following morning Dr. F. W. Avery, a pathologist, performed an autopsy on Parker's body. He testified that Parker's death resulted from a hemorrhage secondary to a gunshot wound in the face.

Defendant offered evidence which tended to show: For approximately two and a half years prior to May 1973, defendant and Frank Parker had lived together at 320 Olive Street. Defendant kept her personal possessions at Parker's house, shared living expenses with him, and cooked his meals. During this period they had taken a vacation bus tour to Canada, and on Labor Day 1972 they had attended a family reunion of de-

fendant's relatives in Hampton, Virginia. In May 1973 defendant's daughter, Brenda Ward, returned to Rocky Mount from New Jersey with a baby, and defendant moved into an apartment at 520 Gay Street with her.

William R. Gaynor, a cab driver, testified that sometime after 6:00 p.m. on 19 July 1973 he picked up defendant at the corner of Middle and Gay Streets and took her to 320 Olive Street. At that time she appeared normal to him and had no gun as far as he could see. He thought he was taking her home. He had "picked her up and taken her there before."

Defendant's testimony, summarized except when quoted, tends to show: She is 52 years old and, on 19 July 1973, was employed as a cook at the Carolina Cafe. She has been separated from her husband for 19 years. Her three children were grown. She had known Frank Parker about twenty years, and they had lived together for three. They broke up housekeeping on 19 July 1973 because her daughter returned to Rocky Mount with a baby, and she decided that it was best for her to be with them. When she and Frank discussed the move he said to her, "Well, it won't be no difference between us, baby. You come to see me and I can go see you. You will still be home." Until her daughter came home defendant slept every night at 320 Olive Street, but thereafter she "went backwards and forwards." She "would go over there and spend the night and sometimes . . . stay half the night." She saw Frank just about every day; he was her "boy-friend." When he got off work at 6:00 he would stop by to see her. On the afternoon of July 18th he had stopped by and asked her to come to his house. The next day, about 8:00 p.m. (traveling in a cab), she went to Frank's house just like any other night. As usual she went in the back door without knocking and entered the kitchen. She heard Lucy talking on the telephone and heard her stop to tell Frank that somebody was walking in his house. Frank came into the kitchen and, without a word, waved defendant into the back bedroom.

In material part, defendant's account of subsequent events is as follows: "I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedrooms and in the living room. And that's when I fired. But I didn't want to kill him. It was so fast and I got upset. I don't really know exactly what happened. I saw Lucy. She and Frank were sitting on the couch. . . . When Frank come in there and waved

for me to go in the back bedroom, I got upset and I couldn't think. It was two guns on the rack and I just reached right up and got it. . . . I don't know where I got the shells. I don't remember even loading the gun. . . . This was a man I loved. A man I did not want to hurt. . . . I really don't know what I was intending to do when I reached up and got the shotgun. I can't express what I was thinking. I was not intending to shoot him. . . . I saw him fall back after I had fired the shotgun. I just walked out the door. I called a cab and went to the police station. . . . I went to the police station to give up. I told them that I had shot him."

Defendant testified that she had previously met Lucy Taylor; that she had seen her at Frank's house three times. She had come when defendant was there. Defendant and Frank had "talked about Lucy because she called a lot."

The court instructed the jury to return one of three verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, or not guilty. The verdict was "Guilty of murder in the first degree." The court imposed the sentence of death and defendant appealed.

Robert Morgan, Attorney General and John R. B. Matthis, Assistant Attorney General, for the State.

Chambers, Stein, Ferguson & Lanning and Howard A. Knox, Jr., for defendant appellant.

MOORE, Justice.

[1] The record discloses that in the selection of the jury "the solicitor was allowed to challenge for cause 18 prospective jurors after said 18 jurors stated on voir dire that he or she would not under any circumstances, regardless of the evidence, consider joining in a verdict the result of which the death penalty would be imposed, but would automatically vote against such a verdict regardless of the evidence and would not even consider such a verdict in his or her deliberation of the case." Defendant's first assignment of error is that the exercise of these 18 challenges by the State denied her (1) the fair trial by an impartial jury guaranteed by U. S. Const. Amend. VI, and (2) due process and the equal protection of the laws guaranteed by U. S. Const. Amend. XIV.

The foregoing contentions have been repeatedly overruled by this Court and so recently discussed that it would serve no

useful purpose to re-examine them here. *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). *See Witherspoon v. Illinois,* 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968).

With reference to the voir dire examination of the eighteen jurors whom the State challenged for cause, defendant makes the novel argument that when prospective jurors are told the crime for which the defendant is being tried carries a mandatory death penalty, they are given information which is irrelevant to the jury's function, "thereby confusing it as to its proper role." It is inconceivable to us that a jury could try a capital case without finding out it was doing so. Certainly, any effort to keep this information from the jury could only result in confusion and resentment. A defendant, charged with a capital crime and convicted by a jury which did not know the death penalty was involved, would surely contend that he had been prejudiced by its ignorance. Jurors trying a capital case can reasonably be counted on to weigh the evidence with the greatest care and to require proof of the defendant's guilt beyond a reasonable doubt, and assumedly counsel for defendant can be counted on to point out to the jury the consequences of their failure to do so. *See State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817 (1974); *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974).

Defendant's assignment of error No. 1 is overruled.

[2] Defendant's third assignment of error is to that portion of the judge's charge in which he defined reasonable doubt as follows:

"You have heard during the trial of this case the term 'reasonable doubt' used many times, so the question arises, what kind of a doubt is a reasonable doubt? You must have some understanding and knowledge of what reasonable doubt is before you can properly perform your duty as jurors in this case. And so I instruct you that a reasonable doubt is not just any kind of doubt, it is not just a possible, imaginary or fanciful doubt; it is not a doubt which might be prompted or suggested to your mind by sympathy for the defendant or her people or family; it is not a doubt which might be born of a merciful inclination or disposition on your part to permit the defendant to escape the penalty of the law; it is not a doubt which originates

in your mind by some ingenious or illogical twist or misconstruction of the evidence. Your mind and judgment should tell you that a doubt would not be reasonable if it was founded upon or suggested by any of these considerations. On the contrary, a reasonable doubt is a sane, sensible, honest doubt based upon reason and common sense. It is an actual, honest and substantial misgiving or doubt of guilt or question of guilt which reasonably arises from the evidence or from the lack of evidence or the insufficiency of the evidence, and a reasonable doubt exists and exists only when the evidence or proof honestly fails to convince or satisfy your judgment and reason to a moral certainty of the guilt of the accused. Thus, if the evidence or proof is such that after due consideration of all the evidence you are fully convinced and entirely satisfied, not to an absolute certainty but to a moral certainty, of the truth of the charge, then you would be satisfied beyond a reasonable doubt and it would be your duty to return a verdict of guilty. On the other hand, if after weighing and considering all of the evidence, you have an actual, honest, substantial misgiving or question as to guilt, a sane, rational doubt based on reason and common sense, then you would have a reasonable doubt, and it would be your duty to give the defendant the benefit of that doubt and to return a verdict of not guilty."

Defendant contends that by first stating "that a reasonable doubt is *not* ten different things" the court overemphasized its negative aspects and left the jury with the impression "that a reasonable doubt is a rare thing indeed, if it ever exists at all." Conceding *arguendo* that the judge overdefined reasonable doubt, it appears nevertheless that he did give equal stress to the affirmative aspects of the definition. We cannot believe that the jury was misled or confused. Notwithstanding, we repeat what this Court has said a number of times, "The words 'reasonable doubt' in themselves are about as near self-explanatory as any explanation that can be made of them." *State v. Wilcox*, 132 N.C. 1120, 1137, 44 S.E. 625, 631 (1903); *State v. Phillip*, 261 N.C. 263, 269, 134 S.E. 2d 386, 391 (1964). In any event we again recommend to the trial judge the shorter, approved definitions, appearing in numerous decisions of this Court. *See State v. Hammonds*, 241 N.C. 226, 85 S.E. 2d 133 (1954). Defendant's third assignment of error is overruled.

[3] Defendant's assignment of error No. 7 is that the court erred in denying her motion to set aside the verdict because

three jurors had taken notes into the jury room for use during their deliberations. When this motion was made the judge immediately and carefully examined the jury. His examination revealed that two jurors had noted the names of the witnesses who had testified and had made some notes during the charge. A third juror had noted the court's definitions of first and second degree murder. Counsel for defendant, who said they had been unaware of the note-taking, argued that it raised such serious questions "concerning the integrity of the jury's process of deliberation" as to invalidate the verdict. We find nothing in the record which supports this contention.

Since defense counsel were unaware that the three jurors were taking notes, it is not to be assumed that their writing distracted the attention of the other jurors from the testimony. As defendant states in her brief, "The trial was both short and simple"; so it is quite unlikely that the three jurors' notes gave them a position of undue influence in the jury's deliberations. As Chief Justice Parker said in *State v. Shedd,* 274 N.C. 95, 104, 161 S.E. 2d 477, 484 (1968), "Most authorities in this Nation take the view that the making and use of trial notes by the jury is not misconduct but is proper, and may even be desirable, where it is unattended by undue consumption of time. *S. v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, cert. den. 377 U.S. 978, 12 L.Ed. 2d 747; *Cowles v. Hayes,* 71 N.C. 230; Annot. in 14 A.L.R. 3d 831 *et seq.* entitled 'Taking and Use of Trial Notes by Jury'; 89 C.J.S., Trial, § 456; 23A C.J.S., Criminal Law, § 1367. . . . " *See* 75 Am. Jur. 2d, *Trial* § 934 (1974). Assignment of error No. 7 is overruled.

Defendant stresses most strenuously her assignment of error No. 6, that the court erred by failing to instruct the jury on the lesser offenses of voluntary and involuntary manslaughter. "The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954). This assignment, therefore, presents the question whether the record contains any evidence which would support a verdict of either involuntary or voluntary manslaughter.

[4] Involuntary manslaughter is the unintentional killing of a human being without either express or implied malice (1) by

some unlawful act not amounting to a felony or naturally dangerous to human life, or (2) by an act or omission constituting culpable negligence. *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889 (1963). *See State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129 (1971). Clearly the evidence did not justify a charge on involuntary manslaughter. Defendant makes no contention that the gun was discharged accidentally. On the contrary she testified, "I went in the back bedroom and I sat there on the bed and then I jumped right up and I run and grabbed the gun and went right in the room. I went through the bedrooms and in the living room. *And that's when I fired.* But I didn't want to kill him. . . . " (Emphasis added.) By her own statement defendant intentionally discharged the gun under circumstances naturally dangerous to human life.

[5] It is equally clear that the evidence will not support a verdict of voluntary manslaughter. The killing did not result from the use of excessive force in the exercise of the right of self-defense; nor was it the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. *See State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Merrick,* 171 N.C. 788, 88 S.E. 501 (1916); *State v. Baldwin,* 152 N.C. 822, 68 S.E. 148 (1910). *See also State v. Wrenn, supra* at 687, 185 S.E. 2d at 136.

The following circumstances aroused the passion upon which defendant relies to reduce the homicide from murder to manslaughter: She found her boyfriend of three years entertaining her rival in the den of his home on an evening when he had invited defendant to visit him. Then, in order to avoid a confrontation between the two women, he had silently waved defendant into a back bedroom and then resumed his conversation with Lucy as if defendant were not in the house.

Defendant and deceased were not husband and wife. However, even had they been lawfully married to each other, his conduct would not, in law, have constituted adequate cause for passion which would mitigate the killing to manslaughter. Defendant did not find Parker and Lucy in the act of adultery. On the contrary, both were fully clothed, sitting on the sofa in the den, and Lucy had been talking on the phone at the time defendant entered the house.

When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in

the very act of intercourse, or under circumstances clearly indicating that the act had just been completed, or was "severely proximate," and the killing follows immediately, it is manslaughter. However, a mere suspicion, belief, or knowledge of past adultery between the two will not change the character of the homicide from murder to manslaughter. The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin. *State v. John,* 30 N.C. 330 (1848); *State v. Samuel,* 48 N.C. 74 (1855); *State v. Avery,* 64 N.C. 608 (1870); *State v. Harman,* 78 N.C. 515 (1878). *See State v. Holdsclaw,* 180 N.C. 731, 105 S.E. 181 (1920); 40 C.J.S., *Homicide* § 49 (1944); 40 Am. Jur. 2d, *Homicide* § 65 (1968).

Defendant argues that where a relationship comparable to that of husband and wife has been of long standing "the rule of mitigation should extend beyond the marital relation" and that "this case comes squarely within the modern view of adequate provocation." In our view the words of Justice English in *People v. McDonald,* 63 Ill. App. 2d 475, 480, 212 N.E. 2d 299, 302 (1965), are appropriate here: "In the first place we do not think that the facts in evidence disclose the 'compromising situation' which defendant uses as the base for his argument. Beyond that, however, we are aware of no case which applies the exculpatory features of *crime passionel* to the killing of a mistress, regardless of the duration of the relationship. We will not do so in this case." *See Cyrus v. State,* 102 Ga. 616, 29 S.E. 917 (1897); 40 C.J.S., *Homicide* § 49. Defendant's assignment of error No. 6 is overruled.

Defendant's assignment of error No. 8, that the death penalty constitutes cruel and unusual punishment a violation of U. S. Const. amends. VIII and XIV, has heretofore been decided adversely to defendant's contentions. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404 (1971); *State v. Atkinson,* 278 N.C. 168, 179 S.E. 2d 410 (1971).

Defendant brought forward nine assignments of error. All have been most carefully considered; none discloses prejudicial error.

No error.

Chief Justice Bobbitt, Justice Higgins, and Justice Sharp dissent as to the 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), the homicide involved herein having been committed in July 1973, that is, in the period between 18 January 1973, the date *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, was decided, and 8 April 1974, the date N. C. Sess. Laws, Ch. 1201 (1973), which rewrote G.S. 14-21, became effective.

LEE HUTCHINS v. WILENA GOODSON HONEYCUTT

No. 80

(Filed 30 December 1974)

1. **Specific Performance; Vendor and Purchaser § 5— contract to convey land — specific performance**

A binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced.

2. **Specific Performance; Vendor and Purchaser § 5— specific performance of contract**

Specific performance of a contract is generally decreed only when it is equitable to do so; accordingly, a plaintiff cannot obtain specific performance when a contract is unfairly procured by overreaching on plaintiff's part, or is induced or procured by means of oppression, extortion, threats or illegal promises on his part, even though these matters are not of such character as would justify a court of equity in rescinding the contract or a court of law in refusing relief.

3. **Specific Performance; Vendor and Purchaser § 5— contract to sell land — overreaching by buyer — insufficiency of evidence**

The evidence was insufficient to support a finding that defendant's contract to convey her land was procured by unfair and overreaching conduct on plaintiff's part, and the court erred in denying specific performance of the contract, where the evidence tended to show that plaintiff knew defendant's husband was an invalid and that defendant had recently been treated for cancer but that neither her treatment for cancer nor any other physical or mental infirmity played a part in her execution of the contract, the evidence showed that defendant's brother took part in the negotiations for sale of the property but there was no evidence that her brother acted in bad faith and against her best interest, there was no contention or evidence that the purchase price agreed upon was not fair and reasonable, and

the totality of the evidence suggests that defendant changed her mind when she discovered her husband did not want her to sell the land.

Chief Justice BOBBITT not sitting.

Justices SHARP and BRANCH concur in result.

APPEAL by defendant from decision of the Court of Appeals, 22 N.C. App. 527, 207 S.E. 2d 333 (1974), reversing order by *Martin (Harry C.), J.*, 4 June 1973 Schedule A Session, BUNCOMBE Superior Court.

Plaintiff brought this action to compel defendant to convey to plaintiff approximately thirty-five acres of land for $35,000.00 pursuant to a written contract executed by the parties. Plaintiff paid $100.00 down with balance due on delivery of the deed. The contract stipulated that the transaction should be closed on or before 28 April 1972. However, on 22 April 1972 defendant wrote plaintiff that her husband would not agree to the sale. She returned plaintiff's check in the amount of $100.00, uncashed, and informed him that the sale would not be made. Plaintiff thereupon brought this suit for specific performance.

The case was initially tried before Judge Martin in June 1973, and the following issues were submitted to and answered by the jury:

"FIRST: Did Wilena Goodson Honeycutt execute the paper writing set out in the Complaint?

ANSWER: Yes.

SECOND: Is $35,000.00 a reasonable and fair price for the property in question?

ANSWER: Yes.

THIRD: Did Wilena Goodson Honeycutt breach said contract?

ANSWER: Yes.

FOURTH: Is the plaintiff, ready, able and willing to carry out his part of said contract?

ANSWER: Yes."

Notwithstanding the verdict, Judge Martin refused to enter judgment decreeing specific performance but entered the following order instead:

"THIS CAUSE coming on before the undersigned Judge after the returning of the verdict of the jury and upon

the tendering by the plaintiff of Judgment requesting specific performance of the contract referred to in the pleadings, and, after considering the record proper and the testimony of the witnesses and verdict of the jury, the Court finds the following facts:

That the defendant inherited most of the property which is the subject of this lawsuit from her family, and that her husband purchased some additional acres and had them conveyed to the defendant; that her husband paid the taxes on the property. That, in December of 1971, the plaintiff [sic] had a serious operation for cancer, and, during January and February of 1972, took treatment of cobalt for this condition;

That the property referred to was the old Home Place of the defendant, and she has two children, one being a son. That, during March of 1972, the plaintiff entered into negotiations with the defendant's brother concerning the purchase of the property in question. That he did not talk with the defendant until he had made some tentative agreement with the brother, Bill Goodson; that the defendant was called to come to the home of her brother, at which time she was told concerning the agreement to sell the property; that she was told to go to the office of Attorney Floyd Brock for the purpose of executing a contract for the sale of the property;

That the plaintiff had known the defendant for some time; that he knew that she was married and that her husband was an invalid; that he had heard that she had suffered from cancer and had been under a physical and mental strain;

That he knew that the property was part of the old Goodson Home Place;

That the defendant went to the office of Attorney Floyd Brock and was shown a paper in his office, but she does not recall the contents of the paper, although she did have an opportunity to read the paper, and she signed the paper. That the paper was a contract in writing for the sale of the defendant's property to the plaintiff, for a price of $35,000;

That the plaintiff did not have any express or specific purpose for the use of this property; that it did not adjoin

his property although it was in the same neighborhood; that the plaintiff was not assembling property of which the subject property was to be a part; that the record does not have any evidence to show that the plaintiff required this specific property for any particular use to which other property could not be put; that, except for its location, there is no evidence to indicate that this propery has any special value or special purposes or use to which the plaintiff had planned to utilize the property;

That, after the execution of the contract, that the defendant returned the plaintiff's $100.00 deposit and sent a letter to him stating that her husband would not agree to the sale, that he would not join in the execution of the deed, and further, that she had been under a difficult physical and mental strain, and advised the plaintiff that she could not convey the property to him;

That the record does not contain any evidence that the property is worth at the time of trial any amount in excess of the $35,000 purchase price.

ON THE FOREGOING FINDINGS OF FACT, THE COURT MAKES THE FOLLOWING CONCLUSIONS OF LAW:

That, although the contract found by the jury is a lawful contract and the Court could not set the same aside, this Court does find that the contract was procured by overreaching the defendant at a time at which her mental and physical condition was impaired and when she was under emotional stress, and the agreement was procured with a degree of unfairness which induces this Court to withhold its aid in the specific performance of the agreement, this Court being of the opinion in the exercise of its judicial discretion, that under the rules set forth in *Knott vs. Cutler,* 224 N.C., p. 430, that equity should not be granted to the plaintiff to require the specific performance of this agreement.

Upon the foregoing findings of fact and conclusions of law, IT IS THEREFORE HEREBY ORDERED, in the exercise of the discretion of the Court, that the plaintiff's prayer for specific performance of the contract in question be, and the same is hereby denied.

IT IS FURTHER ORDERED that this cause shall be placed upon a subsequent calendar for trial before a jury upon the following issue: 'What amount is the plaintiff entitled to recover from the defendant?'

This, the 15th day of June, 1973.

/s/ Harry C. Martin
Judge Presiding"

At the trial on the issue of damages before Judge Friday and a jury at the 7 January 1974 Session, Buncombe Superior Court, the jury answered the issue "Nothing." Plaintiff, having preserved his exceptions and assignments of error with respect to the order of Judge Martin denying specific performance, appealed to the Court of Appeals. That court reversed and remanded the case to the Superior Court of Buncombe County for entry of judgment decreeing specific performance of the contract, Judge Morris dissenting. Defendant thereupon appealed to the Supreme Court pursuant to G.S. 7A-30(2). Evidentiary matters not herein set out, but pertinent to the question posed for decision, will be recited in the opinion.

S. Thomas Walton, attorney for plaintiff appellee.

Morris, Golding, Blue and Phillips by William C. Morris, Jr., attorneys for defendant appellant.

HUSKINS, Justice.

The sole question for our determination is whether, under the facts and circumstances disclosed on the record, the plaintiff is entitled to a decree of specific performance.

[1] "It is accepted doctrine that a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced." *Combes v. Adams,* 150 N.C. 64, 63 S.E. 186 (1908); *Boles v. Caudle,* 133 N.C. 528, 45 S.E. 835 (1903); *Whitted v. Fuquay,* 127 N.C. 68, 37 S.E. 141 (1900); *see* Dobbs, Remedies § 12.10 (1973).

[2] Generally speaking, however, specific performance of a contract is decreed only when it is equitable to do so. Accordingly, a plaintiff cannot obtain specific performance when a contract is unfairly procured by overreaching on plaintiff's part, or is induced or procured by means of oppression, extortion, threats, or illegal promises on his part. *See* 71 Am. Jur. 2d,

Specific Performance, § 45 (1973). "These matters need not be of such character as would justify a court of equity in rescinding the contract or a court of law in refusing relief. There is a difference between that degree of unfairness which will induce a court of equity to interfere actively by setting aside a contract and that which will induce a court to withhold its aid. Relief may be denied upon the ground that the contract is harsh, unjust, or oppressive, regardless of any actual fraud, and regardless of the fact that the contract is valid." 71 Am. Jur. 2d, Specific Performance, § 52 (1973); *Knott v. Cutler*, 224 N.C. 427, 31 S.E. 2d 359 (1944). Even so, it is well settled that when "the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a court of equity to decree its specific performance as for a court of law to award a judgment of damages for its breach." 4 Pomeroy, Equity Jurisprudence § 1404 (5th ed. Symons 1941); *Rudisill v. Whitener*, 146 N.C. 403, 59 S.E. 995 (1907). Thus, specific performance does not depend upon an unbridled discretion that varies with the length of the chancellor's foot but is granted or withheld according to the equities that flow from a just consideration of all the facts and circumstances of the particular case. *Byrd v. Freeman*, 252 N.C. 724, 114 S.E. 2d 715 (1960); 71 Am. Jur. 2d, Specific Performance, § 6 (1973).

Following the verdict of the jury, Judge Martin found and concluded that defendant's contract to convey was a lawful contract which "was procured by overreaching the defendant at a time at which her mental and physical condition was impaired and when she was under emotional stress, and the agreement was procured with a degree of unfairness which induces this Court to withhold its aid in the specific performance of the agreement, this Court being of the opinion, in the exercise of its judicial discretion, that under the rules set forth in *Knott v. Cutler*, 224 N.C., p. 430, that equity should not be granted to the plaintiff to require the specific performance of this agreement."

Findings of fact by the trial court, if supported by any competent evidence, are conclusive on appeal. *State v. Johnson*, 278 N.C. 126, 179 S.E. 2d 371 (1971); *Truck Co. v. Charlotte*, 268 N.C. 374, 150 S.E. 2d 743 (1966). And this is so notwithstanding evidence which would support findings to the contrary.

Lutz v. Board of Education, 282 N.C. 208, 192 S.E. 2d 463 (1972); *Equipment Co. v. Equipment Co.,* 263 N.C. 549, 140 S.E. 2d 3 (1965). Thus, if there is competent evidence to support it, we are bound by the finding that the contract to convey was procured by "overreaching the defendant" at a time when her mental and physical condition was impaired and she was under emotional stress, and was procured "with a degree of unfairness." The word "unfair" is defined as "marked by injustice, partiality or deception: UNJUST, DISHONEST." The definition of "overreach" is "to get the better of esp. by sharp, unfair, tricky, or deceitful means: OUTWIT." Webster's Third New International Dictionary (Unabr. 1964). Conceding that a contract obtained by unfairness and overreaching would be harsh, unjust or oppressive and should not be specifically enforced in equity, we now examine the evidence to determine whether it supports the findings.

Plaintiff offered in evidence the contract to convey. This instrument shows that plaintiff agreed to purchase and defendant agreed to sell the lands therein described for the sum of $35,000.00 and that plaintiff paid $100.00 earnest money upon the execution and delivery of the contract. The instrument provides that the sale should be completed on or before 28 April 1972.

Plaintiff then offered defendant's letter dated 22 April 1972, addressed to plaintiff, stating:

> "My son visited with us over the past weekend and we discussed the suggested sale to you of the old home place with my husband. He will not agree to the sale or to sign a deed out of the family.
>
> The physical and mental strain I have been under for the past months has been most difficult. I am returning your check, uncashed, and am informing you that the sale of this property cannot be made.
>
> Yours very truly,
> /s/ Wilena G. Honeycutt"

Plaintiff's evidence shows that, following negotiations with defendant concerning purchase of her property, he employed Attorney Floyd Brock to abstract the title and prepare the necessary legal documents. Later, he went to Brock's office and signed the contract and Mrs. Honeycutt's signature was on it at that

time. He is ready, able and willing to pay the purchase price of $35,000.00.

Attorney Floyd Brock testified that defendant came to his office on 29 March 1972 and signed the contract in his presence. Thereafter plaintiff came to his office and signed the contract on 6 April 1972. Mrs. Honeycutt had full opportunity to read the contract before signing and apparently examined it to her satisfaction.

Defendant testified that she holds a B.S. degree from Western Carolina University and has engaged in her profession as a school teacher for many years. At the time she entered into the contract in question she was employed as a teacher and has continued to be so employed to the date of the trial. On 17 December 1971 she had surgery for cancer and took twenty-five cobalt treatments, all of which had been completed before she made the contract. She inherited twenty-six acres of the property from her parents and acquired title to the remaining eleven acres by deed from her husband who had purchased it from her brother Bill Goodson. She owns the thirty-seven acres of land in her own right. She was acquainted with the defendant before the date of the contract and knew he owned a tract of land about one hundred yards from the acreage she contracted to sell.

Mrs. Honeycutt further testified that as a result of a conversation with her brother Bill Goodson she agreed to meet with plaintiff at her brother's home to discuss a sale of her property. Her brother had told her plaintiff was interested in purchasing the property but she had never discussed the matter with plaintiff prior to the meeting.

Relative to her conversation with plaintiff at her brother's home, Mrs. Honeycutt said:

> "I had an occasion to see Mr. Hutchins at my brother's home in Newbridge sometime in the early part of 1972. That was about the latter part of March, I would say. I had not seen him or discussed it with him at any time prior to that a sale of my property. There was a discussion about the sale of my property at that time. My husband was not with me at the time and the reason he wasn't because he was not physically able. I happened to go to my brother's house on that occasion because I was called and asked to meet Mr. Hutchins there. My brother Bill Goodson called

me. During the discussion I had there with Mr. Hutchins, I made the statement about my husband that he would have to agree to the sale and would have to sign the deed. I do not remember Mr. Hutchins' exact words to that. He did not make any objection to that at that time."

With reference to signing the contract in Lawyer Brock's office, defendant testified:

"It was at the request of Mr. Hutchins that I went up to Mr. Brock's office. I said I would go up there. I wasn't forced to go up there. And I went up there for the purpose of signing a paper that had to do with the sale of my property for the sum of $35,000.00 and I knew that. I signed a paper but I was not given a copy. I looked at the paper but I am a school teacher, not a lawyer, so I do not understand legal terms. I did look at it enough to know that it wasn't a deed. I read some of the paper but, as I say, I am not well versed in legal terminology. I looked at the paper writing in Mr. Brock's office close enough before I signed it to see the purchase price was inserted in the blanks of $35,000.00. . . . I went up there by myself. . . . I was not coerced. I signed it of my own free will. I had an opportunity to read the document if I had wanted to before I signed it. . . . I was teaching school in March and April of 1972. My mind was not affected by the Cobalt treatments that I had previously had. If I had [sic], I would not have been working."

Mrs. Honeycutt further testified that she thereafter discussed the matter with her husband and her son after which she wrote Mr. Hutchins the letter dated 22 April 1972 informing him that sale of the property could not be made.

[3] We are constrained to hold that the evidence is insufficient to support a finding that defendant's contract to convey her land was procured by unfair and overreaching conduct on plaintiff's part.

The jury found that the contract price of $35,000.00 was fair and reasonable and defendant has never contended otherwise. Her testimony does not indicate she was the victim of a sharp trader or was tricked into an unfair bargain. Moreover, her own testimony belies the assertion that her treatment for cancer or any other physical or mental infirmity played a part

in her execution of the contract. She does not infer, and there is no evidence to support the inference, that her brother acted in bad faith and against her best interest. The only permissible inference to be drawn from the evidence is to the contrary. In fact, the totality of the evidence suggests that defendant changed her mind when she discovered her husband did not want her to sell the land. She has assigned no other reason for her failure to abide by her contract.

It is regrettable that defendant agreed to sell her property before ascertaining her husband's wishes in the matter. Nevertheless, no fraud is involved and specific performance may not be withheld absent evidence of overreaching sufficient to invoke the judicial discretion of the court and justify the exercise of that discretion in accordance with settled principles of equity. Here, there is no such evidence of record: no fraud, no mistake, no undue influence, no harshness and no oppression. In light of those facts and circumstances, the contract is binding and will be specifically enforced. Of course, defendant's husband is under no obligation to plaintiff. The husband's rights under G.S. 29-30, and in all other respects, are not affected.

For the reasons stated the decision of the Court of Appeals, reversing the order of Judge Martin dated 15 June 1973 and remanding the case to the Superior Court of Buncombe County for entry of a decree of specific performance, is

Affirmed.

Chief Justice BOBBITT not sitting.

Justices SHARP and BRANCH concur in result.

STATE OF NORTH CAROLINA v. JOHNNY REID

No. 115

(Filed 30 December 1974)

Searches and Seizures § 4— warrant to search service station — search of car on premises — admissibility of evidence seized

In a prosecution for the unlawful possession for sale of more than one gallon of alcoholic beverages upon which tax had been paid, evidence seized from defendant's car which was parked on his service

station lot was properly admitted where officers searched the premises under a valid warrant which described them with particularity but did not specifically describe the vehicle parked thereon.

APPEAL by defendant, Johnny Reid, from a decision of the Court of Appeals filed October 2, 1974, finding no error in his trial, conviction and sentence by *Judge Armstrong* in the Superior Court of FORSYTH County at the November 19, 1973 Session, for the unlawful possession for sale of more than one gallon of alcoholic beverages upon which tax had been paid.

Robert Morgan, Attorney General, by James Wallace, Jr., Associate Attorney, for the State.

Harrell Powell, Jr., for defendant appellant.

HIGGINS, Justice.

According to the record and the addendum thereto, the defendant, Johnny Reid, was tried in the district court upon a warrant charging that he unlawfully possessed nine pints of tax-paid liquor for the purpose of sale. After conviction, the court imposed a prison sentence of one year. The defendant appealed to the Superior Court of Forsyth County where he was convicted by the jury. Judge Armstrong imposed a prison sentence of one year and day to two years.

The record discloses that D. R. Wilson, a Winston-Salem police officer, made affidavit that Johnny Reid, manager of a service station located at 850 North Liberty Street in Winston-Salem, had been observed dispensing alcoholic beverages, beer and wine, on the premises; that he did not have a permit for such activity. The officer had information from a reliable informant that alcoholic beverages were being dispensed on the premises. He observed from adjoining property persons drinking wine and beer. He knew the defendant was under a probationary sentence. He had signed a consent that his motor vehicle might be searched without a warrant.

On a proper affidavit a search warrant was issued, authorizing a search "on the premises at 850 North Liberty Street, . . . the same being a Service Distributing Inc. gasoline filling station. . . . The above business establishment is located at 850 North Liberty Street, Winston-Salem, Forsyth County, North Carolina. It is a one-story white cement building painted with a red stripe at the top and a red stripe at the bottom. The service

station is located at the corner of Liberty Street and Chestnut Street . . . . There is a small one-room gray metal out building in the rear southwest corner of the service station with one door facing easterly toward Liberty Street. These buildings are separated by approximately 15-feet in distance. The main service station having the words in bold red letters on the front. 'Service Dist Co Inc.' "

Affiant stated that the defendant had a criminal record in the state and federal courts for liquor violations. The affidavit stated the officer observed alcoholic beverages being consumed on the premises about fifty minutes before the affiant obtained the search warrant. The officer's affidavit was attached to and made a part of the warrant which authorized a search for and the seizure of any alcoholic beverages. The sufficiency of the affidavit and the warrant to authorize a search is not challenged. The defendant's brief states: "In this case the Police had a search warrant which empowered them to search the premises on 850 North Liberty Street, Winston-Salem, North Carolina, on August 17, 1973. They did not have a warrant to search the defendant's automobile."

A search of the buildings resulted in a "water haul" (an empty seine after all the water had drained through the mesh). However, on the described premises was the defendant's 1970 Pontiac automobile with all the windows closed and the doors and the lid to the trunk were locked. No reference to any automobile was made either in the affidavit or the warrant. However, the vehicle was on the premises described in the affidavit and in the warrant. The officers could see several bottles of what appeared to be pills on the dash of the vehicle. Upon a demand by the officers, the defendant opened the lid to the trunk. Concealed therein were nine pints of tax-paid intoxicating liquor.

The pills seized were the subject of another prosecution which resulted in a verdict of not guilty. It may be conceded the appearance of the bottles of pills on the dash was insufficient to authorize a search of the trunk for liquor. Hence, the pills were without material significance in the prosecution on the liquor charge. Also without material significance was the provision of the defendant's probationary sentence in a prior case in which he agreed that his vehicle might be searched without a search warrant. The foregoing appeared in the hearing before the judge on the challenge made to the warrant.

Clearly, the search for liquor on the premises under defendant's control at 850 North Liberty Street was specifically authorized. The defendant's automobile at the time of the search was at its parking place on the lot and, of course, would be under suspicion as a means of carrying supplies for the owner's illegal business which the officers had observed as he was carrying it on. The authority to search described premises would include personal property located thereon. Authority to search a house gives officers the right to search cabinets, bureau drawers, trunks, and suitcases therein, though they were not described. "It has been held that if a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car." 68 Am. Jur. 2d, Searches and Seizures, § 80, page 735. *Massey v. Commonwealth (Ky.)*, 305 S.W. 2d 755. "[W]here the warrant designates the building on the premises to be searched, it has been held that a search of a motor vehicle parked near the building, and on the same premises, is not an unreasonable search. (Citing authorities.)" 79 C.J.S., Searches and Seizures, § 83 d., page 903.

The defendant's right to be heard in this Court arises from his claim that his constitutional rights under the Fourth Amendment to the Constitution of the United States and under Article 1, Sec. 20, Constitution of North Carolina, were violated by the search of his automobile parked on the lot near the building where his illicit activities had been observed by the officers and the introduction in evidence of the fruits of the search. Constitutional inhibitions are not against all searches and seizures. They are intended to protect against *unreasonable searches and seizures. State v. Ellington*, 284 N.C. 198, 200 S.E. 2d 177.

The alert officer who had observed the goings-on at the defendant's place of business would be justified in concluding the contraband was surreptitiously delivered to the defendant's premises and the likely means of getting it there would be by motor vehicle. He should know, or at least should suspect, that any reserve supply might remain in his locked automobile so that he or his agent, suspecting officer curiosity, could have the vehicle and its contents miles away in a matter of minutes.

In this case there is no evidence the automobile in which the contraband was found was on the lot at the time the officers first had the place under surveillance, or at the time they obtained the search warrant. These considerations emphasize the

wisdom of the cases which hold a search warrant for contraband on specifically described premises, contemplates the search of any automobile belonging to the owner and parked thereon.

We hold that under the circumstances disclosed by the record before us the search and seizure were not unreasonable and did not violate the defendant's constitutional rights. The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. JAMES BOBBY HARRINGTON

No. 124

(Filed 30 December 1974)

Homicide § 30— second degree murder — no submission of involuntary manslaughter proper

Evidence in this prosecution for second degree murder was insufficient to require submission of an issue as to involuntary manslaughter where the State's evidence tended to show an intentional shooting and where defendant's evidence tended to show an accidental discharge of the rifle, but tended to negate culpable negligence in defendant's handling of the rifle.

ON *certiorari* to review the decision of the Court of Appeals reported in 22 N.C. App. 473, 206 S.E. 2d 768.

Defendant was indicted for the murder of Willie Mae Evans on 24 March 1973. Prior to the commencement of his trial at 30 July 1973 Session of WAYNE County Superior Court before *Canaday, J.*, the State announced its election to place defendant on trial for murder in the second degree or "such lesser included offense" as the evidence might justify.

At trial, the State offered the testimony of Henry Harrington, defendant's brother; the testimony of investigating officers Coley and Locklair; a stipulation fixing the location of the three bullet wounds and identifying the bullet first discharged as being the cause of death; and defendant's .22 rifle from which the three bullets were discharged. Defendant testified but offered no other evidence.

The following summary reveals the evidence pertinent to a consideration of the legal question now presented.

Willie Mae Evans (Willie Mae) died Saturday, 24 March 1973, in the late afternoon. Death occurred in the trailer-home of defendant and was caused by a bullet discharged from the .22 rifle in the hands of defendant. This bullet was the first of three bullets discharged from defendant's .22 rifle. According to the testimony of Henry Harrington (Henry), defendant shot Willie Mae three times inside the trailer. Defendant testified the first bullet was accidentally discharged inside the trailer and that the second and third bullets were discharged after he had left the trailer and was 75 or 100 yards away.

Defendant's trailer-home was located some eight miles or more southeast of Goldsboro in a rural section known as Dudley. It was from 50 to 75 feet from the trailer of Gordon Greenfield. The area surrounding the two trailers was open land.

On Saturday, 24 March 1973, Henry and Willie Mae, who was living with Henry, were spending the day with defendant, defendant's wife and their two children. On previous Saturdays, Henry and Willie Mae had made similar visits. On this particular Saturday they arrived at defendant's trailer during the early morning hours. Greenfield drove Henry and Willie Mae, and defendant and his family, to Goldsboro. Purchases there included the purchase by Henry and by defendant of "a fifth of liquor" from the ABC store. Upon returning to the trailer, Willie Mae and Listine, defendant's wife, went into the kitchen area. Henry and defendant were in the living room talking and drinking the liquor. During this time, defendant got the .22 rifle from the bedroom and brought it (through the kitchen) into the living room. He had bought the rifle a month or so earlier. It had been used for target practicing in which Willie Mae had participated.

After the first "fifth" had been consumed, at Henry's suggestion defendant arranged with Greenfield to take them to LaGrange to buy the second "fifth." Henry testified that, upon their return, he, Willie Mae, defendant, and Listine, drank some of the second "fifth." Defendant testified he drank no part of the second "fifth" and that he had no drink after 11:30 a.m.

According to Henry's testimony, he and defendant got into an argument over who had paid or was supposed to pay the most for the liquor and, while such an argument was in progress, Willie Mae filled a Pepsi-Cola bottle with all or part of the liquor then on hand and went back into the kitchen. At that

time, defendant pointed the rifle at Henry's chest and said, "I'll shoot you." Henry's further testimony is stated in his own words as follows: "When Willie Mae heard him, she walked out of the kitchen and told him not to shoot. Willie Mae was a good ways from me at the time when she walked out of the kitchen. She was standing about in the kitchen door. When she came in the living room, she told him not to shoot. He jumped up and said, 'G—D—it, I'll kill you.' By that time he fired the rifle. He shot her in the shoulder. After he shot her the first time he shot her in the stomach then twice. The first time he shot her she was standing up. When he shot her the second time, she was falling then. When he shot her the third time, she fell and I caught her myself."

Investigating officers testified they arrived about 6:30 p.m.; that, inside the trailer, Henry was kneeling beside Willie Mae's body; that defendant and the rifle were at Greenfield's trailer; and that, in successive conversations, defendant stated (1) that Willie Mae, when engaged with him in target practicing, leaned over in front of the barrel of the rifle and shot herself; (2) that, while on the way to target practice, the rifle went off "when he picked it up and swung it around"; and (3) that he picked up the rifle and shot Willie Mae but didn't mean to do it. Their testimony included statements attributed to defendant to the effect that his argument with Henry related to who paid or was to pay the most for the liquor.

The testimony of defendant contradicted in many particulars the State's evidence and the statements attributed to him by the officers. He testified he had no quarrel with Willie Mae and didn't intend to shoot anybody. He testified he had the loaded rifle and was going out of the back door of the trailer to do some target practicing. Testimony of defendant, stressed as a basis for his contention, is quoted below:

"I had the rifle in my left hand; when I went on out the back door, going out the back door somebody called me and I come back up into the house into the kitchen. I don't know who called me. It was a man's voice. I was going to see who it was and there was a chair down there and I stumbled over the chair and the gun went off. I stumbled over a chair in the kitchen. I had the rifle in my left hand and it went off. When the gun went off the bullet hit Willie Mae up there around the shoulder. Willie Mae was going to fall to the floor so I throwed the rifle on the floor and helped to get her in the rocking chair."

In his charge, Judge Canaday instructed the jury to return either a verdict of guilty of murder in the second degree or a verdict of not guilty.

The jury returned a verdict of guilty of murder in the second degree and judgment imposing a prison sentence was pronounced. Defendant excepted and appealed to the Court of Appeals. The Court of Appeals found "No Error." Defendant then applied to this Court for *certiorari* for review of one question, namely, whether Judge Canaday should have submitted guilty of involuntary manslaughter as a permissible verdict. We allowed *certiorari* 8 November 1974 to consider this question. 286 N.C. 212, 209 S.E. 2d 317.

Attorney General James H. Carson, Jr. and Assistant Attorneys General James E. Magner, Jr. and Claude W. Harris for the State.

Philip A. Baddour, Jr. for defendant.

BOBBITT, Chief Justice.

The only question is whether there was evidence sufficient to require submission of guilty of involuntary manslaughter as a permissible verdict. The answer is provided by application of the well settled legal principles stated below.

"The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954); *State v. Foster*, 284 N.C. 259, 277, 200 S.E. 2d 782, 795 (1973).

The jurors were instructed to return a verdict of not guilty if the State failed to satisfy them from the evidence and beyond a reasonable doubt that defendant *intentionally* shot Willie Mae Evans and thereby proximately caused her death. Nothing in the State's evidence afforded a basis for submitting involuntary manslaughter as a permissible verdict. Our inquiry is whether defendant's testimony provided a sufficient basis therefor.

Assuming, as defendant testified, the first bullet resulted from an *accidental* discharge of the rifle, defendant would be guilty of involuntary manslaughter only if there were evidence

tending to show that such unintentional killing was caused by defendant's unjustified and wanton or reckless use of the rifle in such manner as to jeopardize Willie Mae's safety. *State v. Griffin,* 273 N.C. 333, 335, 159 S.E. 2d 889, 890-91 (1968); *State v. Moore,* 275 N.C. 198, 212, 166 S.E. 2d 652, 661-62 (1969); *State v. Wrenn,* 279 N.C. 676, 683, 185 S.E. 2d 129, 133 (1971).

Defendant's testimony was to this effect: He started out the back door to engage in target practice. A person in his trailer-home called to him. He turned and went back to find out what the caller wanted. In doing so, he stumbled over a chair in his trailer-home. This caused the accidental discharge of the first (lethal) bullet. This testimony tends to negate culpable negligence in defendant's handling of the rifle.

Defendant cites *Moore* and *Wrenn* in support of his contention. Suffice to say, the facts in evidence in each of these cases are quite different from the evidential facts in the present case.

Defendant's testimony being insufficient to provide a basis for submission of involuntary manslaughter as a permissible verdict, the decision of the Court of Appeals is affirmed.

Affirmed.

STATE OF NORTH CAROLINA v. JAMES E. JOHNSON, JR., ALBERT S. KILLINGSWORTH AND WIFE, ELIZABETH E. KILLINGSWORTH

No. 87

(Filed 30 December 1974)

Appeal and Error § 46— equally divided Court — judgment affirmed — no precedent

Where one member of the Supreme Court did not participate in the hearing and the remaining six justices are equally divided, the judgment of the superior court is affirmed without becoming a precedent.

Justice MOORE did not participate in the consideration and decision of this case.

APPEAL by respondents from *Bailey, J.,* 21 May 1973 Special Civil Session of the Superior Court of NEW HANOVER, certified

under G.S. 7A-31 for review by the Supreme Court prior to determination by the Court of Appeals, docketed and argued as case No. 1 at the Spring Term, 1974.

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

At the 8 November 1971 Session of New Hanover, all other questions having been resolved, the sole issue for trial was the fair market value of the land on 28 June 1968, the date of the taking. The jury answered the issue, "$1,262,500.00." Upon the State's appeal from the judgment entered upon the verdict the Supreme Court found error and ordered a new trial. *State v. Johnson,* 282 N.C. 1, 191 S.E. 2d 641 (1972). Upon the retrial before Judge James H. Pou Bailey at the 21 May 1972 Session the jury answered the issue "$617,000.00."

From the judgment entered upon the verdict respondents appealed, assigning errors in the admission and exclusion of evidence and in certain comments which Judge Bailey made to counsel during the course of the trial. This Court granted certiorari for initial appellate review.

Robert Morgan, Attorney General; T. Buie Costen, Assistant Attorney General; and Thomas M. Ringer, Jr., Associate Attorney, for the State.

Marshall, Williams, Gorham & Brawley by Alan A. Marshall and Lonnie B. Williams for respondent appellants.

PER CURIAM.

Justice Dan K. Moore, having been the Governor of North Carolina at the time the State's decision to condemn respondents' property was made and this proceeding instituted, did not sit when the two prior appeals in this case were heard. *See State v. Johnson,* 278 N.C. 126, 179 S.E. 2d 371 (1971); *State v. Johnson,* 282 N.C. 1, 191 S.E. 2d 641 (1972). He does not sit in this appeal. The remaining six justices being equally divided in opinion as to whether prejudicial error was committed in the trial below, the judgment of the Superior Court stands affirmed

in accordance with the usual practice in such cases and decides this case without becoming a precedent. *Parrish v. Publishing Co.*, 271 N.C. 711, 157 S.E. 2d 334 (1967); *Burke v. R. R.*, 257 N.C. 683, 127 S.E. 2d 281 (1962); *State v. Smith*, 243 N.C. 172, 90 S.E. 2d 328 (1955); *James v. Rogers*, 231 N.C. 668, 58 S.E. 2d 640 (1950); *Parsons v. Board of Education*, 200 N.C. 88, 156 S.E. 243 (1930); *Hillsboro v. Bank*, 191 N.C. 828, 132 S.E. 657 (1926); *McCarter v. Railway Company*, 187 N.C. 863, 123 S.E. 88 (1924); 1 N. C. Index 2d, *Appeal and Error* §§ 46, 64 (1967).

Affirmed.

Justice MOORE did not participate in the consideration and decision of this case.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BOWES v. BOWES

No. 89 PC.

Case below: 23 N.C. App. 70.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

CARWELL v. WORLEY

No. 148 PC.

Case below: 23 N.C. App. 530.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

DEAN v. COACH CO.

No. 139 PC.

Case below: 23 N.C. App. 470.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 December 1974.

GOLDING v. TAYLOR

No. 102 PC.

Case below: 23 N.C. App. 171.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

HEDDEN v. HALL

No. 149 PC.

Case below: 23 N.C. App. 453.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

HINES v. PIERCE

No. 128 PC.

Case below: 23 N.C. App. 324.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

IN RE ASHLEY

No. 108 PC.

Case below: 23 N.C. App. 176.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

JOHNSON v. BROOKS

No. 113 PC.

Case below: 23 N.C. App. 321.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

JOHNSON v. JOHNSON

No. 140 PC.

Case below: 23 N.C. App. 449.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

KIDD v. EARLY

No. 113.

Case below: 23 N.C. App. 129.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

LEE v. KING

No. 157 PC.

Case below: 23 N.C. App. 640.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

LEWIS v. COLLEGE

No. 107 PC.

Case below: 23 N.C. App. 122.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

McGRADY v. QUALITY MOTORS

No. 118 PC.

Case below: 23 N.C. App. 256.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 December 1974.

McKINNEY v. BOARD OF ALCOHOLIC CONTROL

No. 114 PC.

Case below: 23 N.C. App. 369.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

MILLS, INC. v. COBLE, SEC. OF REVENUE

No. 104 PC.

Case below: 23 N.C. App. 157.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

NEAL v. BOOTH

No. 56 PC.

Case below: 22 N.C. App. 415.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

SIDDEN v. TALBERT

No. 121 PC.

Case below: 23 N.C. App. 300.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

SMITH v. HOUSE OF KENTON CORP.

No. 152 PC.

Case below: 23 N.C. App. 439.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

SMITH v. STATE

No. 131 PC.

Case below: 23 N.C. App. 423.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

SPEARS v. DISTRIBUTING CO.

No. 143 PC.

Case below: 23 N.C. App. 445.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

STANBACK v. STANBACK

No. 103 PC.

Case below: 23 N.C. App. 167.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

STATE v. ALDERMAN

No. 147 PC.

Case below: 23 N.C. App. 557.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

STATE v. CRABTREE

No. 3.

Case below: 23 N.C. App. 491.

Appeal of defendant treated as a petition for writ of certiorari and allowed 30 December 1974.

STATE v. GATEWOOD

No. 99 PC.

Case below: 23 N.C. App. 211.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

STATE v. GRACE

No. 136 PC.

Case below: 23 N.C. App. 517.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 December 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. GREEN

No. 111.

Case below: 23 N.C. App. 86.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 27 November 1974.

STATE v. GREENLEE

No. 64.

Case below: 22 N.C. App. 489.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

STATE v. HILL

No. 155 PC.

Case below: 23 N.C. App. 614.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 December 1974.

STATE v. JOHNSON

No. 84 PC.

Case below: 23 N.C. App. 52.

Petition for writ of certiorari to North Carolina Court of Appeals denied 3 December 1974.

STATE v. JOHNSON

No. 141 PC.

Case below: 23 N.C. App. 696.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

STATE v. JONES

No. 105 PC.

Case below: 23 N.C. App. 162.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 3 December 1974.

STATE v. JOYNER

No. 112.

Case below: 23 N.C. App. 27.

Motion of Attorney General to dismiss appeal denied 26 November 1974.

STATE v. McALLISTER

No. 115 PC.

Case below: 23 N.C. App. 359.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 30 December 1974.

STATE v. MINK

No. 122 PC.

Case below: 23 N.C. App. 203.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

STATE v. NELSON

No. 9.

Case below: 23 N.C. App. 458.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 December 1974.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. PASSARELLA

No. 6.

Case below: 23 N.C. App. 522.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 30 December 1974.

STATE v. PERRY

No. 116.

Case below: 23 N.C. App. 190.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 December 1974.

TODD v. CREECH

No. 126 PC.

Case below: 23 N.C. App. 537.

Petition for writ of certiorari to North Carolina Court of Appeals denied 30 December 1974.

THE BRANCH BANKING & TRUST COMPANY, PLAINTIFF v. EDWIN GILL, TREASURER OF THE STATE OF NORTH CAROLINA; W. G. PARHAM, JR., STATE WAREHOUSE SUPERINTENDENT; L. C. WOODCOCK; INSURANCE COMPANY OF NORTH AMERICA; AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, DEFENDANTS

— AND —

HENRY L. STEVENS, III, AND VANCE B. GAVIN, RECEIVERS OF SOUTHEASTERN FARMERS GRAIN ASSOCIATION, INC., AND GREAT AMERICAN INSURANCE COMPANY, THIRD PARTY DEFENDANTS

No. 123

(Filed 31 January 1975)

1. **Trial § 58— nonjury trial — appellate review of findings**

When the parties to an action waive a trial by jury and agree that the judge may hear the evidence and find the facts, the findings of fact so made by the trial judge are conclusive upon review in an appellate court if there is competent evidence in the record to support them, even though the appellate court may deem the weight of evidence to be to the contrary.

2. **Trial § 58— nonjury trial — tendered findings of fact**

The trial judge in a nonjury trial is not bound to find facts as proposed by a party, even though there be competent evidence to support such a finding, and his rejection of the party's tendered finding of fact may not be reversed by the appellate court and is not ground for a new trial.

3. **Warehousemen § 2— issuance of fraudulent warehouse receipts — promoting interest of warehouse — findings of fact**

The evidence did not support the trial court's finding that the plan of the local manager of a grain warehouse to obtain possession from plaintiff bank of 16 old warehouse receipts issued to a grain association of which he was an officer by issuing 13 new fraudulent warehouse receipts was in no way intended to promote and did not in fact promote the interest of the grain warehouse where the evidence showed that the purpose of the fraud on the bank was to obtain the old receipts so that they could be canceled by the grain warehouse and a shortage in the warehouse's accounts could be concealed from a warehouse examiner.

4. **Bills and Notes § 7; Uniform Commercial Code § 26— warehouse receipts — absence of payee's indorsement — no negotiation**

A bank was not a transferee of negotiable warehouse receipts by negotiation and, *a fortiori*, was not a transferee by due negotiation and acquired only the title and rights of the payee under the receipts where the receipts were delivered by the payee to the bank without the payee's indorsement and where the payee's bookkeeper who subsequently stamped the payee's name upon the reverse side of the

receipts had neither the authority nor the intent thereby to indorse them in the name of the payee. G.S. 25-7-504(1); G.S. 25-7-501(1), (4).

5. **Principal and Agent § 6— ratification of unauthorized contract**

When an agent, for the purpose of advancing the interests of his principal, makes, without authority, a contract in the name of the principal with another person, and the principal thereafter, with full knowledge of the facts, accepts and retains the benefits resulting from the contract, the principal ratifies the act of the agent and is bound upon the contract as fully as if the agent had originally acted in accordance with his authority.

6. **Principal and Agent § 6; Warehousemen § 2— fraudulent warehouse receipts — ratification by warehouse**

When a grain warehouse, with knowledge through its agent that 16 valid warehouse receipts had been obtained from a bank by the agent's fraudulent issuance of 13 new warehouse receipts for which the warehouse had received no grain, accepted and canceled the 16 old receipts, thus retaining the benefits derived from the unauthorized receipts, it thereby ratified the new receipts and cannot be heard to deny their validity in the hands of the bank.

7. **Warehousemen §§ 1, 3— issuance of fraudulent warehouse receipts — liability of warehouseman, surety, indemnity fund**

Where the local manager of a grain warehouse defrauded a bank by the issuance of warehouse receipts for which no grain had been delivered to the warehouse and the exchange of the fraudulent receipts for valid ones, the local manager and the surety on his bond are primarily liable to the bank for the resulting loss and the State Indemnity and Guaranty Fund is secondarily liable for such loss.

8. **Uniform Commercial Code § 25— variance between words and figures — variance between pounds and bushels**

Uniform Commercial Code provision that "Words control figures except that if the words are ambiguous figures control," G.S. 25-3-118(c), if applicable to warehouse receipts, has no application where the variance in the receipts is between pounds and bushels and the statement of poundage is the same in both words and figures.

9. **Reformation of Instruments § 7— mutual mistake of fact — mistake of draftsman**

Upon the showing of mutual mistake of fact resulting from the error of the draftsman of warehouse receipts in stating the poundage therein incorrectly, the number of bushels having been stated correctly, a court of equity will order the warehouse receipts reformed to express the true intent of the parties to the transaction, nothing else appearing.

10. **Reformation of Instruments § 1— mistake of draftsman — equity power to reform instrument — effect of U.C.C.**

Nothing in the Uniform Commercial Code deprives a court of equity of its power to reform a warehouse receipt so as to correct a mistake of the draftsman.

11. Equity § 1— clean hands doctrine

"Clean hands" connotes the absence of sharp practice and bad faith on the part of the party seeking equity, not complete freedom from negligence and gullibility.

12. Reformation of Instruments § 7— warehouse receipts — mistake of draftsman — clean hands doctrine

In a transaction in which a bank exchanged 16 valid warehouse receipts for 13 new warehouse receipts which had been fraudulently issued by a warehouse manager to a grain association of which he was an officer so that the valid receipts could be obtained and canceled on the warehouse books and a grain shortage concealed, the evidence and findings were insufficient to support the conclusion that the bank acted in bad faith or engaged in any sharp practice so as to render its hands unclean and bar it from asking a court of equity to reform the new receipts to make them show the correct poundage of grain they represented where the evidence and findings showed only that for a substantial period prior to the transaction, the bank knew of the payee's precarious financial condition, that over such a period the bank had been generous in allowing overdrafts by the payee and making loans to it, and that at the time of the transaction, the bank knew an official examination of the grain warehouse was in progress and that the bank was lax in its inspection and handling of the documents involved.

Justices COPELAND and EXUM took no part in the consideration or decision of this case.

APPEAL by the plaintiff from *Cowper, J.*, at the 18 March 1974 Civil Session of DUPLIN, heard prior to determination by the Court of Appeals.

Branch Banking and Trust Company, hereinafter called the Bank, brought this action to recover $383,900, the value of grain alleged by it to be represented by certain warehouse receipts pledged to it to secure notes made by Southeastern Farmers Grain Association, Inc., hereinafter called Southeastern, or, in the alternative, to recover the amounts due upon the notes, with interest.

The defendant Gill is sued as Custodian of the State Indemnity and Guaranty Fund, which is maintained pursuant to General Statutes Chapter 106, Article 38. The defendant Parham is the State Warehouse Superintendent. The defendant Woodcock was Local Manager of the Farmers Grain Elevator, hereinafter called the Elevator, at the time of the transactions out of which this action arose. The defendant Insurance Company of North America is sued as surety on the bond of Woodcock. The defendant Hartford Accident and Indemnity Company,

hereinafter called Hartford, is sued as surety upon a blanket fidelity bond insuring the State against loss through the failure of any of its employees (including Parham) to perform his duties faithfully.

The Elevator was a unit of the North Carolina State Warehouse System. It operated a grain storage facility at Warsaw, North Carolina. Woodcock, in addition to being Local Manager of the Elevator, was also Secretary-Treasurer of Southeastern and managed its operation. The third party defendants (made so by the complaint of the defendants Gill, Parham, and the two above named surety companies) are the duly appointed receivers for Southeastern and the surety on the fidelity bond of Woodcock for the faithful performance of his duties as Secretary-Treasurer of Southeastern. The third party complaint was dismissed as to Great American Indemnity Company and from that judgment no appeal was taken. No judgment was rendered as to the Receivers of Southeastern.

A jury trial having been waived, the matter came on for hearing before Cowper, J., who received in evidence voluminous oral testimony and documentary exhibits and made the following findings of fact (summarized) :

1. Southeastern engaged in the business of buying and selling grain.

2. Elevator's facilities were owned by Southeastern, leased by it to Parham as State Warehouse Superintendent and operated as a public warehouse for the storage of grain under the provisions of the United States Warehouse Act and the North Carolina Warehouse Law.

4. Woodcock was Secretary-Treasurer of Southeastern and was paid by it alone. He was also duly licensed to act as Local Manager of the Elevator.

5. The Elevator engaged in no activity except the storage of grain.

* * * *

7. A depositor of grain would, upon request, be issued by the Elevator a negotiable warehouse receipt therefor.

8. Printed and numbered blank warehouse receipt forms, bearing the signature of Parham, were furnished to Woodcock for issuance by him as Local Manager of the

Elevator. In addition to acknowledging the receipt of a specified number of pounds of grain of the described grade and kind, the receipt form provided: *"The State of North Carolina guarantees the integrity of this receipt.* Grade and weight are as determined by an inspector and weigher licensed under the United States Warehouse Act. Said grain is fully insured by the State Warehouse Superintendent against loss or damage by fire, lightning, inherent explosion, tornado, cyclone and windstorm unless expressly stated otherwise hereon." (Emphasis added.)

9. The signature of Woodcock was required on each receipt prior to its issuance. The receipt also stated upon its face in red ink: "The Local Manager [Woodcock] is an employee of Southeastern Farmers Grain Association, Inc."

10. The Bank and Southeastern agreed that the Bank would make loans to Southeastern and that warehouse receipts would be pledged as security therefor.

11. For a substantial time, it was the practice that each receipt so pledged to the Bank bore on its margin a number relating the receipt to the "IN ticket" issued to the depositor of the grain and showing, in pounds, the exact amount of grain deposited and represented by the receipt. Thereafter, prior to the transactions here involved, this practice was discontinued and the pledged receipts were issued for round numbers of bushels, such as 5,000, 10,000 or 20,000 bushels.

12. In 1969, the Bank began habitually to carry substantial overdrafts on Southeastern's checking account, holding such checks for substantial sums for several days until deposits were made to cover them. Such overdrafts reached a high of $212,000 on 17 November 1969.

* * * *

14. In the Fall of 1969, Craven Brewer (Manager of the Bank's Warsaw Branch) made, on behalf of the Bank, loans to Southeastern substantially in excess of the line of credit authorized for Southeastern by the Bank's Home Office (in Wilson). On 3 February 1970, the loan balance amounted to $634,224 in addition to overdrafts.

* * * *

16. On 9 February 1970, Warehouse Examiner Flynt went to the Elevator to make a routine examination. Wood-

cock, knowing there was not enough grain in the Elevator to meet the outstanding receipts, instructed the bookkeeper for Southeastern to prepare its check payable to the Bank in the amount of $165,760 and to deliver it to the Bank in exchange for the Bank's surrender of warehouse receipts then held by it as pledgee. This check was an overdraft.

17. The warehouse receipts so obtained by the bookkeeper from the Bank were then canceled. Thereby the shortage of grain in the Elevator in relation to outstanding receipts was eliminated and Warehouse Examiner Flynt completed his examination of the Elevator without discovering this shortage.

18. On the day after the examination by Warehouse Examiner Flynt was completed, Woodcock instructed the bookkeeper of Southeastern to prepare a new note to the Bank in the amount of $71,040 and to pledge to the Bank, as security therefor, six new warehouse receipts, issued by the Elevator to Southeastern for 10,000 bushels of grain each, no new grain having been received by the Elevator to justify the issuance of such new warehouse receipts. By reason of such new notes, the Bank credited the checking account of Southeastern with sufficient funds to make Southeastern's above mentioned check to the Bank in the amount of $165,760 good.

19. From 10 February 1970 to 5 May 1970, Woodcock caused the Elevator to deliver for the account of Southeastern quantities of grain far in excess of the amount actually stored in the Elevator by Southeastern.

20. On 5 May 1970, Warehouse Examiner Brown arrived at the Elevator to make another routine check of the grain storage operation. Woodcock then knew that due to the shipments so made on account of Southeastern there was not sufficient grain in the Elevator to meet the outstanding warehouse receipts.

21. At the opening of business on 5 May 1970, the Warsaw Branch of the Bank held demand notes of Southeastern, secured by 19 warehouse receipts issued by the Elevator to Southeastern, in the total face amount of $545,424. Six of these pledged receipts were the receipts referred to in Finding No. 18.

22. During the morning of 5 May 1970, Woodcock caused Southeastern's check, drawn on sufficient funds, to be delivered to the Bank in exchange for its surrender of two of the pledged receipts, which were thereupon canceled on the books of the Elevator. This left in the hands of the Bank 17 warehouse receipts issued by the Elevator to Southeastern, including the six referred to in Finding No. 18. The grain for these 17 receipts had previously been shipped out by the Elevator, on the account of Southeastern, without requiring the surrender of such receipts for cancelation.

23. On the afternoon of 5 May 1970, Woodcock went to the Bank and requested it to release to him some of the 17 receipts so held by the Bank, informing the Bank that the Warehouse Examiner was then at the Elevator and stating that the warehouse receipts were needed for the examination.

24. The Bank refused to release the receipts until the loans which they secured were paid. Woodcock then offered to give the Bank a check, which would have been an overdraft, but the Bank refused to surrender the receipts in exchange for such check. Woodcock and the Bank then agreed to negotiate a new loan by the Bank to Southeastern which would be secured by new receipts and which loan would provide the funds needed to make good a check given to pay the existing loans secured by the 17 receipts above mentioned.

25. On the morning of 6 May 1970, pursuant to the instructions of Woodcock, the bookkeeper of Southeastern prepared two notes made by Southeastern payable to the order of the Bank in the total amount of $307,840, a deposit slip for that amount, and 13 new warehouse receipts issued by the Elevator to Southeastern. She then also prepared Southeastern's check payable to the Bank in the amount of $328,952.

26. About noon on 6 May 1970, the bookkeeper of Southeastern, pursuant to the instructions of Woodcock, delivered the above papers to the Bank's note teller.

27. The balance in Southeastern's checking account at the close of business on 6 May 1970 was, in addition to the amount of the above mentioned new notes, sufficient to make the above mentioned check good.

28. On 6 May 1970, upon receipt of the above mentioned new notes, new warehouse receipts, deposit slip and check, the Bank's note teller surrendered to Southeastern's bookkeeper 16 of the warehouse receipts previously pledged to the Bank, but retained the notes secured thereby because the check so delivered to the Bank by Southeastern did not cover the accrued interest on the notes.

29. Shortly after the bookkeeper of Southeastern left the Bank with the surrendered warehouse receipts, the Bank's note teller discovered that the new warehouse receipts delivered as security for the new notes had not been endorsed by Southeastern. She telephoned the bookkeeper of Southeastern and requested that the new receipts be endorsed.

30. A resolution of the directors of Southeastern, a copy of which had been delivered to the Bank, required for a valid endorsement the signatures of both the President and the Secretary-Treasurer (Woodcock) of Southeastern.

31. On every prior occasion endorsement of warehouse receipts pledged to the Bank by Southeastern was by the signature of Woodcock.

32. On the morning of 7 May 1970, the bookkeeper of Southeastern went to the Bank and with a rubber stamp placed Southeastern's name on the reverse side of each of the new warehouse receipts so pledged to the Bank. None of these receipts was ever endorsed by the signature of Woodcock or of any other officer of Southeastern. Neither the note teller of the Bank, the bookkeeper of Southeastern nor Woodcock considered the stamping of Southeastern's name upon the receipts a sufficient endorsement thereof by Southeastern.

33. On the afternoon of 7 May 1970, the bookkeeper of Southeastern delivered to the Bank a check for the interest due on the notes which had been secured by the warehouse receipts surrendered by the Bank as above stated.

34. The note teller of the Bank did not process any of the new papers so received by her but held them in anticipation of obtaining Woodcock's endorsement of the new receipts.

35. The new receipts so pledged to the Bank contained an irregularity on the face thereof in that the body of each receipt stated in words that it represented 112,000 pounds of corn, whereas the number of bushels, shown in numerals, was 20,000. One hundred twelve thousand pounds of corn are only 2,000 bushels.

36. During the afternoon of 7 May 1970, Warehouse Examiner Brown's examination of the Elevator disclosed to him a substantial shortage of grain. He thereupon advised Parham of his findings. Parham and an officer of the United States Department of Agriculture then went promptly to Warsaw to confer with Examiner Brown. During their continuing investigation, they learned of the issuance of the new warehouse receipts so delivered to and presently held by the Bank.

37. On the evening of 7 May 1970, Parham advised the Bank that a shortage had been discovered at the Elevator and no further transactions should be entered into by the Bank with Southeastern until further determinations could be made.

38. On Friday, 8 May 1970, Parham conferred with officers of the Bank and discussed with them the findings of the Warehouse Examiner and the 13 warehouse receipts then held by the Bank.

39. On 8 May 1970, officers of the Bank instructed its employees at the Warsaw Branch to continue to hold up the processing of the loan papers of Southeastern, so delivered to the Bank by the bookkeeper of Southeastern on 6 May 1970, until advice of counsel could be obtained.

40. On Monday, 11 May 1970, the Bank proceeded with the processing of the papers, credited the proceeds of its new loan to Southeastern to the checking account of Southeastern and charged against such account the checks so received by it from the bookkeeper of Southeastern covering the principal and interest on the old notes. Immediately thereafter, the Bank closed the checking account of Southeastern and credited the then balance therein against the notes then held by the Bank.

41. The plan whereby Southeastern delivered to the Bank the 13 new, fraudulent warehouse receipts in exchange

for the surrender by the Bank of the 16 old warehouse receipts was not intended to and did not in fact promote the interest of the Elevator. Since Southeastern had already caused the grain represented by these receipts to be delivered by the Elevator, Southeastern was obligated to surrender the receipts for cancelation and when the Elevator obtained possession of such receipts, "it had a perfect right to cancel them on its records." The Elevator did not benefit from the cancelation of these receipts.

42. On 14 May 1970, the Bank demanded of Parham delivery to it of the grain represented by the 13 new receipts then held by it.

* * * *

44. On 18 August 1970, the Bank demanded of Parham payment of the debt due the Bank from Southeastern, together with interest thereon, and a like demand was made upon the defendant Gill, as Custodian of the State Indemnity and Guaranty Fund.

45. Southeastern was insolvent on 8 May 1970 and its affairs have been placed in the hands of receivers appointed by the Superior Court.

46. The Insurance Company of North America executed a bond in the amount of $100,000 as surety for Woodcock, Manager of the Elevator, conditioned upon the faithful performance by Woodcock of his duties as such Local Manager of the Elevator.

47. Hartford executed, as surety, a bond in the amount of $100,000 for the faithful performance by Parham of his duties as State Warehouse Superintendent.

Upon the foregoing findings of fact, the court concluded: The warehouse receipts now held by the Bank were not negotiated to it within the meaning of G.S. 25-7-501; the warehouse receipts were irregular on their face; the Bank's knowledge of the poor financial condition of Southeastern and of the circumstances surrounding the transaction of 6 May 1970 were sufficient to put it on inquiry as to the "regular course" quality of the transaction; the Bank, having delayed the processing of the new notes secured by the fraudulently issued warehouse receipts, after recieving actual notice of the defenses to such receipts, elected to accept them and to confirm the transaction; the actions

of Woodcock, above recounted, were all designed and entered into solely for the benefit of Southeastern, and the defendants Gill and Parham are not estopped to plead Woodcock's fraud as a complete defense against the Bank; Gill, Parham, the Insurance Company of North America and Hartford, representing the Elevator, have a complete defense against Southeastern and the Bank as to the 13 warehouse receipts now held by the Bank, in that such receipts were improperly and fraudulently issued and did not represent grain on storage in the Elevator; the Bank is not entitled to invoke the equity powers of the court to reform the 13 warehouse receipts so as to have them endorsed effectively or so as to change them to represent 1,120,000 pounds (20,000 bushels) of corn, or to recover the valid warehouse receipts surrendered by it to Southeastern on 6 May 1970, because the Bank does not have clean hands and because such relief would be in conflict with the provisions of Chapter 25 of the General Statutes; the Bank, with full knowledge of the shortage of grain at the Elevator and of the improper issuance of the warehouse receipts, elected to complete the processing of the papers received from the bookkeeper of Southeastern on 6 May 1970, and thus abandoned its rights to rescission and restitution; and the defendant surety companies are not liable to the Bank since Woodcock is not liable to the Bank in his capacity as Local Manager of the Elevator, and Parham is not liable to the Bank in his capacity as State Warehouse Superintendent.

The Superior Court, therefore, adjudged that the plaintiff have and recover nothing of any of the original defendants.

The Superior Court also entered judgment dismissing the action as to the defendant Parham, individually. In this judgment the court found as facts (summarized):

> 4. Parham, under procedures for operation of the Elevator, "as established by the State of North Carolina and the United States Department of Agriculture," signed warehouse receipt forms in blank and delivered forms so signed to Woodcock, who, under the procedures, would sign the warehouse receipts upon their issuance for grain stored in the Elevator.
>
> 5. The procedures followed by Parham were prescribed by the cooperative agreement between the United States Department of Agriculture and the State, the United States

Warehouse Act and the North Carolina Warehouse Law and were in harmony with standard warehouse operating procedures throughout the United States.

6. Parham, individually, made no misrepresentation of fact to the plaintiff upon which the plaintiff relied to its damage. Parham's name, as State Warehouse Superintendent, appeared on all warehouse receipts issued by Woodcock, including the receipts in question in this action.

Upon these findings the court concluded that Parham, individually, was not negligent either in the licensing of Woodcock as Local Manager of the Elevator or otherwise; that he made no misrepresentations of fact to the plaintiff and did not, individually, commit any act, or fail to perform any act, which he had an obligation to perform which resulted in damage or injury to the plaintiff.

From these judgments the Bank has appealed, making 79 assignments of error directed to rulings excluding evidence offered by the plaintiff, to findings of fact, to failure to find facts, to conclusions of law in the two judgments and to the entry of such judgments.

Carr, Gibbons & Cozart by S. R. Gibbons; Johnson & Johnson by Rivers D. Johnson, Jr., and Dees, Dees, Smith, Powell & Jarrett by William A. Dees, Jr., for Branch Banking & Trust Company.

James H. Carson, Jr., Attorney General, by Millard R. Rich, Jr., Assistant Attorney General; Manning, Fulton & Skinner by Howard E. Manning and W. Gerald Thornton for Edwin Gill and W. C. Parham, Jr.

Young, Moore & Henderson by J. C. Moore for Insurance Company of North America.

Purrington, Hatch & Purrington by A. L. Purrington, Jr., for Hartford Accident and Indemnity Company.

Corbett & Fisler by Leon H. Corbett for Individual Defendant Woodcock.

Henry L. Stevens III and Vance B. Gavin, Receivers of Southeastern Grain Association, Inc., Third Party Defendants.

LAKE, Justice.

The Bank's Assignments of Error Numbers 9 to 14, inclusive, are directed to the judgment of the Superior Court dismissing the action against the defendant Parham, individually. These assignments are not brought forward in the Bank's brief, no argument is made and no authorities are cited therein with reference thereto. They are, therefore, deemed abandoned, and, no error appearing on the face of the record concerning it, that judgment is affirmed. Rule 28, Rules of Practice in the Supreme Court; *Capune v. Robbins*, 273 N.C. 581, 590, 160 S.E. 2d 881; *Mathis v. Siskin*, 268 N.C. 119, 150 S.E. 2d 24; Strong, N. C. Index 2d, Appeal and Error, § 45.

By that judgment it is determined that Parham was not negligent in any manner in connection with the operations of the Elevator and that he did not, individually, fail to perform any act, which he had an obligation to perform, which resulted in damages or injury to the plaintiff. The Bank's abandonment of all its assignments of error directed to that judgment makes it unnecessary for us to determine whether it was negligent, or otherwise a breach of Parham's duty, for him to sign warehouse receipts in blank and deliver them over to Woodcock, the Local Manager of the Elevator and also an officer of its principal customer, and thus put it in Woodcock's power to issue such receipts when no grain had been delivered to the Elevator in exchange therefor. We express no opinion upon that question herein.

Parham having been adjudged not negligent and free from any failure to perform his duties resulting in damage to the Bank, it necessarily follows that there was no error in the conclusion of the Superior Court in its other judgment that Hartford, the surety on the bond of Parham for the faithful performance of his duties, is not liable to the Bank or in so much of the second judgment of the Superior Court as adjudges that the Bank recover nothing from Hartford. (Bank's Assignments of Error Numbers 45, 65, 78 and 79.)

The Bank's Assignments of Error Number 1 through 8 relate to rulings of the Superior Court excluding or admitting evidence. We have carefully examined each of these and find no error therein which would justify a new trial of this action. No useful purpose would be served by discussing any of these assignments in detail.

[1, 2] The Bank's Assignments of Error Number 15, in part, and 47 to 72, inclusive, relate to the refusal of the Superior Court to adopt findings of fact tendered by the Bank. When, as in the present case, the parties to an action waive a trial by jury and agree that the judge may hear the evidence and find the facts, the findings of fact so made by the trial judge are comparable to the verdict of a jury. Such findings are conclusive upon review in an appellate court if there is competent evidence in the record to support them, even though the appellate court may deem the weight of the evidence to be to the contrary. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373; *Fast v. Gulley*, 271 N.C. 208, 155 S.E. 2d 507; *Crews v. Crews*, 210 N.C. 217, 186 S.E. 156; Strong, N. C. Index 2d, Appeal and Error, § 57. Conversely, the weight and credibility of the evidence being for the trial judge in such case, he is not bound to find facts as proposed by a party, even though there be competent evidence to support such a finding, and his rejection of the party's tendered finding of fact may not be reversed by the appellate court and is not ground for a new trial. *Mitchell v. Barfield*, 232 N.C. 325, 59 S.E. 2d 810. Assignment of Error Number 15, insofar as it relates to the court's failure to make findings of fact as tendered by the Bank, and Assignments of Error Numbers 47 to 72, inclusive, are, therefore, overruled.

Assignments of Error Numbers 16 to 36, inclusive, relate to findings of fact made by the Superior Court, the Bank contending that the specified findings are not supported by competent evidence. We have reviewed each such finding and, except as noted below, conclude that there is in the record ample, competent evidence to support each finding made by the Superior Court in all material respects. Under the aforementioned rule, these findings of fact are binding upon us and these assignments of error are, therefore, overruled except as noted below. It would serve no useful purpose to discuss these overruled assignments of error individually.

[3] The Superior Court's Finding of Fact Number 41, Assignment of Error Number 35, is a mixture of findings of facts and conclusions of law. The essence of it is in this sentence: "The plan to obtain possesion of the sixteen old warehouse receipts from the Bank by issuing thirteen new fraudulent receipts was in no way intended nor did it in fact promote the interest of the Farmers Grain Elevator." This is not supported by any evidence

and is clearly in conflict with other findings which are themselves supported by evidence.

At the time Woodcock's plan to obtain the 16 old receipts (the validity of which, in the hands of the Bank, is not questioned by the parties or by the finding of the trial court) was conceived and carried out, the Elevator, not Southeastern, was under official examination. Woodcock, its Local Manager, knew there were outstanding receipts issued by it calling for delivery of thousands of bushels of grain in excess of that in the Elevator. He knew that, if this shortage were discovered by the examiner, the Elevator would be compelled to cease operations. His plan was not designed to reduce and did not reduce the indebtedness of Southeastern or to enable Southeastern to obtain grain by surrendering the receipts obtained from the Bank, or to enable Southeastern to raise cash by further negotiation of the receipts. The purpose of the fraud upon the Bank was to surrender the old receipts to the Elevator for cancelation by it and thus conceal the shortage in the Elevator's accounts from the examiner, whose presence threatened the life of the Elevator. Clearly, the Elevator was the intended beneficiary of the fraud on the Bank and, clearly, it has, by retaining and canceling these receipts, benefited through a substantial reduction of its own liabilities if, as the defendants contend, the new receipts be held invalid.

The net result of Woodcock's fraud, plus the judgment of the Superior Court, is this: The Bank has lost its old note, secured by warehouse receipts, the validity of which, in the hands of the Bank, is not denied, and, in lieu thereof, holds a new note of an insolvent association, secured by worthless paper. Southeastern is neither richer nor poorer than before. The Elevator's obligations to deliver grain have been substantially reduced at no cost to it. Finding of Fact Number 41 is not supported by evidence and must be stricken. The question for us is, Does the law of this State direct the reaching of the above result in the absence of Finding of Fact Number 41?

The Bank, by this action, does not seek the restitution to it of the old note and the old warehouse receipts. In its brief it states:

> "The plaintiff does not seek to rescind the loan transaction with Southeastern. The plaintiff has elected to affirm that transaction and has brought suit to recover from the

State Warehouse Superintendent the value of the grain represented by the 13 warehouse receipts which it holds. The burden is upon the State Warehouse Superintendent to make restitution to the appellant of the value of the 16 old receipts if he wishes to avail himself of the plea of fraud as a defense to the 13 new receipts. He cannot keep the benefits of his agent Woodcock's fraud without putting himself in the position of rectifying the validity of the 13 new receipts."

Clearly, the 13 new receipts were issued, in the name of the Elevator, by its agent Woodcock without actual authority in him to do so, no grain having been received by the Elevator in exchange for the receipts. G.S. 106-441; G.S. 106-443. Woodcock was also agent for Southeastern, the payee of the receipts. His knowledge of his own want of authority to issue these receipts is attributed to Southeastern. *Norburn v. Mackie,* 262 N.C. 16, 24, 136 S.E. 2d 279; *Williams v. Lumber Co.,* 176 N.C. 174, 180, 96 S.E. 950. Consequently, the doctrine of apparent authority would not be available to Southeastern and the 13 new receipts were a nullity in the hands of Southeastern. See: *Barrow v. Barrow,* 220 N.C. 70, 16 S.E. 2d 460; 3 AM. JUR. 2d, Agency, § 74. Obviously, had Southeastern retained the 13 new receipts, having received them with full knowledge that no grain had been delivered to the Elevator in exchange for them, Southeastern would have no claim thereon against the Elevator or any of the defendants.

[4] Nothing else appearing, the Bank has no greater right by virtue of these receipts than did Southeastern, since the Bank is not a holder of them by "due negotiation," as that term is defined in the Uniform Commercial Code, G.S. Chapter 25, Part 5. The Code provides:

"Rights acquired in the absence of due negotiation; effect of diversion; seller's stoppage of delivery.—

(1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey." G.S. 25-7-504(1).

A warehouse receipt is a "document of title." G.S. 25-1-201(15). The receipts here in question were negotiable. G.S. 25-7-104(1)a. "A negotiable document of title is 'duly

negotiated' *when it is negotiated* in the manner stated in this section to a holder who purchases it in good faith without notice of any defense against or claim to it on the part of any person and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves receiving the document in settlement or payment of a money obligation." G.S. 25-7-501(4). (Emphasis added.) "A negotiable document of title running to the order of a named person is negotiated *by his indorsement* and delivery." G.S. 25-7-501(1). (Emphasis added.)

The 13 new warehouse receipts in question were delivered by Southeastern, the payee, to the Bank without Southeastern's indorsement. To be sure, the affixing of the payee's (or subsequent holder's) name upon the reverse side of a negotiable document of title by rubber stamp is a valid indorsement, if done by a person authorized to indorse for the payee and with the intent thereby to indorse. *Mayers v. McRimmon,* 140 N.C. 640, 53 S.E. 447. However, the Superior Court found that Mrs. Carlton, who stamped the name of Southeastern upon the reverse side of these receipts, had neither the authority nor the intent thereby to indorse them in the name of Southeastern. The evidence supports these findings and would support no contrary finding. Therefore, the Bank is not a transferee by negotiation and, *a fortiori,* is not a transferee by due negotiation and, nothing else appearing, acquired the title and rights of Southeastern under the 13 receipts and no more.

It is quite true, as the Bank asserts, that the transferee of a negotiable document of title has a specifically enforceable right to have his transferor supply any necessary indorsement, but it is also true that "the transfer becomes a negotiation only as of the time the indorsement is supplied." G.S. 25-7-506. Thus the Bank's proper demand, through its note teller, upon Southeastern's bookkeeper for indorsement of the receipts would not confer upon the Bank the status of a transferee by due negotiation, and a proper indorsement, after the Bank acquired knowledge of the defect in the instruments, would be equally unavailing.

Since the Bank is not a transferee by negotiation, it is unnecessary for us to determine the correctness of the Superior Court's conclusion that the Bank is not a transferee by due negotiation, for the further reasons that the receipts were irregular upon their face and that the Bank, by reason of its knowledge

of Southeastern's poor financial condition and of the circumstances surrounding the transaction did not take the receipts in the regular course of business, or without notice of defenses.

Obviously, Southeastern, having, through its officer, Woodcock, full knowledge of the facts surrounding the issue of these receipts in the name of the Elevator, could not, if it had retained the receipts, recover anything upon or by reason thereof from any of these defendants. Nothing else appearing, the Bank has no greater rights as transferee of the documents. But, says the Bank, something else does appear, namely, the Elevator received and canceled the old receipts with full knowledge, *via* Woodcock, that they were benefits flowing from the unauthorized 13 new receipts, the fruits of the fraud perpetrated upon the Bank, and thereby the Elevator is estopped to challenge the validity of the 13 new receipts in the hands of the Bank.

Woodcock was the agent of both the Elevator and Southeastern. His knowledge of the plan and the purpose and circumstances of its execution is attributed to both his principals. The situation is, therefore, the same as if the two principals were natural persons dealing with each other with full knowledge of the plan and the circumstances of its execution. The present case is distinguishable from that supposed by the Superior Court in its Finding of Fact Number 41. Had Woodcock's plan to defraud the Bank not been for the purpose of benefiting the Elevator, as, for example, had his purpose been to obtain the old, valid receipts and surrender them for grain or further negotiate them for money for his own use, his knowledge would not be attributable to the Elevator.

[5] When an agent, for the purpose of advancing the interests of his principal, makes, without authority, a contract in the name of the principal with another person, and the principal thereafter, with full knowledge of the facts, accepts and retains the benefits resulting from the contract, the principal ratifies the act of the agent and is bound upon the contract as fully as if the agent had originally acted in accordance with his authority. *Lawson v. Bank*, 203 N.C. 368, 166 S.E. 177; *Sugg v. Credit Corp.*, 196 N.C. 97, 144 S.E. 554; *Parks v. Trust Co.*, 195 N.C. 453, 142 S.E. 473; *Waggoner v. Publishing Co.*, 190 N.C. 829, 130 S.E. 609; *Bank v. Justice*, 157 N.C. 373, 72 S.E. 1016.

[6] The Elevator, with full knowledge of the issuance of the 13 new receipts though no grain had been delivered to it there-

for, accepted the old receipts, upon which it was liable to the Bank, and canceled them. It still retains this benefit derived from the unauthorized contracts (receipts) made in its name by Woodcock. It thereby ratified those receipts and cannot now be heard to deny their validity in the hands of the Bank.

The 13 new receipts being the valid obligations of the Elevator and the Elevator having defaulted thereon, the liabilities of the defendants Gill (as Custodian of the State Indemnity and Guaranty Fund), Woodcock and his surety, Insurance Company of North America, are the same as they would have been had Woodcock been expressly authorized by the Elevator to issue these receipts. We turn to the North Carolina Agricultural Warehouse Act to determine what those liabilities are.

Woodcock was not the employee or agent of the State, or of the State Warehouse System, since no part of his compensation was paid by either. G.S. 106-432.1 and G.S. 106-433(b). The Bank's right to proceed against the State Indemnity and Guaranty Fund does not, therefore, rest upon the principle of *respondeat superior*.

The State Indemnity and Guaranty Fund was created by G.S. 106-435 "in order to provide the financial backing which is essential to make the warehouse receipt universally acceptable as collateral." To that end G.S. 106-441 provides: "[T]he receipts issued under this section for cotton and other agricultural commodities shall be supported and guaranteed by the indemnity fund provided in § 106-435." Each receipt here in question states upon its face, "The State of North Carolina guarantees the integrity of this receipt." The extent of that guaranty is the right of recourse to the said fund. G.S.106-446.

In *Ellison v. Hunsinger*, 237 N.C. 619, 75 S.E. 2d 884, an action by the owner of the cotton wrongfully stored and delivered to another, upon the receipt issued therefor to the converter, this Court, speaking through Justice Parker, later Chief Justice, said:

> "G.S. Ch. 106, Art. 38, makes * * * provision for the payment of full compensation to the plaintiff for his cotton by making (1) the bond of Noggle, local Manager of the Warehouse, Inc., and his employer, the Warehouse, Inc., primarily responsible for the plaintiff's loss, if there has been any default of Noggles and the Warehouse, Inc., in the faithful performance of their obligations in operating

a warehouse under the terms of G.S. 106, Art. 38; and if they are not responsible by making (2) the bond of Fairley, State Warehouse Superintendent, liable for plaintiff's loss, if there has been any default by him in the faithful performance of his duties as State Warehouse Superintendent; and (3) if the plaintiff's loss, or any part of it, is not covered by such bonds, and by the liability of the Warehouse, Inc., then the indemnifying or guaranty fund created by G.S. 106-435 and held in the State Treasury to the credit of the warehouse system is responsible to the plaintiff for his loss, or any part of his loss not covered by such bonds."

To the same effect, see: *Lacy v. Indemnity Co.*, 193 N.C. 179, 136 S.E. 359; *Lacy v. Indemnity Co.*, 189 N.C. 24, 126 S.E. 316.

In the present case, it has been judicially determined, as above noted, that Parham, the State Warehouse Superintendent, did not fail in the faithful performance of his duties and, consequently, neither he nor the surety on his bond is liable to the Bank.

[7] Woodcock argues in his brief, that, having "paid his debt to Society" on account of his failure to perform faithfully his duties as Local Manager of the Elevator, he cannot be held liable to the Bank. Not so! In the first place, the term "debt to Society" is a misnomer. One who serves a sentence imposed for a criminal offense pays no debt to Society. He suffers a punishment for his wrong doing. In the second place, he is now sued upon an obligation to the Bank, not to Society. He defrauded the Bank and violated his duty under the Warehouse Act by issuing warehouse receipts for which no grain had been delivered to the Elevator. G.S. 106-443. For the resulting loss, he and the surety on his bond are clearly liable to the Bank, theirs being the primary liability, that of the State Indemnity and Guaranty Fund secondary. *Credit Association v. Whedbee*, 251 N.C. 24, 110 S.E. 2d 795. Woodcock's actions were, in part, for his own benefit since the shortage of grain at the Elevator was due to his own wrongful deliveries of stored grain, but even if he were acting solely for the benefit of his principal, the Elevator, this would not absolve him from personal liability for his fraud upon the Bank. *Norburn v. Mackie, supra.*

Thus the Superior Court was in error in concluding and adjudging that the Bank is entitled to recover nothing of the

defendant Gill, as Custodian of the State Indemnity and Guaranty Fund, and nothing of the defendant Woodcock and his surety, Insurance Company of North America.

The remaining question relates to the amount the Bank is entitled to recover. Each of the 13 new receipts stated in words in its body that it was for "one hundred twelve thousand pounds of grain of the kind and grade described herein." In the margin, but as part of the printed, official form, were blanks for showing in figures both the number of pounds and the number of bushels. In each receipt these blanks were filled with figures showing the amount of grain as "112,000 pounds" and as "20,000 bushels." A bushel of corn weighs 56 pounds. Thus, there is an ambiguity in each receipt. Is it for 112,000 pounds, which is 2,000 bushels, or is it for 20,000 bushels, which is 1,120,000 pounds?

[8] Part 3 of the Uniform Commercial Code deals with commercial paper, not warehouse receipts. In G.S. 25-3-118(c) it provides, "Words control figures except that if the words are ambiguous figures control." Assuming, without deciding, that the same rule applies to warehouse receipts, it has no application here for the statement of poundage is the same in both words and figures, the variance is between pounds and bushels.

In its complaint the Bank alleged it is the holder for value of 13 receipts for 20,000 bushels of No. 2 yellow corn, each. Its prayer was for recovery of the value of that quantity of such corn. The answers of all defendants denied this allegation and the answers of all, save Woodcock, alleged, affirmatively, that the receipts were issued without authority and the Bank was not a transferee by due negotiation for the reason (among others) that this ambiguity appeared on the face of the receipts, Hartford further alleging that this ambiguity rendered the receipts void for uncertainty. Thereupon, the Bank filed a reply, with leave of the Court, alleging that the old receipts which it surrendered in exchange for those now in question called for 270,000 bushels, that it was the intent of all parties to the transaction that the 13 new receipts be for 20,000 bushels each, a total of 260,000 bushels, and the statement of poundage thereon was a mistake of drafting not detected at the time of the transaction. The reply prayed reformation of the receipts to show each represented 1,120,000 pounds, the weight of 20,000 bushels.

It is true, as the defendants contend in their brief, that we have said that a reply is a defensive pleading and the plain-

tiff's cause of action cannot be alleged therein but must be stated in the complaint. *Davis v. Highway Commission,* 271 N.C. 405, 156 S.E. 2d 685. The Bank, however, stated in its complaint the cause of action for recovery of the value of 260,000 bushels of corn alleged to be due it upon these receipts. Its prayer for reformation of the receipts for mistake in the drafting of them is a defensive measure raised in response to the defendants' several answers. The rule of pleading now cited by the defendants will not bar that relief if the Bank is otherwise entitled thereto.

[9] The uncontradicted testimony of Mrs. Carlton, who prepared the receipts, is that Woodcock instructed her to make them out for 20,000 bushels each, that she undertook to do so and that, by her mistake, she stated the poundage therein incorrectly, stating the number of bushels correctly, took the receipts to the Bank and received in exchange receipts for a total of 270,000 bushels, which old receipts she canceled. Obviously, the Bank did not detect the mistake of the draftsman or it would not have released the old receipts calling for 270,000 bushels.

It is clear that, nothing else appearing, upon such showing of mutual mistake of fact resulting from an error of the draftsman, a court of equity will order the instruments reformed to express the true intent of the parties to the transaction. *Crews v. Crews, supra. Crawford v. Willoughby,* 192 N.C. 269, 134 S.E. 494; *King v. Hobbs,* 139 N.C. 170, 51 S.E. 911; Strong, N. C. Index 2d, Reformation of Instruments, § 1.

The Superior Court concluded:

> "The plaintiff is not entitled to invoke the equity jurisdiction of this Court to reform warehouse receipts numbered 974 through 986 to change the pounds reflected thereon from 112,000 to 1,120,000, because the plaintiff does not have clean hands and, further, to grant such relief would be in direct conflict with the provisions of Chapter 25 of the General Statutes of North Carolina."

[10] We find nothing in the Uniform Commercial Code, Chapter 25 of the General Statutes, which deprives a court of equity of its power to reform a warehouse receipt so as to correct a mistake of the draftsman. The maxim, "He who comes into equity must come with clean hands," is well established as a foundation principle upon which the equity powers of the Superior Courts rest. However, in its application, it is limited to

the conduct of the party seeking equitable relief in the specific matter before the court and does not extend to his general character. See: *S. H. Kress & Co. v. Aghnides,* 246 F. 2d 718 (4th Cir.); *Minnesota Muskies, Inc. v. Hudson,* 294 F. Supp. 979 (D.C.N.C.); 27 AM. JUR. 2d, Equity, § 142; 30 C.J.S., Equity, § 98c. Nothing in the findings of fact, or in the evidence, indicates any knowledge, or even suspicion, by the Bank, at the time it took these warehouse receipts in exchange for the old receipts, that these receipts were not valid or that each did not, in fact, represent 20,000 bushels of No. 2 yellow corn then in the Elevator. Obviously, the Bank had nothing whatever to gain by releasing receipts, valid in its hands, for 270,000 bushels of corn, held as security for the note of a maker in precarious financial condition, in return for spurious receipts purporting to represent a total of only 26,000 bushels.

[12] The Superior Court's conclusion that the Bank does not have clean hands in this matter appears to rest upon its findings of fact to the effect that, for a substantial period prior to this transaction, the Bank knew of Southeastern's precarious financial condition; that over such period the Bank had been exceedingly generous in allowing overdrafts by Southeastern and making loans to it; and that, at the time of this transaction, the Bank knew an official examination of the Elevator was in progress and that the Bank was rather lax and slipshod in its inspection and handling of the documents in this particular exchange. The difficulty we have with the Superior Court's conclusion is not with these findings of fact but stems from their inadequacy to show bad faith on the part of the Bank in taking these receipts in lieu of the valid ones previously held by it. In no way could the Elevator's liability have been increased or the Bank's rights have been enlarged by the exchange.

Had the draftsman's error in stating the poundage on the receipts been detected by Mrs. Carlton, the draftsman, and Mrs. Walker, the Bank's note teller, at the time Mrs. Carlton tendered the new receipts as an exchange for the old, it is inconceivable that Mrs. Carlton would have failed to correct her error.

[11] "Clean hands" connotes absence of sharp practice and bad faith on the part of the party seeking equity, not complete freedom from negligence and gullibility. As Justice Hoke, later Chief Justice, observed in *Tobacco Association v. Bland,* 187 N.C. 356, 360, 121 S.E. 636:

"Considering the record, then, in view of the general principles which should prevail in such cases, it is recognized that one who invokes in this way the equitable powers of the court for the protection of his rights must not, by his own breach of duty, *have caused the injuries or threat of them, of which he complains*, a position to some extent embodied in the more familiar maxim 'that he who comes into equity must do so with clean hands.'" (Emphasis added.)

See also: *Beam v. Wright*, 224 N.C. 677, 684, 32 S.E. 2d 213; *Stelling v. Trust Co.*, 213 N.C. 324, 197 S.E. 754; 27 AM. JUR. 2d, Equity, § 137; 30 C.J.S., Equity, §§ 93, 95, 98.

[12] We find nothing in the findings of fact by the Superior Court, or in the evidence set forth in the record, to support the conclusion that, in the transaction in which the Bank acquired the new warehouse receipts in exchange for the old, the Bank was acting in bad faith, or engaged in any sharp practice, so as to render its hands unclean and bar it from asking a court of equity to reform the new receipts to make them express the clear intent of the parties. The Bank, on this record, is entitled to have the 13 new receipts it now holds reformed so as to show they represent 1,120,000 pounds of corn each.

The judgment of the Superior Court that the Bank have and recover nothing of the defendant Gill, as Custodian of the State Indemnity and Guaranty Fund, or of the defendants Woodcock and Insurance Company of North America is reversed and this matter is remanded to the Superior Court of Duplin County for the entry of a judgment in conformity with this opinion.

As to Defendants Parham and Hartford Accident and Indemnity Company

Affirmed.

As to Defendants Gill, Woodcock and Insurance Company of North America

Reversed and remanded.

Justices COPELAND and EXUM took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROY JOYNER

No. 112

(Filed 31 January 1975)

1. **Indictment and Warrant § 14— motion to quash — constitutionality of ordinance**

A defendant charged with a violation of an ordinance may challenge the constitutionality of such ordinance by a motion to quash the warrant since there can be no sufficient statement of a criminal offense in a charge of violation of an unconstitutional statute or ordinance.

2. **Municipal Corporations § 30— rezoning ordinance — presumption of validity**

A duly adopted rezoning ordinance is presumed to be valid and the burden is on the complaining party to show it to be invalid.

3. **Constitutional Law § 23— due process — guaranty against arbitrary legislation**

Substantive due process is a guaranty against arbitrary legislation, demanding that the law be substantially related to the valid object sought to be obtained.

4. **Municipal Corporations § 30— determination of reasonableness of zoning ordinance — application to individual not made**

In examining the reasonableness of an ordinance, due process dictates that the court look at the entire ordinance and not only at the provision as it applies to a particular inhabitant of the municipality, and the fact that one citizen is adversely affected by a zoning ordinance does not invalidate the ordinance.

5. **Municipal Corporations § 30— building material salvage yard — removal required by zoning ordinance — constitutionality of ordinance**

A zoning ordinance which prohibited operation of a building material salvage yard in specified districts, including the one in which defendant maintained his business, and which allowed a grace period of three years after it was adopted for the removal of such business was not so arbitrary, unreasonable, or unrelated to the general welfare of the community as to be unconstitutional by its terms; rather, it represented a conscious effort on the part of the legislative body of the city to regulate the use of land throughout the city and thus promote the health, safety, or general welfare of the community.

6. **Municipal Corporations § 30— zoning ordinance — amortization provision — validity**

Amortization provisions requiring termination of nonconforming uses within a prescribed period of time are valid if the period of time is reasonable; an amortization period of three years for removal of a building material salvage business was reasonable and the provision was therefore valid.

State v. Joyner

7. **Municipal Corporations § 30— zoning ordinance — removal of building material salvage yard required — no taking of property without compensation**

A zoning ordinance which required that defendant remove his building material salvage yard within three years did not amount to a taking of his property for a public purpose without compensation where, at the time the ordinance was passed, defendant had an oral lease for the property on which his business was located, any improvements which he made would inure to the benefit of the landowner, defendant by his own testimony could dispose of his inventory within the three year period, and with full knowledge that the ordinance required him to remove his business within three years, defendant proceeded to enter into a long-term written lease, continued to make improvements and to operate his business.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Justice LAKE dissenting.

APPEAL by defendant pursuant to G.S. 7A-30(1) from the decision of the Court of Appeals, reported in 23 N.C. App. 27, 208 S.E. 2d 233 (1974), which found no error in the trial before *McConnell, J.*, at the 22 April 1974 Session of FORSYTH Superior Court.

Defendant was convicted on trial *de novo* in the Superior Court on a warrant charging a violation of a zoning ordinance of the city of Winston-Salem. The ordinance, effective 17 September 1968, prohibited operation of a building material salvage yard in specified districts, including those zoned as B-3, and allowed a grace period of three years thereafter for the removal of such business. Defendant operates a building material salvage yard at 4131 N. Patterson Avenue in Winston-Salem within a B-3 zone contrary to the ordinance. Section 29-11 G of the ordinance under which defendant is charged is as follows:

"G. *Removal of Certain Non-Conforming Uses Required*

"1. The following uses, if they are or become nonconforming by virtue of the adoption of this ordinance or of subsequent amendments thereto, shall be removed within three years after the date of adoption hereof or of such amendment:

a. Auto wrecking yards, building material salvage yards, general salvage yards, scrap metal processing yards, and contractors' storage yards

b. Advertising signs in all districts except B-2, other than those advertising signs that are non-conforming only as to size or height."

Defendant does not own the land on which his business is located, but began operation at his present location in 1966 under an oral lease. The record does not disclose the terms of this lease. In 1968, after the adoption of the zoning ordinance, defendant, with notice of this ordinance, entered into a written lease extending until 1979. Upon the expiration of the three-year period following the passage of the ordinance, defendant was informed that his business violated the zoning ordinance. He refused to remove his salvage yard. A warrant charging defendant with a violation of the ordinance was issued on 11 May 1973. In Superior Court defendant made a motion to quash the warrant on the grounds that the ordinance upon which it was based was unconstitutional. This motion was denied.

At trial defendant testified: "I do not deny that I am operating a place that is nonconforming. I know it's a B-3 zone and has been since 1968."

The jury found defendant guilty. From a sentence of 30 days imprisonment suspended for one year on the condition that defendant pay a fine of $50 and costs and that he discontinue the nonconforming use of the property at the end of 12 months, defendant appealed to the Court of Appeals. That court found no error.

Other facts pertinent to decision are set out in the opinion.

Attorney General James H. Carson, Jr., by Richard N. League, Assistant Attorney General, for the State.

Craige, Brawley, by C. Thomas Ross for defendant appellant.

MOORE, Justice.

Defendant assigns as error the failure of the trial court to quash the warrant on the ground that the ordinance on which it is based is unconstitutional.

[1] A defendant charged with a violation of an ordinance may challenge the constitutionality of such ordinance by a motion to quash the warrant since there can be no sufficient statement of a criminal offense in a charge of violation of an unconstitutional

statute or ordinance. *State v. Atlas,* 283 N.C. 165, 195 S.E. 2d 496 (1973); *State v. Brewer,* 258 N.C. 533, 129 S.E. 2d 262 (1963).

As stated by Justice Lake in *State v. Vestal,* 281 N.C. 517, 189 S.E. 2d 152 (1972):

> "In passing upon such motion, the court treats the allegations of fact in the warrant, or indictment, as true and considers only the record proper and the provisions of the statute or ordinance. *State v. Lee,* 277 N.C. 242, 176 S.E. 2d 772; *State v. McBane,* 276 N.C. 60, 170 S.E. 2d 913; *State v. Cooke,* 248 N.C. 485, 103 S.E. 2d 846; *State v. Andrews,* 246 N.C. 561, 99 S.E. 2d 745. . . ."

Defendant does not question the validity of the entire ordinance. Instead, he questions only the section which provides for termination of certain nonconforming uses. Defendant takes the position that the Court of Appeals should have reversed the trial court's refusal to quash the warrant on the ground that section 29-11 G of the Winston-Salem zoning ordinance he is charged with violating is contrary to the Fifth and Fourteenth Amendments of the Constitution of the United States in that it deprives him of his property without due process of law and represents a taking of his property without compensation.

The zoning power of municipalities is derived from the State. As stated in *Keiger v. Board of Adjustment,* 278 N.C. 17, 178 S.E. 2d 616 (1971):

> "The original zoning power of the State reposes in the General Assembly. *Marren v. Gamble,* 237 N.C. 680, 75 S.E. 2d 880. It has delegated this power to the 'legislative body' of municipal corporations. G.S. 160-172 *et seq.; In re Markham,* 259 N.C. 566, 131 S.E. 2d 329, and cases cited. Within the limits of the power so delegated, the municipality exercises the police power of the State. *Raleigh v. Fisher,* 232 N.C. 629, 61 S.E. 2d 897. The power to zone, conferred upon the 'legislative body' of a municipality, is subject to the limitations of the enabling act. *Marren v. Gamble, supra; State v. Owen,* 242 N.C. 525, 88 S.E. 2d 832."

On 17 September 1968, G.S. 160-172 in pertinent part provided:

> "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative

body of cities and incorporated towns is hereby empowered *to regulate* and *restrict* the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and *the location and use of buildings, structures and land for trade, industry, residence or other purposes. . . .* " (Emphasis added.)

G.S. 160-173 provided:

"For any or all said purposes it may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article; and within such districts it *may regulate and restrict* the erection, construction, reconstruction, alteration, repair or *use of buildings, structures or land.* All such regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts." (Emphasis added.)

G.S. 160-174 provided:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provisions of transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration, among other things, as to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and *encouraging the most appropriate use of land throughout such municipality.*" (Emphasis added.)

Acting under the broad authority given the city by these statutes, a comprehensive zoning ordinance was adopted by the Board of Aldermen of Winston-Salem pursuant to these statutes and Chapter 677 of the 1947 Session Laws of North Carolina as amended. The section under which defendant was convicted was a part of that ordinance.

[2] A duly adopted rezoning ordinance is presumed to be valid. *Allred v. City of Raleigh,* 277 N.C. 530, 178 S.E. 2d 432 (1971);

Schloss v. Jamison, 262 N.C. 108, 136 S.E. 2d 691 (1964). And the burden is on the complaining party to show it to be invalid. *Heaton v. City of Charlotte,* 277 N.C. 506, 178 S.E. 2d 352 (1971).

As we said in *In Re Appeal of Parker,* 214 N.C. 51, 55, 197 S.E. 706, 709 (1938):

> "When the most that can be said against such ordinances is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere. In such circumstances the settled rule seems to be that the court will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining whether its action is in the interest of the public health, safety, morals, or general welfare. [Citations omitted.]"

Defendant first contends that Section 29-11 G, under which he was convicted, is unconstitutional on its face in that it deprives him of his property without due process of law.

[3, 4] Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained. *West Coast Hotel Co. v. Parrish,* 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578, 108 A.L.R. 1330 (1937); *Nebbia v. New York,* 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, 89 A.L.R. 1469 (1934); *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 71 L.Ed. 303, 47 S.Ct. 114, 54 A.L.R. 1016 (1926); *Blades v. Raleigh,* 280 N.C. 531, 187 S.E. 2d 35 (1972); *Helms v. Charlotte,* 255 N.C. 647, 122 S.E. 2d 817 (1961). In examining the reasonableness of an ordinance, due process dictates that the court look at the entire ordinance and not only at the provision as it applies to a particular inhabitant of the municipality. *Schloss v. Jamison, supra; City of Elizabeth City v. Aydlett,* 201 N.C. 602, 161 S.E. 78 (1931). The fact that one citizen is adversely affected by a zoning ordinance does not invalidate the ordinance. *Blades v. Raleigh, supra,* and cases cited therein; *Bohannan v. San Diego,* 30 Cal. App. 3d 416, 106 Cal. Rptr. 333 (1973).

Defendant's building material salvage yard is located in a B-3 district, in which such business is prohibited. The purpose of the B-3 district is set out in Section 29-6 D 3 a. of the ordinance as follows: "This district seeks to provide areas for the develop-

ment of the business, heavy commercial, or service establishments which locate along the major streets or highways of Winston-Salem and its surrounding area." Section 29-11 G provides that, in the event of an auto wrecking yard, building material salvage yard, general salvage yard, scrap metal processing yard or contractors' storage yard is located in an area zoned by the ordinance to prohibit such use, the user has a three-year grace period to remove the nonconforming use.

Section 29-6 contains a table of uses permitted in Winston-Salem and indicates which uses may be located in each of the thirteen zoning districts. The list of permitted uses covers eleven and one-half pages. Building material salvage yards are permitted in districts zoned as I-3.

[5] Winston-Salem has sought, through a comprehensive ordinance, to assure that future growth is orderly and in the best interests of its citizens. To further that purpose, the ordinance establishes a three-year period during which defendant may remove his nonconforming use. The method used to terminate nonconforming uses was a legislative decision to be reached by balancing the burden on the individual with the public good sought to be achieved. Section 29-11 G is not so arbitrary, unreasonable, or unrelated to the general welfare of the community as to be unconstitutional by its terms. To the contrary, it represents a conscious effort on the part of the legislative body of the city to regulate the use of land throughout the city and thus promote the health, safety, or general welfare of the community. Defendant's first assignment of error is overruled.

[6] Defendant next contends that section 29-11 G is invalid on its face in that it permits a taking of private property for a public purpose without compensation contrary to the Fifth and Fourteenth Amendments of the United States Constitution.

The reasoning behind the utilization of amortization provisions to displace nonconforming uses is well stated by Professor Anderson, as follows:

> "Municipalities which seek to terminate nonconforming uses through amortization proceed on the assumption that the public welfare requires that such uses cease, but that summary termination is illegal, impractical, or unfair. They find a middle ground, between immediate cessation of use and the indefinite continuance thereof, by adopting regulations which permit the nonconforming users, or some of

them, to continue for a specified period, but which require them to end the prohibited use upon the expiration of that period. The term 'amortization' is derived from the notion that the nonconforming user can amortize his investment during the period of permitted nonconformity. It is reasoned that this opportunity to continue for a limited time cushions the economic shock of the restriction, dulls the edge of popular disapproval, and improves the prospects of judicial approval." 1 Anderson, American Law of Zoning, sec. 6.65, 446-47 (1968).

North Carolina has neither accepted nor rejected amortization provisions requiring termination of nonconforming uses within a prescribed period of time. Our Court has dealt with the problem of the elimination of nonconforming uses in various ways. In two early cases, *Wake Forest v. Medlin,* 199 N.C. 83, 154 S.E. 29 (1930), and *Ahoskie v. Moye,* 200 N.C. 11, 156 S.E. 130 (1930), this Court upheld ordinances forcing the termination of nonconforming uses without amortization periods. In *Medlin* the city ordinance provided that it was unlawful to erect, build, maintain, or operate any station for the sale or distribution of gasoline, kerosene, or any other petroleum products in any part of the town of Wake Forest west of the Seaboard Railroad tracks after February 1, 1929. The defendant had been operating a filling station in the restricted area since 1905. This Court, in an opinion by Chief Justice Stacy, upheld the ordinance and held that it was within the police power of the State to regulate this business and to declare such use a nuisance if the power is not exerted with unjust discrimination. Chief Justice Stacy then concluded that since "it operates on all alike within the territory affected, and all within the prescribed limits are affected by its terms," it was neither arbitrary nor discriminatory.

In *In re O'Neal,* 243 N.C. 714, 92 S.E. 2d 189 (1956), and *In re Appeal of Hastings,* 252 N.C. 327, 113 S.E. 2d 433 (1960), the Court approved restrictions on the extension of nonconforming uses, and held that a city has the authority to prohibit an enlargement of a nonconforming use.

Amortization provisions have been considered a number of times in other jurisdictions. See Annot., 22 A.L.R. 3d 1134 (1968). The majority of courts that have addressed the question have held that provisions for amortization of nonconforming uses are valid if reasonable. *Standard Oil Co. v. Tallahassee,*

183 F. 2d 410 (5th Cir. 1950); *National Advertising Co. v. County of Monterey,* 211 Cal. App. 2d 375, 27 Cal. Rptr. 136 (1962); *Los Angeles v. Gage,* 127 Cal. App. 2d 442, 274 P. 2d 34 (1954); *Eutaw Enterprises, Inc. v. Baltimore,* 241 Md. 686, 217 A. 2d 348 (1966); *Harbison v. Buffalo,* 4 N.Y. 2d 553, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958). See also, Comment, Amortization of Nonconforming Uses, 7 Wake Forest L. Rev. 255 (1971). These cases have held that such regulation of private property does not *per se* constitute a compensable taking, stating:

> " . . . In essence there is no distinction between requiring the discontinuance of a nonconforming use within a reasonable period and provisions which deny the right to add to or extend buildings devoted to an existing nonconforming use, which deny the right to resume a nonconforming use after a period of nonuse, which deny the right to extend or enlarge an existing nonconforming use, which deny the right to substitute new buildings for those devoted to an existing nonconforming use—all of which have been held to be valid exercises of the police power." *Los Angeles v. Gage, supra,* at 459, 274 P. 2d at 44.

As the New York Court of Appeals said in *Harbison v. Buffalo, supra,* at 562-63, 176 N.Y.S. 2d at 605, 152 N.E. 2d at 47:

> " . . . We cannot say that a legislative body may not in any case, after consideration of the factors involved, conclude that the termination of a use after a period of time sufficient to allow a property owner an opportunity to amortize his investment and make other plans is a valid method of solving the problem. . . .
>
> " . . . When the termination provisions are reasonable in the light of the nature of the business of the property owner, the improvements erected on the land, the character of the neighborhood, and the detriment caused the property owner, we may not hold them constitutionally invalid."

Three-year time limtiations have often been upheld by other courts in zoning proceedings, *Village of Gurnee v. Miller,* 69 Ill. App. 2d 248, 215 N.E. 2d 829 (1966); *Naegele Outdoor Advertising Company v. Village of Minnetonka,* 281 Minn. 492, 162 N.W. 2d 206 (1968); as have two-year limitations, *Spurgeon v. Board of Commissioners of Shawnee County,* 181 Kan. 1008, 317 P. 2d 798 (1957); and one-year limitations,

Standard Oil Company v. Tallahassee, supra; McKinney v. Riley, 105 N.H. 249, 197 A. 2d 218 (1964); *Seattle v. Martin,* 54 Wash. 2d 541, 342 P. 2d 602 (1959). See generally, 1 Anderson, *supra,* § 6.62-6.71; 2 Yokley, Zoning Law and Practice § 16-14 (1965).

We concur in the majority rule as above set out that the provisions for amortization of nonconforming uses are valid if reasonable, and reject the *per se* rule holding all amortization provisions unconstitutional. This assignment of error is overruled.

[7] Defendant finally contends that the ordinance is unconstitutional as applied to him in that it constitutes a taking of his property for a public purpose without compensation.

Defendant began operation of his building material salvage yard on its present site in 1966. The ordinance became effective on 17 September 1968. Later in 1968, after the effective date of the ordinance, defendant signed his first written lease on the property extending to 1979. Prior to that time, the record shows defendant had an oral lease. An oral lease for land is void in North Carolina if the term exceeds three years. G.S. 22-2; *Moche v. Leno,* 227 N.C. 159, 41 S.E. 2d 369 (1947). Thus, at the effective date of the ordinance, defendant, being without a written lease, could have had no more than a three-year vested leasehold interest in the property. Any improvements on the land would inure to the benefit of the landowner. The ordinance provides a three-year grace period for nonconforming uses to relocate. The interference by the city with defendant's vested rights in his leasehold was therefore minimal. Furthermore, under the facts in this case defendant is in no position to complain. He testified: "I have an inventory out there and I turn it over and I could have turned over everything that I sold out there in three years. . . . I know it's a B-3 zone and has been since '68. The only thing that I am contending is that I was out there two years prior to this zoning. So far as I know the law applies to everybody but I do not like the fact that it applies to me. . . . " Defendant further testified that he tried to get the property rezoned, but failed. Despite this, and with full knowledge that the ordinance required him to remove his business within three years, he proceeded to enter into a long-term written lease, continued to make improvements and to operate his business.

Defendant was notified on several occasions after the expiration of the grace period that he was in violation of the law. The zoning inspector so informed defendant on 14 September 1971, 25 July 1972, and 4 May 1973. In addition, defendant was mailed a zoning violation notice on 5 October 1971. Defendant made no effort to comply with the ordinance because he "did not think it was fair." Since the passing of the ordinance in 1968, defendant has operated his nonconforming use for over six years—a part of this time in defiance of the city. Under these facts, we cannot say that the Winston-Salem ordinance which defendant is charged with violating is unconstitutional as applied to defendant. We neither consider nor decide whether this ordinance would be considered "reasonable" had the defendant been the owner in fee.

For the reasons above set out, the decision of the Court of Appeals is affirmed.

Affirmed.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Justice LAKE dissenting.

When the zoning ordinance was adopted the appellant's material storage yard was already in operation. Thus, the appellant could not have been compelled to close his business immediately without compensating him for the taking. The city does not contend otherwise. What it contends is that it may reach the same result by dragging the process out over a period three years because, by permitting him to "amortize" his loss, it hurts him less. This argument is like the classic formula for reducing a dog's pain by cutting off his tail an inch at a time.

The fallacy in the "amortization" argument of the majority opinion is thus stated by the Supreme Court of Missouri in *Hoffman v. Kinealy*, ... Mo. ....., 389 S.W. 2d 745:

> "To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly may be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a

'reasonable' time. All of this leads us to suggest, as did the three dissenting justices in *Harbison v. City of Buffalo,* [4 N.Y. 2d 533], 152 N.E. 2d at 49, that it would be a strange and novel doctrine indeed which would approve a municipality taking private property for public use without compensation if the property was not too valuable and the taking was not too soon, and prompts us to repeat the caveat of Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416, 43 S.Ct. 158, 160, 67 L.Ed. 322, 28 A.L.R. 1321, that '[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.' "

The appellant's business is a lawful one. It is not contended that it is a nuisance per se or in its manner of operation, nor that it is a threat to the public health, safety or morals. At the time the ordinance was passed, the appellant had no long term lease, but he was in possession of the site with the consent of the owner of the fee and had the legal right to remain there, so long as the owner of the fee would permit, after the termination of his then existing lease. The city could not terminate his short term lease or the ensuring tenancy at will, nor, in my opinion, can it terminate his right to carry on his lawful, nonconforming use of the property without paying him for it.

STATE OF NORTH CAROLINA v. BOBBY HINES, JESSE LEE WALSTON AND VERNON LEROY BROWN

No. 15

(Filed 31 January 1975)

1. Rape § 1— definition of rape — nature of force required

Rape is the carnal knowledge of a female person by force and against her will, but the force necessary to constitute rape need not be physical force; rather, fear, fright, or coercion may take the place of force.

2. Rape § 5— sufficiency of evidence for submission to jury

The trial court in a prosecution for rape properly submitted the case to the jury where the prosecuting witness testified that she did not consent to any one of the defendants having sexual relations with her, that each of the acts of intercourse was against her will, that defendants' strength was greater than hers, and that she feared for her life.

3. **Criminal Law § 102— solicitor's statement on voir dire — prejudicial error — new trial**

In a capital case an improper statement made by a solicitor in the presence of prospective jurors during their *voir dire* examination may well be as prejudicial as a similar statement made by him during argument to the jury; therefore, defendants in this rape case are entitled to a new trial where the solicitor on *voir dire* told a juror, who expressed misgivings regarding the death penalty, "and to ease your feeling, I might say to you that no one has been put to death in North Carolina since 1961."

Justices COPELAND and EXUM took no part in the consideration or decision of this case.

APPEAL by defendants from *Webb, J.*, 3 December 1973 Special Session of EDGECOMBE Superior Court.

Each defendant was charged by an indictment, proper in form, with the rape of Deborah Jo Tostoe. The cases were consolidated for trial over defendants' objections, and each defendant entered a plea of not guilty.

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

Deborah Jo Tostoe, a twenty-two-year-old white woman, testified that on the night of 4 August 1973 she had been out with her boyfriend and another couple. While at the home of the mother of her female companion, she became nauseated from drinking alcoholic beverages. She told her boyfriend, Ricky Sanderson, that she wanted to go home, but he refused to take her home. She was "hurt" by this refusal and started walking home alone about midnight. She was crying as she walked barefooted along the U. S. Highway 64 Bypass in Tarboro. While on the bypass, she saw a car pass and heard someone shout something to her from the car. The car turned around, came alongside her, and stopped. Someone in the car offered her a ride home. She accepted the offer and voluntarily entered the automobile. The automobile was a two-door Chevelle with bucket seats, and the front seat had to be pulled forward in order for a person to enter the back seat. She entered the back seat, where defendant Hines was sitting and for the first time realized that all of the occupants of the car were young black males. She could not get out of the car, and she relied on their promise to take her home. The car proceeded toward her home but passed through the intersection where it should have turned in order to go to her residence. She told defendants that

they had missed the turn, but they completely ignored her. She failed in her attempt to locate the door handle or window handle, and at that time she became frightened.

Defendant Hines then grabbed prosecutrix's breasts, which action "totally shocked" her. She was initially successful in removing his hands, but, as the car continued on its way, Hines pushed her down in the back seat and proceeded to remove her clothing. She tried to push him away, but, realizing his superior strength, she concluded that resistance would be futile. In previous discussions with her mother and sister, prosecutrix had agreed that, in such a situation, it would be better to submit rather than to resist and risk serious injury.

Prosecutrix stated that she cried during this entire episode but that, despite her tears and protestations, defendant Hines proceeded to have sexual intercourse with her. By this time the car had stopped on a deserted stretch of rural road. There the other two defendants had sexual intercourse with her against her will. As the car left the scene, defendant Hines again had intercourse with her. She testified:

> "I did not consent to the defendant having relations with me. I did not give any one of them permission to have sexual relations with me. It definitely was done against my will.
>
> * * *
>
> "Their strength was much greater than mine and I was afraid that my life could have been taken or hurt in some way."

The car proceeded to the Hollywood Drive-In where she left the automobile and received aid from bystanders.

In corroboration, the State offered witnesses who testified that they heard the prosecuting witness state that she had been raped by three black men. These witnesses also testified that in their opinion she was not intoxicated but that she was very upset and in a hysterical condition.

Dr. John Whaley testified that he examined Deborah Jo Tostoe at the emergency room of the local hospital during the early morning hours of 5 August 1973, that he found sperm in her vagina, but that he observed no bruises, contusions, or cuts on her body. He testified that there was evidence of sexual intercourse within twelve to fourteen hours prior to his examina-

tion. He further testified that the physical evidence showed no more than he would have expected to find upon examining a married woman who had engaged in recent sexual intercourse with her husband.

The State also offered witnesses whose testimony tended to show that the prosecuting witness bore a good reputation in the community.

Defendants offered evidence which, in summary, tended to show that all three defendants were in the Chevelle automobile and that they stopped and picked up the prosecutrix. Each defendant admitted that he had sexual intercourse with Deborah Jo Tostoe; however, each defendant emphatically testified that each act of intercourse was consummated with her consent. The defendants' evidence further tended to show that the prosecuting witness voluntarily got into the car with them and shortly thereafter began to address them as "Sugar." She not only consented to several acts of intercourse but in fact encouraged each of them to consummate each act of intercourse. The defendants' evidence also tended to show that the prosecuting witness was under the influence of alcohol.

Defendants offered several witnesses who testified as to their good character.

The jury returned a verdict of guilty of rape as to each defendant. Each defendant appealed from a judgment sentencing him to death by asphyxiation.

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

Grover Prevatte Hopkins of the North Carolina Bar; Morris Dees, Jr., and Charles F. Abernathy of the Alabama Bar for Defendants.

BRANCH, Justice.

Defendants assign as error the failure of the trial judge to grant their motions for nonsuit.

[1] Rape is the carnal knowledge of a female person by force and against her will. The force necessary to constitute rape need not be physical force. Fear, fright, or coercion may take the place of force. *State v. Flippin,* 280 N.C. 682, 186 S.E. 2d 917; *State v. Primes,* 275 N.C. 61, 165 S.E. 2d 225; *State v.*

Carter, 265 N.C. 626, 144 S.E. 2d 826; *State v. Thompson*, 227 N.C. 19, 40 S.E. 2d 620.

In passing upon a motion for judgment as of nonsuit, the trial judge must consider all the evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence and considering so much of defendant's evidence as may be favorable to the State. In considering the motion, the Court is not concerned with the weight of the testimony, or with its truth or falsity, but only with the question of whether there is sufficient evidence for the jury to find that the offense charged has been committed and that defendant committed it. *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156; *State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845; *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365; *State v. Primes, supra; State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679.

[2] The only question of fact presented for determination by the jury was whether defendants obtained carnal knowledge of the prosecuting witness by force and against her will or whether the acts were done with her consent. The prosecuting witness testified that she did not consent to any one of the defendants having sexual relations with her and that each of the acts of intercourse was against her will. She stated that their strength was greater than hers and that she feared for her life. We note that in the oral argument before this Court, counsel for defendants conceded that the evidence was sufficient to require submission of the case to the jury.

We hold that there was substantial evidence of all material elements of the crime of rape as to each defendant and that the trial judge properly overruled the motions for nonsuit.

Appellants, by their Assignment of Error Number 15, contend that certain statements made by the solicitor during the *voir dire* examination of prospective jurors were so prejudicial as to entitle them to a new trial.

After three jurors had been seated, the following exchange occurred:

> "JUROR GRACE WHITEHURST: I am not comfortable with capital punishment. However, were I to serve on this jury, if I felt that the defendants were guilty, I would have to vote that way, but I would feel that I had endangered myself.

"MR. HOLDFORD: Well, everybody feels that way but this is the punishment that is provided at this point. And to ease your feelings, I might say to you that one one has been put to death in North Carolina since 1961.

OBJECTION: SUSTAINED.

EXCEPTION No. 11."

We do not find that this Court has ruled upon the effect of similar statements by the solicitor during *voir dire* examinations of prospective jurors in a capital case; however, we find guidance in our cases in which the solicitors have made like remarks during jury arguments.

In *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542, the solicitor stated in his closing argument that "in all first degree cases where men were convicted there would be an appeal to the Supreme Court, and that in this case, if this defendant were convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed, there would be an appeal to the Governor to commute the sentence of the prisoner; and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed." Even though counsel for defendant subsequently told the trial judge that he did not desire an instruction to disregard this improper statement, this Court held such statement to be prejudicial error. Justice Winborne (later Chief Justice), writing for the Court, stated:

"[I]t is manifest that the statements of facts that if the defendant be convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed there would be an appeal to the Governor to commute the sentence of the prisoner, and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed, are matters not included in the evidence. Nor are they justified as being in answer to argument of counsel for defendant. They are calculated to unduly prejudice the defendant in the defense of the charge against him. 'Who can say,' as counsel for defendant ask, 'to what extent the jury was influenced by the solicitor's statement that the prisoner, in the event his appeal did not obtain a new trial, that he still had a forty per cent chance to have his sentence commuted?' We hold

the remarks to be error,—and such error as called for correction by the presiding judge. [Citations omitted.]"

In *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35, the defendant was convicted of first-degree murder and sentenced to death. During the trial of this case, the solicitor, in his final argument to the jury, in part, argued:

"In North Carolina there are four capital felonies, that is felonies for which the punishment is death. Murder in the first degree is one of these felonies. The defendant is being tried under a bill of indictment which charges murder in the first degree, and the State is asking for a conviction. I know that juries as a rule are reluctant to find defendants guilty of an offense for which the punishment is death. You, gentlemen of the jury, are but a small cog in the final determination and conclusion of this case. If you find the defendant guilty as charged, and the defendant is sentenced by the Presiding Judge to be executed in the manner which the statute prescribes, that does not mean that the defendant will be put to death. Before the defendant will be put to death the Supreme Court will review his trial, whether or not the defendant appeals, and the Supreme Court will seek to find some error or errors entitling the defendant to a new trial. If the Supreme Court fails to find error, the Governor, through the Commissioner of Paroles, will be urged to extend executive clemency. Petitions and letters of recommendation, recommending clemency, will be filed, and the Commissioner of Paroles, and in all probability the Governor, personally, will carefully review and consider this case and all recommendations and petitions filed in the defendant's behalf, before the defendant is executed, and I argue to you, gentlemen of the jury, that not all, but only a certain percentage of the defendants who are convicted in North Carolina of capital felonies finally suffer the death penalty. You can see, therefore, gentlemen of the jury, that you are only a small cog in the final determination of what may happen to this defendant, even if you find him guilty, as charged in the bill of indictment."

No objection was made to the argument. This Court, nevertheless, granted a new trial, and, *inter alia,* stated:

" 'The State does not ask for the conviction of a defendant except upon the facts and the law, stripped of all extraneous

matter,—the naked facts,' said *Walker, J.*, in *S. v. Davenport,* 156 N.C., 596, 72 S.E., 7. To find the facts is the sole province and responsibility of the jury. Moreover, what consequences the verdict on the facts may bring to defendant is of no concern to the jury. Hence, the remarks here tend to disconcert the jury in fairly and freely deliberating upon the facts and in arriving at a just and true verdict.

"Moreover, here as in the *Little case* it is doubted that the harmful effect of the remarks of the solicitor in appealing for a verdict of murder in the first degree could have been removed from the minds of the jury by full instruction of the trial judge. In *S. v. Noland,* 85 N.C., 576, speaking of a gross abuse of privilege by counsel, *Ruffin, J.*, said: 'After its commission, under the circumstances, it admitted of no cure by anything that could be said in the charge.' See also *Holly v. Holly,* 94 N.C., 96.

"But the contention was made in the *Little case,* as it is here, that exception to the improper remarks not taken before verdict is not seasonable. Under the facts there as here the rule is inapplicable.

"Ordinarily it is the duty of counsel to make timely objection so that the judge may correct the transgression by instructing the jury. *S. v. Suggs,* 89 N.C., 527. And, ordinarily, the failure to object before verdict is held to constitute waiver of objection. *S. v. Tyson,* 133 N.C., 692, 45 S.E., 838. But where, as here, the harmful effect of the remarks is such that it may not be removed from the minds of the jury by instruction of the judge, the reason for the rule requiring the objection to be made before the verdict does not exist."

See also State v. Dockery, 238 N.C. 222, 77 S.E. 2d 664.

Other jurisdictions have considered remarks comparable to those here challenged, which, as here, were made during the *voir dire* examination of prospective jurors in capital cases.

In *People v. Johnson,* 284 N.Y. 182, 30 N.E. 2d 465, the district attorney, over defendant's objection, asked numerous prospective jurors, on their *voir dire* examination, whether they knew that, if defendant were convicted and received the death sentence, any jury error could be corrected by judicial appeal or executive clemency. The Court, faced with "such grave error at

the very threshold of the trial as to make it doubtful whether the jury could thereafter render a verdict with full appreciation of its responsibility," reversed the conviction and forcefully explained its reasoning, as follows:

> "The vice of the statements and questions of the District Attorney lies not primarily in the incorrectness of the statement that an appeal to the Court of Appeals is compulsory but in the suggestion that the jury's verdict, if against the defendant, cannot be seriously harmful to him because of the opportunities for review. This suggestion is fundamentally unsound and vitiates the trial. No element of our judicial process must be more carefully protected than the function of the jury. The jury has nothing to do with appeals and applications for clemency. They lie in a wholly different field. The jurors have task enough to find the truth and proclaim it by their determination without regard to ultimate consequences. Nothing can be permitted to weaken the jurors' sense of obligation in the performance of their duties. [Citations omitted.]"

A similar holding appears in *Blackwell v. State,* 76 Fla. 124, 79 So. 731, where the defendants were charged with murder. During the *voir dire* examination of prospective jurors, the assistant State's attorney, in the presence of the veniremen, stated that the future action of the Board of Pardons was entitled to consideration by them. The Court granted a new trial and condemned this statement on the theory that it fixed in the minds of the jurors the thought that if they erred in returning a verdict of guilty, the Board of Pardons might or would correct it. *See generally,* as to prosecutorial indiscretions at various stages of the trial, Annotation, 16 A.L.R. 3d 1137; Annotation, 3 A.L.R. 3d 1448.

[3] We hold that in a capital case improper statements made by a solicitor in the presence of prospective jurors during their *voir dire* examination may well be as prejudicial as a similar statement made by him during argument to the jury.

The position and grave responsibilities of a public prosecutor as the representative of the sovereign were clearly enunciated by Justice Sutherland in *Berger v. United States,* 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314. We quote from that opinion:

> "The [district attorney] is the representative not of an ordinary party to a controversy, but of a sovereignty

whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. . . .

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. . . . "

In the context of cases before us, the statement of the solicitor, professedly made to "ease" the "feelings" of a juror concerning her misgivings regarding the death penalty, suggested to the jurors, both prospective and seated, that if verdicts of guilty were returned, the mandatory death penalty, in all probability, might not or would not be imposed.

It is the province of a juror to return a verdict which speaks the truth. This duty is his sole responsibility. We cannot allow this solemn obligation to be diluted by statements *aliunde* the record and foreign to his single duty. In these volatile and bitterly contested cases, in which three human lives hung in the balance, we think the solicitor's statement was intended to, and in all probability did, lighten the solemn burden of the jurors in returning their verdict.

We hold that the challenged statement of the solicitor was improper and unduly prejudicial to these defendants.

We do not deem it necessary to discuss the remaining assignments of error since, in all probability, they will not recur at the next trial.

New trial.

Justices COPELAND and EXUM took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES MICHAEL KETCHIE

No. 79

(Filed 31 January 1975)

1. **Constitutional Law § 31— identity of confidential informant — disclosure not required**

A defendant charged with possession of marijuana with intent to distribute and possession of MDA had no constitutional right to disclosure of the identity of a confidential informant who furnished information essential to a finding that officers had probable cause to arrest and search defendant without a warrant but who did not participate in or witness the alleged crimes so as to make him a material witness on the issue of guilt or innocence.

2. **Searches and Seizures § 1— warrantless arrest and search — confidential informant — probable cause — absence of underlying circumstances — description of defendant**

An officer had probable cause to arrest defendant and search his car for marijuana without a warrant on the basis of the minute particularity with which a reliable informant described defendant and his car and the physical and independent verification of this description by the officer, notwithstanding the informant did not relate to the officer any of the underlying circumstances to support his belief that defendant was transporting marijuana.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

DEFENDANT appeals from decision of the Court of Appeals, 22 N.C. App. 637, 207 S.E. 2d 364 (1974), upholding judgment of *Thornburg, J.*, 15 October 1973 Session, FORSYTH Superior Court.

In two bills of indictment, consolidated for trial, defendant was charged with (1) possession of marijuana with intent to distribute and (2) possession of 3, 4-methylenedioxy amphetamine (MDA), a Schedule I controlled substance.

The State's evidence tends to show that shortly before 7:30 p.m. on 16 May 1973 Officer M. M. Choate of the Winston-Salem Police Department received a telephone call from a reliable informant that marijuana was en route from High Point to Fairchild Industries in Winston-Salem. Officer Choate was told that the drug was being transported in a 1968 Oldsmobile, white over blue convertible, license ADE-269, driven by a white male approximately twenty-one years of age with long brown hair and a moustache. The informant told Officer

Choate that the drugs would arrive at Fairchild Industries at approximately 7:30 p.m. Officer Choate immediately contacted other officers by radio and they met him at North Liberty Street and Fairchild Drive where a surveillance was set up. Within five minutes thereafter a white over blue Oldsmobile convertible with license ADE-269 approached Fairchild Industries. The vehicle was driven by defendant, a white male with long brown hair and a moustache. Officer Choate stopped the vehicle at the entrance to Fairchild Industries and advised defendant he had information the vehicle was being used to transport marijuana. After thus restricting defendant's freedom of movement, Officer Choate searched the Oldsmobile and found three plastic bags on the right rear floorboard and three additional plastic bags in the trunk all of which contained, in the aggregate, 2,246 grams of marijuana. Also found were several plastic bags containing MDA.

Upon a voir dire conducted to determine the legality and constitutionality of the search and seizure, Officer Choate testified that he had no knowledge of defendant prior to the phone call from the reliable informant; that he had engaged in discussions with the informer on numerous occasions when information had been furnished which proved to be reliable; that he did not ask his informant how he obtained his information about the presence of the drugs in defendant's Oldsmobile and the informant did not relate any of the underlying circumstances.

At this point in the voir dire defense counsel asked Officer Choate to state whether his informant was one Jimmy Louis Felder but the trial court sustained the State's timely objection and refused to require the prosecution to disclose the identity of the informant. The defendant tendered evidence, which the court refused to consider, that the informant was, in fact, one Jimmy Louis Felder and that Mr. Felder was not only unreliable but had denied ever talking to Officer Choate on the night in question.

At the close of the evidence on voir dire the trial court found that Officer Choate had received information from a person known to him and from whom he had previously received reliable information concerning the drug traffic; that the officer had previously received information from the same informant on which an arrest was made and a conviction obtained; that the informant was not asked and did not state the

basis for his information but did describe the Oldsmobile and its driver with minute particularity, which description was precisely in accord with the car and driver apprehended minutes later. Based on the findings, the court concluded that the identity of the informant should not be disclosed; that the officer had probable cause to stop and immediately search the vehicle; and that the evidence obtained from the vehicle was competent and should be admitted in evidence before the jury. Defendant's motion to suppress was thereupon overruled. To the ruling of the court in the foregoing respects, defendant in apt time objected and excepted.

Defendant was convicted by the jury on both charges and sentenced to two years as a youthful offender. The Court of Appeals upheld the conviction and judgment, and defendant appealed to the Supreme Court alleging involvement of a substantial constitutional question.

James H. Carson, Jr., Attorney General; Ralf H. Haskell, Assistant Attorney General, for the State of North Carolina.

White and Crumpler by Fred G. Crumpler, Jr. and Michael J. Lewis, attorneys for defendant appellant.

HUSKINS, Justice.

The sole question brought forward on defendant's appeal to this Court is whether the prosecution is privileged to refuse disclosure of the informer's identity. Both the trial court and the Court of Appeals answered in the affirmative and defendant urges reversal of that decision.

The general rule, subject to certain exceptions and limitations, recognizes the prosecution's privilege to withhold the identity of an informer. *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973); *State v. Fletcher* and *State v. St. Arnold,* 279 N.C. 85, 181 S.E. 2d 405 (1971); *State v. Swaney,* 277 N.C. 602, 178 S.E. 2d 399, appeal dismissed, 402 U.S. 1006, 29 L.Ed. 2d 428, 91 S.Ct. 2199 (1971); Annotation, Accused's Right To, And Prosecution's Privilege Against, Disclosure Of Identity Of Informer, 76 A.L.R. 2d 262 (1961). The privilege is founded upon public interest in effective law enforcement and its application turns on the facts of each particular case. *State v. Boles,* 246 N.C. 83, 97 S.E. 2d 476 (1957). These principles were ar-

ticulated by Justice Burton in *Roviaro v. United States*, 353 U.S. 53, 1 L.Ed. 2d 639, 77 S.Ct. 623 (1957), as follows:

> "What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. . . . The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
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> "We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

Roviaro makes two things clear: (1) There is a distinct need for an informer's privilege but the general rule of nondisclosure is not absolute, and (2) disclosure is required where the informer directly participates in the alleged crime so as to make him a material witness on the issue of guilt or innocence.

[1] The issue here concerns probable cause for an arrest and search without a warrant, not guilt or innocence; hence, *Roviaro* is not controlling on the facts in this case. Instead, we are guided by *McCray v. Illinois*, 386 U.S. 300, 18 L.Ed. 2d 62, 87 S.Ct. 1056 (1967), which dealt with disclosure of an informer's identity on a motion to suppress evidence obtained in a warrantless arrest and search. In that case the Court held that defendant had no constitutional right to disclosure of the informer's identity even though the information furnished by him was essential to a finding that the officers had probable cause to make the arrest and search.

In *McCray* the informant told police officers that defendant would be on a street corner at a particular time and that he

would be in possession of narcotics. McCray appeared on the corner at the designated time and the informant pointed him out to the officers who arrested McCray without a warrant and discovered the narcotics on his person. Relying upon *Draper v. United States,* 358 U.S. 307, 3 L.Ed. 2d 327, 79 S.Ct. 329 (1959), the United States Supreme Court held there was probable cause on those facts to sustain the arrest and incidental search. In reviewing defendant's argument that he was entitled to know the identity of the informant, the Court sustained an established principle in Illinois law that "when the issue is not guilt or innocence, but . . . the question of probable cause for an arrest or search . . . police officers need not invariably be required to disclose an informant's identity if the trial judge is convinced, by evidence submitted in open court and subject to cross-examination, that the officers did rely in good faith upon credible information supplied by a reliable informant."

In *Draper v. United States, supra,* a case dealing with probable cause for arrest, a particular informant named Hereford told police that Draper had gone to Chicago by train on September 6 and would bring back three ounces of heroin, returning to Denver by train either on the morning of September 8 or the morning of September 9. Hereford gave the police a detailed description of Draper and of the clothing he was wearing and said Draper would be carrying a tan zipper bag and that he habitually "walked real fast." Draper was arrested without a warrant on September 9 after leaving an incoming Chicago train. He had the exact physical attributes and was wearing the precise clothing described by the informant. A search incident to the arrest uncovered two envelopes of heroin. The informant had previously given reliable information to the police. On these facts the Court held that the officer had reasonable grounds to believe that defendant possessed heroin, once the officer had verified by personal observation every facet of the information. Speaking of the officer, the Court said:

> "And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a 'fast' pace toward the station exit, Marsh [the arresting officer] had personally verified every facet of the information given him by Hereford except whether peti-

tioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information—that Draper would have the heroin with him—was likewise true."

In *Spinelli v. United States,* 393 U.S. 410, 21 L.Ed. 2d 637, 89 S.Ct. 584 (1969), the Court adhered to its views expressed in *Draper v. United States, supra,* with respect to information furnished "with minute particularity" by an informant and said: "A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way."

[2] So it is here. The additional information acquired by Officer Choate by personal observation corroborated the informant's tip in every minute detail—(1) defendant's time of arrival, (2) from High Point, (3) destination Fairchild Industries, (4) driving a 1968 Oldsmobile, (5) white over blue convertible, (6) license ADE-269, (7) driven by a white male, (8) approximately twenty-one years of age, (9) with long brown hair and (10) a moustache. With no time to obtain a warrant, Officer Choate contacted two other officers by radio and they set up a surveillance near the entrance to Fairchild Industries. Approximately fifteen minutes had elapsed from the time the information was received from the informant until Officer Choate stopped defendant. Certainly, under these facts and circumstances, the officers had probable cause and reasonable grounds to believe that defendant was violating the laws of this State relating to controlled substances at the time they arrested him and searched his car. The warrantless arrest, search and seizure were therefore lawful. Compare *State v. Edwards,* 286 N.C. 162, 209 S.E. 2d 758 (1974), where the informant's tip contained neither underlying circumstances nor minute particularity sufficient to support a finding of probable cause to issue a search warrant.

[1] Defendant has made no defense on the merits and does not contend that the informant participated in or witnessed the alleged crime. Therefore, he has no constitutional right to discover the name of the informant. *McCray v. Illinois, supra; Roviaro v. United States, supra; United States v. James,* 466 F. 2d 475 (D.C. Cir. 1972). As stated by the Court in *McCray v. Illinois, supra:* "Nothing in the Due Process Clause of the Four-

teenth Amendment requires a state court judge in every such hearing to assume the arresting officers are commiting perjury."

We further hold that defendant has not been deprived of his Sixth Amendment right to confront and cross-examine the witnesses against him by reason of their refusal to reveal the informant's name. Otherwise, "no witness on cross-examination could ever constitutionally assert a testimonial privilege, including the privilege against compulsory self-incrimination guaranteed by the Constitution itself. We have never given the Sixth Amendment such a construction, and we decline to do so now." *McCray v. Illinois, supra; Cooper v. California,* 386 U.S. 58, 17 L.Ed. 2d 730, 87 S.Ct. 788 (1967).

[2] In his supplemental brief filed in this Court, defendant did not raise or discuss his assignment urged in the Court of Appeals relating to lack of probable cause; and in oral argument here, counsel stated that the assignment had been abandoned. Even so, as heretofore noted, probable cause to arrest and search defendant existed on the basis of the minute particularity with which the informant described defendant and the physical and independent verification of this description by Officer Choate. *Whiteley v. Warden,* 401 U.S. 560, 28 L.Ed. 2d 306, 91 S.Ct. 1031 (1971); *McCray v. Illinois, supra; Draper v. United States, supra.*

For the reasons stated the decision of the Court of Appeals is

Affirmed.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1975

STATE OF NORTH CAROLINA v. HAROLD GEROME WHITE

No. 90

(Filed 12 February 1975)

1. Homicide § 21— first degree murder — sufficiency of evidence

The State's evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that defendant had an argument with decedent, a restaurant owner, over the price of two hot dogs, that when defendant left the restaurant he stated, "You s.o.b. I will be back; I will get you," that a woman who left the restaurant with defendant returned to the restaurant and stated that defendant had gone to get a shotgun and was coming back, and that defendant returned to the restaurant with a shotgun, stated that he had come to kill decedent, and shot decedent to death with the shotgun.

2. Criminal Law § 102— capital case — jury argument about judicial or executive review

In a capital case, any argument made by the solicitor or by private prosecution appearing for the State which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant.

3. **Criminal Law § 102— capital case — argument that jury's verdict not final disposition — absence of objection — duty of court**

In a death case intimations by counsel for the State that a jury's verdict is not necessarily a final disposition of the case are so prejudicial that counsel's failure to make timely objection will not waive defendant's right to object, it being the duty of the trial judge to correct such an abuse at some time in the trial and, if the impropriety be gross, to interfere at once.

4. **Criminal Law § 102— capital case — prosecutor's jury argument about appeal of guilty verdict**

Argument by the private prosecutor in a capital case that "If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say," was improper; and the harmful effect of such argument was not removed when the trial judge sustained an objection to the argument and instructed the jury not to consider "what he said about the Supreme Court," or when the trial judge at the beginning of his charge stated, "The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I made a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit."

5. **Criminal Law § 86— employment of private prosecutor — competency to show bias**

In this first degree murder prosecution, the trial court erred in the exclusion of cross-examination of decedent's wife as to whether she had employed private counsel in the case since such evidence was competent to show bias on her part against defendant.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Justice LAKE concurring in result.

Justice HUSKINS dissenting.

APPEAL by defendant under G.S. 7A-27(a) from *Winner, S. J.*, 3 December 1973 Special Session of the Superior Court of ALAMANCE, docketed and argued at the Spring Term 1974 as Case No. 83.

Defendant was tried upon an indictment, drawn under G.S. 15-144, which charged him with the murder of Howard Langley on 11 August 1973. Both the State and defendant offered evidence. The State's evidence tended to show the facts summarized below.

The deceased, Howard Langley (Langley), owned and operated the Farmer's Drive-In, a restaurant located on High-

way No. 87 about nine miles south of Graham. About 6:00 p.m. on 11 August 1973 defendant came into the Drive-In carrying a small child. He proceeded to the counter, which was approximately 32 feet directly back from the entrance. Langley, who was behind the counter, noticed that defendant appeared to stagger as he approached. When defendant sat down on a stool and ordered a beer, Langley told him he did not think he needed one. Defendant denied that he was drunk and said he had staggered because he was carrying the child. Langley served him the beer. Thereafter, Langley played with the baby and engaged in a laughing conversation with defendant.

Soon defendant "ordered three draft beers and two hotdogs to go." Mrs. Langley, who worked with her husband in the restaurant, prepared the hot dogs. She handed them to defendant, and returned to the kitchen, directly behind the counter. Defendant asked Langley the price of the hot dogs and the reply was "seventy-three cents." Defendant retorted that "he did not want to buy a cow, just two hotdogs." Then "one word led to another."

Their loud voices brought Mrs. Langley from the kitchen in time to hear her husband say that he had never cheated a man as long as he had been in business and he would not start now. Defendant said he would pay for the hot dogs but Langley said, "No, I will keep my hotdogs and you keep your money." Defendant's response was, "What is the matter, whitey, isn't my money good enough for you?" Langley replied that "this" had nothing whatsoever to do with it and he would like for him to leave. When defendant got off the stool "yelling and swearing" at Langley, a black woman came from a booth near the entrance and said to him, "Come on; let's go." She attempted to pull him toward the door. He "pulled back from her," but she finally got him out of the door.

At the door defendant called to Langley to "come on out." Mrs. Langley restrained her husband and defendant said, "You s. o. b. I will be back; I will get you."

Defendant left in a car with the woman who had pulled him out of the door. She returned in about ten minutes and went to a booth where the child, another black woman, and a black male were sitting. Mrs. Langley heard her tell the black man in the booth that defendant had gone to get a shotgun and was coming back. Upon hearing this all the occupants of the booth left. Mrs. Langley called the sheriff, and Langley locked the door.

However, in about 20-25 minutes, "thinking that the other colored man would stop him and that defendant would not come back," Langley unlocked the door. Minutes later, at about 7:00 p.m., defendant entered the restaurant holding a double barrel shotgun, pointed to the floor.

At that time Mrs. Langley was behind the counter and Langley was in the kitchen behind her. When defendant said, "Where is that white son of a bitch? I came to kill him," Langley emerged from the kitchen. He told his wife "to go back," and started to the storeroom, which opened into the dining room at the south end of the counter. His double barrel shotgun was in a corner of the storeroom by the deep freeze. Defendant fired at Langley from about the center of the dining area when Langley was between the kitchen and the door to the storeroom. At that time he had not reached his gun. As Langley was falling he managed to reach into the storeroom and get his shotgun. Holding onto the storeroom door he fired and defendant fired.

The witnesses all agreed that three shots were fired in all, two in rapid succession, and that two of the three shots were fired by defendant. They did not agree (some were uncertain) whether the shot Langley fired as he was falling was the second or third shot which was fired. When Langley fired at defendant, it looked to one of the patrons seated in the restaurant "like it kind of dazed defendant a little bit." He turned around with the barrel toward them and that nearly "scared them to death."

For a moment thereafter defendant remained standing on the spot from which he had been shooting. Langley had fallen backward into the storeroom. Looking at him defendant said, "I told you I would be back and now I have got you." With that he left the restaurant and drove away in his old Chevrolet truck.

A deputy sheriff arrived at the Drive-In at 7:12 p.m. Langley was still alive but bleeding profusely. He was immediately sent to the county hospital but was dead on arrival. An autopsy revealed that he bled to death from gunshot wounds which had lacerated the jugular vein.

Shortly after defendant drove away from the restaurant the officers found him at the county hospital being treated for gunshot wounds. They also found Mr. and Mrs. W. H. Hilliard, who had been eating supper at the Drive-In. At the time of the shooting defendant had been standing in front of their booth.

Both Mr. and Mrs. Hilliard had received gunshot wounds in the legs.

Defendant, testifying as a witness in his own behalf, gave evidence which tends to show:

He and several companions began drinking before noon on 11 August 1973 and, after 2-3 hours and 4-5 drinks, he was "high." Thereafter he went to the home of Hattie Morrow and from there he, she, and her three children went to the Farmer's Drive-In, where he ordered a beer. At that time he was still "feeling what he had drunk," but when Langley told him he was high he said he had "stumbled from taking the baby and that was all that was said." After drinking the beer and paying for it, he took the baby away from the counter and returned to order two hot dogs without asking the price. He didn't care what they cost because he had the money to pay for them. He never said anything to Langley with reference to the price of hot dogs, but he did remark to his friend, Ray Morrow (a cousin of Hattie's), that all meat was high — hot dogs, hamburger, and steak.

Mr. Langley, overhearing and misinterpreting his remarks, "snatched the hotdogs his wife had set in front of defendant," told him he did not have to buy "a damn thing" and "to get the hell out of his place." Defendant offered to pay for the hot dogs more than once and told Langley he was sorry about the whole thing. Langley refused to accept his apology and kept saying, "You get the hell out of here." Defendant, however, did not say a word back to him or raise his voice. He left peacefully, without resisting Hattie, and went back to her house. En route he did not tell her was going to get his gun and kill Langley.

When defendant got out of Hattie's car he went to M. C. Morrow's trailer where "some of the boys" advised him not to go back to the Drive-In "because that man will shoot you." However, he decided to go back and tell Langley he wasn't talking to him about the hot dogs. He got in his truck and drove first to the home of his employer, Mr. Harrelson, whom he hoped "would go talk to Mr. Langley for him." Not finding Harrelson at home, defendant and his first cousin, Jerry White, returned to the Drive-In. There defendant took his shotgun from under the seat of his truck (where he had previously put it in order to get the stock repaired). He took the gun into the restaurant with him, not because he intended to hurt anybody but because he "just felt safer carrying it in. With it he thought Langley might listen to him; he had not listened previously."

Defendant entered the Drive-In carrying the gun down beside his leg, with the barrel pointing toward the ceiling. He made no inquiry as to Langley's whereabouts and made no threats; he had no intention of hurting anyone. However, after he had taken a couple of steps into the restaurant he got shot in the left leg, the thigh, and the side. He fell but managed to prop himself on his gun. He felt a burning and stinging and could not see very well. His only thought was to regain his balance and get out, but when he looked up he saw "a flare or something move and his first thought was that he would be shot again and he shot." He did not raise his gun until he got hit. He does not know how many shots he fired. He remembers shooting at Mr. Langley once, and he remembers going out the door. Thereafter his mind is a blank until "he was in Chapel Hill hospital."

Defendant was removed from the Alamance Connty Hospital to the North Carolina Memorial Hospital at Chapel Hill for surgery to repair pellet wounds in his abdomen, left knee, and right thigh. A member of the surgical team, who operated on defendant, testified that at the time he received these wounds defendant suffered intense pain. After six weeks in the hospital defendant had recovered satisfactorily.

Other witnesses for defendant included Hattie Morrow, Ray Morrow, Jerry White, Ricky Garner, and Douglas Durham.

Hattie Morrow's testimony corroborated that of defendant. She also testified that, after taking defendant to her home, she returned to the Drive-In to get "her cousin, her baby, and several more of the girls" who went with her to the restaurant. She denied that she told Ray Morrow, who went to the Drive-In with her group and remained there during the time she was away, or anyone else, that defendant was coming back with a gun. She had "no idea" that he intended to return there. He was at Harrelson's when she started on her return trip to the Drive-In, and she did not see him again until after he had been shot. He was then in his truck in front of her cousin's home, and she had the boys put him in her car so that she could take him to the county hospital.

Ray Morrow's testimony corroborated both defendant and Hattie. Jerry White testified that he declined to go into the Drive-In with defendant because he had the gun; that he heard three shots after defendant "had time to get about four steps

in the door." He "heard one and then two"; the last two being one after the other.

Ricky Garner testified that he arrived at the Drive-In on the evening of 11 August 1973 just as defendant was leaving (the first time). At that time he was cursing loudly and saying that he would be back. Garner was having a hamburger and beer when defendant returned about twenty-five minutes later with a gun in his hand and asked where Langley was.

Douglas Durham, another patron, said that he was in the restaurant from 4:00 p.m. until 8:00 p.m.; that he saw defendant the first time he came to the restaurant and he saw him leave. During the time defendant was there he heard no argument, yelling, cursing or threats. When, in about twenty-five minutes, defendant returned to the Drive-In with a gun, Durham "hit the floor" because he was scared of the gun and did not know what defendant was going to do.

In addition to the foregoing testimony defendant offered testimony tending to show that his character was good.

Judge Winner instructed the jury to return one of four verdicts: Guilty of murder in the first degree, guilty of murder in the second degree, guilty of voluntary manslaughter, or not guilty. He instructed the jury upon the law pertaining to self-defense and a killing in the heat of sudden passion. The jury's verdict was "guilty of murder in the first degree." From the sentence of death imposed upon that verdict defendant appeals to this Court.

Additional facts pertinent to decision will be stated in the opinion.

Robert Morgan, Attorney General, William B. Ray, Assistant Attorney General, John Morgan, Associate Attorney, for the State.

Thomas V. Aldridge, Jr., for defendant appellant.

SHARP, Chief Justice.

In his brief appellant purports to bring forward twenty assignments of error, none of which comply with Rule 28 of the Rules of Practice in the Supreme Court, 254 N.C. 783, 810. This rule requires that appellant's brief "shall contain, properly numbered, the several grounds of exception and assignment of

error *with reference to printed pages of transcript* and the authorities relied on classified under each assignment." (Emphasis added.) However, because this is a capital case, aided by the diligence of the members of the Attorney General's staff who prepared the State's brief and gave us the references which defendant's counsel omitted, we have considered each assignment of error. However, we deem it necessary to note only four.

[1] Defendant's assignments of error 21 and 22, that the State's evidence "was not sufficient to carry the case to the jury and further that the evidence was not sufficient to support the submission of the capital charge of first degree murder to the jury," are overruled. The resume of the evidence at the beginning of this opinion clearly demonstrates its sufficiency to withstand all motions for nonsuit, and itself eliminates the necessity of any discussion.

[4] At the close of the evidence the solicitor for the State made the opening argument to the jury. He was followed by defendant's two lawyers. Mr. Harold Dodge, counsel privately employed to assist solicitor, made the final argument. In it he said: " . . . you will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say."

Counsel for defendant objected immediately, and the court summarily disposed of the objection by saying, "Sustained. Members of the jury, don't consider what he said about the Supreme Court."

As soon as Mr. Dodge concluded his argument defense counsel moved the court to declare a mistrial for prejudice to defendant from the prosecution's argument that the jury verdict in this case was not final. The court denied the motion. At the beginning of his charge the judge instructed the jury as follows:

"I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. They will not

review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit."

No further instruction was given with reference to Mr. Dodge's argument, which is defendant's assignment of error No. 24.

[2] This Court has consistently held that, in a capital case, any argument made by the solicitor, or by private prosecution appearing for the State, which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant. *See State v. Hines, Walston & Brown,* 286 N.C. 377, 211 S.E. 2d 201, in which Justice Branch collects the authorities which fully explain the reasons for the rule.

[3] When such an argument is made it is counsel's duty "to make timely objection [as defense counsel did in this case] so that the judge may correct the transgression by instructing the jury." *State v. Hawley,* 229 N.C. 167, 170, 48 S.E. 2d 35, 37 (1948). However, in a death case intimations by counsel for the State that a jury's verdict is not necessarily a final disposition of the case are so prejudicial that counsel's failure to make timely objection will not waive defendant's right to object. *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953). It is the duty of the trial judge to correct such an abuse at some time in the trial "and, if the impropriety be gross, it is the duty of the judge to interfere at once." *State v. Little,* 228 N.C. 417, 421, 45 S.E. 2d 542, 545 (1947).

In each of the three cases cited immediately above a new trial was awarded because the solicitor, or private prosecution argued that the jury's verdict was not the end of the case; that others would review their verdict before the sentence was executed.

In both *Little* and *Dockery* the Court expressed doubt that the court could have given an instruction that would have removed the harmful effect of the improper remarks from the minds of the jury. In *Hawley* the Court said flatly that no instruction could have neutralized the harmful effect of the solicitor's argument that before the defendant would be put to death the Supreme Court, the Commissioner of Paroles, and in all probability the Governor personally, would carefully consider

the case; and that, in any event, "only a certain percentage" of capital felons finally suffered death.

Private prosecution's argument in this case did not go as far as the solicitor's went in *Hawley*, yet it was clearly intended to overcome the jurors' natural reluctance to render a verdict of guilty of murder in the first degree by diluting their responsibility for its consequences. We cannot, of course, say whether its harmful effects could have been removed by an immediate and positive instruction to the jury that counsel's argument was improper; that neither the Supreme Court nor any other governmental agency could share their responsibility for their verdict; and that their duty required them to weigh the evidence and find the facts on the assumption that whatever verdict they rendered would be the final disposition of the case. Such instructions would have been the minimum requirement, and they were not given.

[4] When objection was made to the argument the court merely said, "Sustained. Members of the Jury don't consider what he said about the Supreme Court." Clearly this instruction was inadequate to "correct the transgression." Later, at the beginning of his charge the judge said, "The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit." This instruction was likewise inadequate.

It is quite true that on appeal this Court considers only questions of law, yet we apprehend that the foregoing instruction did not fully enlighten the jury as to the nature of the Supreme Court's review of a case on appeal and as to the difference between "triers of the facts" and judges of the law. They did understand, however, the Supreme Court would "review the case," for both the judge and counsel had told them so. Futhermore, by his positive statement that "the Supreme Court will review this case," the jury was bound to have understood that the court assumed their verdict would be guilty.

For the errors embraced in assignment No. 24, we hold that defendant is entitled to a new trial. Our decision on this assignment is bolstered by the following and final episode of the trial.

The jury returned its verdict on 6 December 1973, and the court pronounced judgment. Following the recess of the court

that afternoon Mrs. E. R. Larzelere, a member of the panel of jurors summoned for the term, but not a member of the jury which tried defendant, reported the incident detailed below, and one other, to defense counsel:

Mrs. Larzelere was seated in the courtroom when the verdict in this case was returned. When the jurors were discharged and directed to take seats in the courtroom, one of the jurors took a seat behind her. As he sat down she heard him say, "They always take it to the Supreme Court." She did not see the juror who made that statement, but, in her opinion, it was the foreman of defendant's jury.

Counsel told the court what Mrs. Larzelere had told him and moved to set aside the verdict on the grounds of "jury misconduct." Judge Winner "accepted" Mrs. Larzelere's affidavit in which she swore to the facts she had reported, but he denied defendant's motion for a new trial, because "there is nothing in either of those instances that is prejudicial to defendant." We argee that, standing alone, the juror's comment, "They always take it to the Supreme Court," would not justify a new trial. It does, however, indicate to us that one or more of the jurors did consider what counsel "said about the Supreme Court."

[5] Since the case goes back, we consider defendant's assignment of error No. 9. For the purpose of showing bias on the part of Mrs. Langley, the widow of the deceased, who testified for the State as an eyewitness to the homicide, defense counsel asked her on cross-examination, "Have you privately employed counsel to prosecute this case for you?" The court sustained the State's objection to the question. Had she been permitted to answer, Mrs. Langley would have said, "Yes, I did."

A party to either a civil or criminal proceeding may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him, hostile to his cause, or that the witness is interested adversely to him in the outcome of the litigation. Ordinarily, it is prejudicial error to prevent cross-examination of a witness as to facts from which bias would clearly be inferred. *State v. Hart,* 239 N.C. 709, 711, 80 S.E. 2d 901 (1954). Indisputably, the fact that a witness had employed private counsel to prosecute the case against defendant has a logical tendency to show the witness' bias against him. "[H]ostility toward a party may be shown by the fact that the witness has . . . em-

ployed special counsel to aid in prosecuting the party." McCormick on Evidence § 40 (1972). *See* 98 C.J.S., *Witnesses* § 552 (1957).

The court erred in excluding the evidence that Mrs. Langley had employed private prosecution in this case. However, decision on assignment No. 24 makes it unnecessary to decide whether this error was prejudicial in this case. Other of defendant's assignments of error have merit but, since we deem none of them likely to reoccur at the next trial, we omit discussion of them.

New trial.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Justice LAKE concurring in result.

It is my opinion that a new trial must be had in this case but not for the reason upon which the majority opinion rests.

After the jury had begun its deliberations, which it did later than 5 p.m. on December 5, the jury returned to the courtroom with a request for further instructions as to the elements of the crime of first degree murder. The judge stated that because of the late hour, he would not explain the law relating to that matter at that time but would do so "the first thing in the morning" and would let the jury go in the meantime. He specifically instructed the jury: "Be careful and observe all the instructions I gave you the first of the week, do not talk about the case. Let me caution you again, not to discuss this case even among yourselves until you are back here tomorrow and back in the jury room."

The trial resumed at 9 a.m. on December 6, at which time the court, in response to the request of the jury, instructed the jury as to the elements of first degree murder and second degree murder and, thereupon, sent the jury to its room to resume its deliberations. The jury returned with its verdict of guilty of murder in the first degree and, upon that verdict, the court sentenced the defendant to death.

On the following day, December 7, before the end of the term, the defendant made a motion that the judgment be vacated and a new trial granted because of misconduct of one or more of the jurors. The alleged misconduct had been brought to the

attention of counsel for the defendant, after the imposition of sentence, by Mrs. W. R. Larzelere who was on the jury panel for the term but was not a member of the jury which tried this defendant. Her affidavit, which was submitted to the court in support of the motion, stated:

> "That when this Affiant arrived at the Courthouse on the morning of December 6, 1973, she proceeded to the hallway immediately to the rear of the Courtroom where the Harold Gerome White Case was being tried and between 8:30 and 9:00 o'clock a.m. there observed several individuals at least three in number, and recognized at least one of said individuals as a juror on the Harold Gerome White Case. That as Affiant approached this group she commented about climbing the stairs and proceeded toward the Courtroom door when the said individuals there talking to each other were overheard by her as discussing the trial, and this Affiant commented that she had not been present for all the testimony but there seemed to her to be contradictions in the testimony, whereupon the white male in said group which this Affiant recognized as a juror on the White Case stated very emphatically that he had heard all the evidence and that it was an open and shut case of murder."

The court thereupon had Mrs. Larzelere duly sworn. She testified that she did not know whether the group she observed talking about the case contained more than one of the jurors serving on that case but "there were at least two other men out there" and they were talking when she came up, "discussing this case." She testified that she informed the group that she thought there was some "controversy in the testimony" but that she had not heard all of the testimony and, thereupon, the foreman of the jury made the statement that he thought it was an open and shut case of murder.

Although the foreman of the jury, thus accused of impropriety by Mrs. Larzelere, was present in the courtroom and was identified therein by her as the man she had heard making the statement in question, the court did not see fit to call him as a witness and interrogate him about the matter, simply stating that there was nothing in the incident that was prejudicial to the defendant and, therefore, denied the motion for a new trial.

It is obvious that Mrs. Larzelere, on her own testimony, was guilty of gross misconduct in discussing the case with at least one

person known by her to be a juror in the case. For this misconduct she, herself, could well have been cited for contempt of court but no such action was taken.

Taking the testimony and the affidavit of Mrs. Larzelere as true, which under the circumstances we must do, the foreman of the jury clearly violated the proper instructions given the jury by the court at adjournment on December 5. He not only stated his own conclusion as to the defendant's guilt prior to the final instructions of the court, but he engaged in "dicussing this case" with other persons who may or may not have been members of the jury. The nature of their discussion concerning the case is not known. We cannot, upon this record, determine whether that discussion was prejudicial to the defendant or not. A verdict of guilty in a capital case should not be allowed to stand as support for a death sentence under these circumstances, though, ordinarily, the granting of a mistrial for misconduct of this sort rests in the sound discretion of the trial judge. See, *State v. Shedd,* 274 N.C. 95, 103, 161 S.E. 2d 477. The trial judge, in my opinion, should have vacated this judgment, set aside the verdict and ordered a new trial.

I agree with both the majority opinion and with the dissenting opinion of Justice Huskins concerning the alleged comment by the foreman after the jury returned to the courtroom following the verdict and was discharged. That comment was not prejudicial to the defendant and did not disclose any impropriety by the jury or any consideration by the jury of any improper or irrelevant matter.

I am unable to agree with the majority concerning the steps taken by the trial judge to correct the improper statement by counsel for the private prosecution in his argument to the jury. As to that matter, I am in agreement with the dissenting opinion of Justice Huskins.

In his argument, counsel for the private prosecution told the jury:

> "You will answer the question whether this Defendant is guilty of First Degree Murder. *If found guilty,* he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this Court, that Court will say." (Emphasis added.)

That argument was improper because it tended to minimize the importance of the jury's verdict and from it the jury might

infer that its verdict would be reviewed by the Supreme Court. See, *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35, and *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542, in each of which the argument of the solicitor was substantially more objectionable than in the present case. Upon prompt objection by counsel for the defendant, the trial judge responded:

> "SUSTAINED, Members of the Jury, don't consider what he said about the Supreme Court."

The foregoing statement apparently occurred at the very end of the concluding argument to the jury. The defendant's counsel thereupon moved for a mistrial, which the court denied. The court then asked, "Do you want me to instruct them not to consider it again, or not?" Counsel for the defendant replied, "Without prejudice to the defendant on its motion for mistrial, we ask the Court to instruct the jury as to the proper law." It does not appear that these remarks were in the hearing of the jury. The court immediately began its instructions to the jury and opened its charge with this statement:

> "Members of the Jury, I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. *They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit.*" (Emphasis added.)

To say that this is an expression of opinion by the trial court that the jury would (or should) return a verdict of guilty is, in my opinion, a very strained construction of what the judge said. Only a few moments before, the argument in question had been made to the jury and, in view of the resulting flurry of excitement, it is reasonable to suppose that the jury remembered that, whatever it may have remembered about the rest of counsel's argument. That statement was, "*If found guilty,* he gets an automatic appeal." (Emphasis added.) In the remainder of the charge, the trial court clearly instructed the jury as to the burden of proof and as to the elements which the State must prove beyond a reasonable doubt in order to justify a verdict of guilty.

In my opinion, the sum total of the argument of counsel, the objection, the ruling of the court thereon and the instruction of

the court with reference thereto was not prejudicial to the defendant. Had none of this occurred, it is entirely possible that the jurors might have gone into their deliberations under the impression that their verdict could be reviewed on appeal. In view of all that had been written and said in the press and upon other news media in recent years concerning the death penalty and the appeals from judgments imposing sentences of death, it is probable that any jury in North Carolina would be aware of the likelihood of an appeal from a sentence of death and, in absence of some instruction thereon, the jury might well be confused as to the scope of such appeal. The argument of counsel for the private prosecution was improper and ill advised. Had it not been corrected, it would have been ground for a new trial, but, in my opinion, the trial judge corrected it clearly and effectively. It was made perfectly clear to the jury that the jury and not the appellate court was the final voice on the question of guilt or innocence. I see no error in the ruling or the instruction of the trial judge concerning this argument.

Justice HUSKINS dissenting.

The evidence recited in the majority opinion provides overwhelming support for the verdict returned by the jury. Thus, unless prejudicial error is made to appear, the verdict should be upheld.

In my view, the error relied on by the majority is inflated all out of proportion to its actual significance. Granted that Mr. Dodge, the privately employed prosecutor, erred when he argued to the jury: " . . . you will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say." Upon objection the able and conscientious trial judge immediately said: "Sustained. Members of the jury, don't consider what he said about the Supreme Court." This was sufficient, in my opinion, to remove any harmful effect the mildly improper argument of counsel might have had. But the judge went further and at the beginning of his charge to the jury stated: "I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I make a mistake on a legal question. *They will not re-*

view the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit." (Emphasis added.) While this instruction is not a model of good grammar or sentence structure and does not depict the wisest choice of words, it nevertheless informs the jury in understandable language that a review by the Supreme Court would entail only an examination of the case for errors of law, not errors of fact—"they will not review the decisions of the facts by the jury." Thus it seems to me that any prejudicial effect the improper argument might have had was decisively removed by the instructions of the court. I see little else the court could have done; and unless we are to say that this impropriety was so gross it could not be corrected, the effects of the episode should be regarded as cured and the conviction upheld.

Moreover, I attach no significance whatever to the report by Mrs. Larzalere that, after the jury had been discharged, she heard one of the jurors say: "They always take it to the Supreme Court." Once a jury is discharged its verdict cannot be impeached by statements, and rumors of statements, allegedly made by some of the jurors. *Selph v. Selph,* 267 N.C. 635, 148 S.E. 2d 574 (1966); *State v. Hollingsworth,* 263 N.C. 158, 139 S.E. 2d 235 (1964); 7 Strong's N. C. Index 2d, Trial § 46 (1968).

I am in thorough agreement with the majority ho'ding that defendant should have been permitted to cross-examine Mrs. Langley with reference to her employment of private counsel. This evidence was competent to show bias on the part of Mrs. Langley, and the rule to that effect is so generally recognized as to require no citation of authority. Even so, defendant was on trial for killing Mrs. Langley's husband who was shot down before her eyes, and every member of the jury knew she was bitterly biased against defendant and intensely interested in seeing him convicted. Hence exclusion of evidence that she had employed counsel to assist the prosecution was harmless beyond a reasonable doubt. *Schneble v. Florida,* 405 U.S. 427, 31 L.Ed. 2d 340, 92 S.Ct. 1056 (1972); *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970).

For the reasons stated I respectfully dissent from the majority opinion granting a new trial. I vote to uphold the conviction.

ANDREWS v. BUILDERS AND FINANCE, INC.

No. 161 PC.

Case below: 23 N.C. App. 608.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

BROWN v. VICK

No. 134 PC.

Case below: 23 N.C. App. 404.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

CLINE v. BROWN

No. 1 PC.

Case below: 24 N.C. App. 209.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

COMR. OF INSURANCE v. AUTOMOBILE RATE OFFICE

No. 7 PC.

Case below: 24 N.C. App. 223.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

COMR. OF INSURANCE v. AUTOMOBILE RATE OFFICE

No. 144 PC.

Case below: 23 N.C. App. 475.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

DRURY v. DRURY and HOLLAND v. DRURY

No. 3 PC.

Case below: 24 N.C. App. 246.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

ELECTRIC CO. v. HOUSING, INC.

No. 150 PC.

Case below: 23 N.C. App. 510.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

ELLIS v. CIVIC IMPROVEMENT, INC.

No. 181 PC.

Case below: 24 N.C. App. 42.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

FINANCIAL SERVICES v. CAPITOL FUNDS

No. 151 PC.

Case below: 23 N.C. App. 377.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

FISHER v. MISENHEIMER

No. 162 PC.

Case below: 23 N.C. App. 595.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

GILES v. TRI-STATE ERECTORS

No. 106 PC.

Case below: 23 N.C. App. 148.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

HARGETT v. AIR SERVICE and LEWIS v. AIR SERVICE

No. 163 PC.

Case below: 23 N.C. App. 636.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

HUDSON v. INSURANCE CO.

No. 145 PC.

Case below: 23 N.C. App. 501.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

IN RE APPEAL OF AMP, INC.

No. 167 PC.

Case below: 23 N.C. App. 562.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

IN RE CUSTODY OF COX

No. 183 PC.

Case below: 24 N.C. App. 99.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

IN RE HOGAN

No. 154 PC.

Case below: 24 N.C. App. 51.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

IN RE WILL OF MUCCI

No. 12.

Case below: 23 N.C. App. 428.

Petition of Caveators for writ of certiorari to North Carolina Court of Appeals allowed 7 January 1975. Motion of Propounders to dismiss appeal allowed 7 January 1975.

INSURANCE CO. v. INSURANCE CO.

No. 165 PC.

Case below: 23 N.C. App. 715.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

REDEVELOPMENT COMM. v. UNCO, INC.

No. 168 PC.

Case below: 23 N.C. App. 574.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

ROSE v. MOTOR SALES

No. 156 PC.

Case below: 23 N.C. App. 494.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

SHANKLE v. SHANKLE

No. 164 PC.

Case below: 23 N.C. App. 692.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

STATE v. ADCOCK

No. 180 PC.

Case below: 24 N.C. App. 102.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. BAGNARD

No. 179 PC.

Case below: 24 N.C. App. 54.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. BARFIELD

No. 170 PC.

Case below: 23 N.C. App. 619.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. BEST

No. 5.

Case below: 23 N.C. App. 507.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 February 1975.

STATE v. BROWN and STATE v. RAY

No. 129 PC.

Case below: 23 N.C. App. 291.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

STATE v. CARRIKER

No. 182 PC.

Case below: 24 N.C. App. 91.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

STATE v. CONNER

No. 166 PC.

Case below: 23 N.C. App. 723.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. CRANDALL

No. 54.

Case below: 23 N.C. App. 625.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 February 1975.

STATE v. DAWSON

No. 171 PC.

Case below: 23 N.C. App. 712.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. HOOD

No. 177 PC.

Case below: 24 N.C. App. 139.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. JONES

No. 169 PC.

Case below: 23 N.C. App. 686.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

STATE v. JOYNER

No. 178 PC.

Case below: 23 N.C. App. 741.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. KAPLAN

No. 2.

Case below: 23 N.C. App. 410.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 February 1975.

STATE v. McKINNEY

No. 4 PC.

Case below: 24 N.C. App. 259.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

STATE v. MONTIETH

No. 153 PC.

Case below: 23 N.C. App. 498.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. PARKS

No. 5 PC.

Case below: 24 N.C. App. 314.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. POPE

No. 185 PC.

Case below: 24 N.C. App. 217.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. REID

No. 133 PC.

Case below: 23 N.C. App. 217.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

STATE v. SALAME

No. 51.

Case below: 24 N.C. App. 1.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question.

STATE v. SANDERS

No. 158 PC.

Case below: 24 N.C. App. 33.

Petition for writ of certiorari to North Carolina Court of Appeals denied 7 January 1975.

STATE v. WORTHAM

No. 174 PC.

Case below: 23 N.C. App. 262.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

STATE v. ZIMMERMAN

No. 142 PC.

Case below: 23 N.C. App. 396.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

TRUST CO. v. SMITH

No. 172 PC.

Case below: 24 N.C. App. 133.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

WHITE v. ALEXANDER

No. 175 PC.

Case below: 24 N.C. App. 23.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 February 1975.

WILMAR, INC. v. CORSILLO

No. 6 PC.

Case below: 24 N.C. App. 271.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 February 1975.

YEARWOOD v. YEARWOOD

No. 146 PC.

Case below: 23 N.C. App. 532.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 7 January 1975.

STATE OF NORTH CAROLINA v. BRYANT HENRY WILLIAMS, JR.

No. 25

(Filed 12 March 1975)

1. **Criminal Law § 126— unanimity of verdict**

The Constitution of this State requires a unanimous verdict for a valid conviction for any crime. Art. I, § 24, of the N. C. Constitution.

2. **Jury § 7— State's right to unbiased jury**

The State, like the defendant, is entitled to a jury, all members of which are free from a preconceived determination to vote contrary to its contention concerning defendant's guilt of the offense for which he is being tried.

3. **Jury § 6— prospective jurors — examination — capital punishment views**

In a capital case, both the State and the defendant may propound questions to prospective jurors concerning their views about the death penalty.

4. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— prospective jurors — capital punishment views — challenge for cause**

The trial court in a capital case properly sustained the State's challenge for cause of three prospective jurors who stated, in response to questions by the solicitor and by the court, that even though the evidence satisfied them beyond a reasonable doubt of defendant's guilt of the offense charged, they could not vote for such a verdict knowing that the death penalty was required thereupon.

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

The State's evidence was sufficient for the jury to find that the offense of rape was perpetrated on the 13-year-old prosecuting witness after she accepted a ride in a dump truck and that defendant was the perpetrator of it.

6. **Constitutional Law § 36; Criminal Law § 135; Rape § 7— death penalty for rape**

Imposition of the death sentence for the crime of rape is constitutionally permissible.

7. **Constitutional Law § 36; Criminal Law § 135; Rape § 7— Act creating two degrees of rape — nonretroactivity**

Provision of the 1974 Act rewriting G.S. 14-21 and creating two degrees of rape which declared that the Act "shall become . . . applicable to all offenses hereafter committed" is a saving clause, showing the intent of the Legislature to leave the preexisting statute in effect as to the elements of and punishment for the crime of rape committed prior to the effective date of the Act, 8 April 1974; consequently, the Act is not retroactive so as to make unlawful the imposition upon defendant of a sentence of death for an offense, committed prior to its effective date, which falls within the definition

of second degree rape in Section 2(b) of the Act. Ch. 1201, Session Laws of 1973.

Chief Justice SHARP *and Justices* COPELAND *and* EXUM *dissenting as to the death penalty.*

APPEAL by defendant from *McKinnon, J.*, at the 25 February 1973 Criminal Session of WAKE.

Upon an indictment, proper in form, defendant was tried on the charge of rape. He was found guilty as charged and appeals from a sentence to death, imposed pursuant to the verdict.

The evidence for the State was to the following effect:

Shortly after 2:30 p.m., on 16 May 1973, the prosecuting witness, a 13 year old girl about 5 feet in height and weighing less than 90 pounds, carrying her school books, was walking along Lake Boone Trail in the City of Raleigh from her school to her home. A red and green dump truck, loaded with dirt, stopped and the driver asked if she would like a ride to the top of the hill. She accepted the invitation. Upon arriving at the point where she should alight to go into her home, she told the driver she wanted to get off. He did not stop but continued to drive on out of the city and into Umstead Park, where he turned onto a little used dirt road. There he told the child to get out. When she did, he seized her, put his hand over her mouth when she tried to scream and told her he would kill her if she did not stop and that if she did not permit him to do what he wanted, she would never go home. He pulled her a short distance into the woods and there, over her protest, partially disrobed her and had sexual intercourse with her. She had not previously had sexual intercourse. She bled as the result of the penetration and also because she was then in her menstrual period. After the completion of the sexual act, the defendant permitted her to dress, gather up her school books and get back in the truck, which she did because she was afraid and wanted to go home. He turned the truck around, having to reverse it at least once in order to make the turn. At some point during the ride he talked on his two-way radio but she did not understand what he said. Driving back along Lake Boone Trail, he let her out and she went to the home of her friend, from which she telephoned her mother who was at work. The police were called and she was taken to the hospital and examined by the doctor who corroborated her testimony concerning the penetration.

Later that afternoon, the child gave the investigating officers a description of the truck and of the driver, her assailant. She told them the truck had a red cab with a green body, it was loaded with dirt and had the number 6 painted on it in silver. At the same time, she described her assailant, the truck driver, to the officers as a white man with red, wavy hair and a lot of freckles on his face and arms, wearing a blue shirt with sleeves rolled up and having on it a name, the first three letters of which were "BRY." She also told the officers that when he first picked her up he was wearing sun glasses which looked like mirrors so that she could not see his eyes.

On 16 May 1973, a construction project involving excavation and the hauling away of dirt was in progress not far from the point at which the child was picked up by her assailant. The defendant was driving one of a number of dump trucks, each of which, in regular rotation, was loaded with dirt at the construction project, hauled the dirt away, dumped it and returned for another load, the circuit for each truck taking approximately 15 minutes. The defendant was absent from his regular place in the truck lineup for an hour, beginning at approximately 2:35 p.m. on this afternoon, missing three loadings of the trucks.

Later that afternoon, a police officer, patrolling in his police vehicle, observed and followed a dump truck meeting the description given by the child of the vehicle in which she had ridden. He followed it and, by radio, arranged for a road block ahead of the truck. It was stopped and the defendant was arrested. On his blue shirt there was a name patch carrying his name "BRYANT." He has red hair. The truck which he was driving was green with a red cab and had a white or silver 6 painted on the body. The officers made photographs and impressions of the tire treads of the truck. Photographs of the truck were identified by the girl, and also by a boy, who, while playing near by, observed her getting into the truck of her assailant, as being like the truck in which she rode.

On the afternoon of the offense, the girl was taken by the investigating officers to the police headquarters and there, in the presence of and with the consent of the defendant's then attorney, was shown a number of photographs from which she identified the photograph of the defendant as a picture of her assailant.

Later, on the same afternoon, the investigating officers accompanied the child and her mother to the place to which she

directed them as being the scene of the offense. There they observed on the surface of the dirt road truck tire tracks which matched the tire treads on the truck driven by the defendant at the time of his arrest. On top of one of these tire tracks was a print of a tennis shoe which, in size and tread marks, matched the tennis shoe worn by the child. Hanging on a bush at the place where the child said the offense occurred was a pair of sunglasses.

The child, testifying at the trial, positively and unequivocally identified the defendant in the courtroom as her assailant. To this testimony there was no objection.

On the front tail of the shirt worn by the defendant at the time of his arrest, on the front tail of the T shirt and on the outside front of the trousers then worn by him, near the zipper, were stains identified by an expert serologist as human blood, group A. The girl's blood was group A. The serologist did not examine a specimen of blood drawn from the defendant, but the Solicitor stipulated that the defendant's blood is also in group A.

The defendant did not testify but offered three witnesses: the bookkeeper of his employer, an employee of a tire company and the wife of the defendant. Their testimony was to the following effect:

The defendant's wife testified that she worked in the office of the trucking company by which the defendant was employed. They went to work together on the morning that the offense in question was committed. At noon they went home for lunch, at which time he told her he was feeling badly. She then noticed dark spots on his shirt which "looked like blood." Two days prior to this she had observed her husband vomiting blood. At noon on 16 May, the splotches on his shirt looked similar to the ones shown in the photograph of the defendant taken at the police station after the occurrence here in question.

The tire company employee testified that, in response to a call, he went to the defendant's job site and fixed a flat tire on the defendant's truck, "somewhere" between 2:00 p.m. and 4:00 p.m. on 16 May. The defendant's truck was then at the place where dirt was being loaded into his and other trucks. After the tire was fixed, which took about 15 or 20 minutes, the defendant pulled his truck back in the loading line and it was loaded with dirt.

The bookkeeper for the defendant's employer testified that, about 2:30 p.m. on the day this offense was committed, the defendant called her on his two-way radio and said that he had a tire "that was going flat." She told him to go to the filling station and put air in it and see "if it would hold." This filling station was on Lake Boone Trail at about the point where the little girl was picked up by her assailant. A few minutes after that radio call the defendant again called her on his radio saying that he was going "to try to make it to the dump and unload." Shortly after 3:00 p.m., he again radioed her to ask if she had gotten in touch with "the tire man" and she replied that she had and the man would meet him on the job site to fix the tire. The defendant did not state where he was at the time of this last radio call. When this witness last saw the defendant on 16 May 1973, which was approximately 12:30 p.m., she did not observe any evidence of blood on his clothing, having no reason to look for any. The truck the defendant was driving on that date had a silver 6 on its back and is the one portrayed in the photographs identified by the witnesses for the State as the one driven by the assailant of the girl. The witness was unable to say where the defendant was at any particular time on 16 May 1973 after he left her office at 12:24 p.m.

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

W. Arnold Smith for defendant.

LAKE, Justice.

Approximately two-thirds of the defendant's brief is directed to his Assignment of Error No. 1, which reads:

> "The Court erred in allowing the Solicitor to ask members of the jury panel questions regarding their moral or religious scruples about the death penalty in that such question eliminated all prospective jurors approved [opposed?] to capital punishment and denied defendant the right to be tried by a cross-section of his peers."

It is not clear from the defendant's brief whether his attack upon the trial, under this assignment of error, is directed to the trial court's permitting the Solicitor to ask questions of prospective jurors concerning their views as to the death penalty, or to the trial court's sustaining of challenges for cause by

reason of the responses made to such questions. In either view of it, this assignment of error is completely lacking in merit.

The defendant does not challenge the procedures whereby the jury panel was selected and summoned, nor does the record contain any suggestion of a basis for such challenge. The statutory procedures for its selection having been followed, the jury panel, in its entirety, was a representative cross-section of the people of Wake County. Of the 38 prospective jurors examined in the selection of the 12 who rendered the verdict and two alternates, only four indicated their opposition to the imposition of a death sentence in a proper case therefor.

[1] The defendant, in his brief, makes the startling observation that a jury's verdict finding a defendant guilty need not be unanimous, so the denial of the State's challenge to a juror, who under no circumstances would vote for a verdict of guilty of an offense for which the prescribed punishment is death, would not necessarily prevent the State from obtaining such a verdict. In *Apodaca v. Oregon,* 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed. 2d 184, and *Johnson v. Louisiana,* 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed. 2d 152, a sharply divided Supreme Court of the United States, a majority of which was unable to agree upon an opinion, sustained sentences imposed by state courts pursuant to verdicts of guilty reached by juries not unanimous. Neither of these was a capital case. Whether or not the Fourteenth Amendment to the Constitution of the United States prevents a state from imposing a death sentence upon a defendant convicted of a capital crime by a jury not unanimous, we need not now determine. It has never been doubted that the Constitution of this State requires a unanimous verdict for a valid conviction for any crime. Article I, § 24, of the Constitution of North Carolina provides:

> "*Right of jury trial in criminal cases.* No person shall be convicted of any crime but by the unanimous verdict of a jury in open court. The General Assembly may, however, provide for other means of trial for misdemeanors, with the right of appeal for trial de novo."

From time immemorial it has been standard practice in this State for prosecuting attorneys in capital cases to interrogate prospective jurors concerning their opposition, if any, to the imposition of the death penalty.

[2, 3] The State, like the defendant, is entitled to a jury, all members of which are free from a preconceived determination

to vote contrary to its contention concerning the defendant's guilt of the offense for which he is being tried. See, *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776. To that end, the State, like the defendant, is allowed certain peremptory challenges to prospective jurors, nine being allowed the State for each defendant in a capital case and 14 being allowed each such defendant. G.S. 9-21(b). In order to permit intelligent exercise of peremptory challenges, as well as to determine the existence of basis for a challenge for cause, wide latitude must be allowed counsel in the interrogation of prospective jurors. In *State v. Britt,* 285 N.C. 256, 267, 204 S.E. 2d 817, Justice Branch, speaking for a unanimous Court, said:

> "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. [Citations omitted.] 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."

In *State v. Jarrette,* 284 N.C. 625, 638, 202 S.E. 2d 721, this Court said:

> "We have held many times that there is no error in permitting questions to be propounded to prospective jurors concerning their views about the death penalty. *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345; *State v. Yoes,* and *State v. Hale* [271 N.C. 616, 157 S.E. 2d 386]; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802."

[4] A total of 38 prospective jurors was examined. The State challenged a total of eight of these, three for cause and five peremptorily, including four who stated no objection to the death penalty. The defendant challenged 14 peremptorily and two for cause. Each of the three prospective jurors challenged for cause by the State said, in response to questions by the Solicitor and by the Court, that even though the evidence satisfied her beyond a reasonable doubt of the defendant's guilt of the offense of rape, she could not vote for such a verdict know-

ing that the death penalty was required thereupon. Under these circumstances, it was not error to sustain the Solicitor's challenge for cause. *Witherspoon v. Illinois, supra; State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407; *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *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. Jarrette, supra; State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241. Furthermore, had these three challenges for cause not been sustained, the Solicitor could have challenged all of these jurors peremptorily without reaching his limit of nine such challenges.

[5] The defendant's Assignments of Error No. 9 and No. 11 are directed to the denial of the defendant's motions for a judgment of nonsuit and for a directed verdict. These assignments of error are patently without merit. The evidence for the State was abundantly sufficient to permit the jury to find that the offense of rape was perpetrated upon the prosecuting witness and that the defendant was the perpetrator of it. It is elementary that, upon a motion for judgment of nonsuit, or for a directed verdict, the evidence for the State is taken to be true and the State is entitled to every reasonable inference which may be drawn therefrom, contradictions and discrepanices in the State's evidence are disregarded and the evidence of the defendant in conflict with that of the State is not taken into consideration. Strong N. C. Index 2d, Criminal Law, § 104, and the numerous cases there cited. It is also elementary that upon the consideration of such a motion, evidence for the State, even though improperly admitted, is taken into account. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777. The motion for judgment of nonsuit and the motion for a directed verdict of not guilty have the same legal effect. *State v. Britt, supra; State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305.

[6] The defendant's Assignment of Error No. 14 is to the imposition of the sentence of death upon the verdict of guilty of rape. The defendant's contentions with respect to the validity of the death sentence for rape have been carefully considered and found without merit by this Court in a number of recent decisions. See: *State v. Noell, supra; State v. Jarrette, supra; State*

v. Waddell, 282 N.C. 431, 194 S.E. 2d 19. It would serve no useful purpose to repeat here the reasons for that determination.

[7] At the time this offense was committed and at the time the defendant was tried, convicted and sentenced to death, G.S. 14-21, as construed by this Court in *State v. Waddell, supra,* made a sentence to death mandatory upon every person convicted of the rape of any female of the age of 12 years or more by force and against her will. Chapter 1201 of the Session Laws of 1973, § 2, ratified 8 April 1974, rewrote G.S. 14-21. As rewritten, the statute now makes provision for first degree rape, for which the punishment "shall be death," and for second degree rape, for which the punishment shall be "imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

The same Act also rewrote G.S. 14-17, dealing with murder, G.S. 14-52, dealing with burglary, G.S. 14-58, dealing with arson, G.S. 148-58, dealing with the parole of prisoners, and G.S. 14-2, dealing with the punishment of persons convicted of felonies for which no specific punishment is prescribed by statute. Section 8 of the Act provides:

> "This act shall become effective upon ratification *and applicable to all offenses hereafter committed.*" (Emphasis added.)

The Act was ratified, and thus became effective, 8 April 1974 and is, in its entirety, "applicable" to all offenses thereafter committed.

The defendant contends that this statute is retroactive so as to make unlawful the imposition upon this defendant of a sentence to death, since the prosecuting witness, at the time of the offense, was more than 12 years of age, her submission was not procured by the use of a deadly weapon and serious bodily injury (other than the rape, itself) was not inflicted upon her and, therefore, the offense falls within the definition of second degree rape contained in Section 2(b) of the above mentioned Act of 1974.

This contention requires us to construe Section 8 of the 1974 Act. It is our authority and duty, in capital cases as in other cases, to apply a valid statute so as to give to it the meaning and effect intended by the Legislature at the time of its enactment. Throughout the years, rules of statutory construction

have been evolved and declared whereby courts are to determine such legislative intent. They apply to capital cases just as to other cases. Because of the gravity of a capital case, both in its consequences to the defendant and in the consequences to the State of the offense with which the defendant is charged, this Court always considers the record and the legal contentions in such case with special care, but in a capital case, just as in any other case, we are not at liberty to disregard established principles of law in arriving at the intent of the Legislature in enacting a statute, nor, having determined that intent, may we properly refuse to give it effect.

We find no merit in this contention of the defendant. In clear, explicit terms the Legislature provided, "This act shall become * * * applicable to all offenses hereafter committed." Had these words been omitted, the Act would, nevertheless, apply to all offenses committed after its effective date, 8 April 1974. Consequently, these words were not used for the purpose of giving the Act that effect. It is a well established principle of statutory construction that a statute must be construed, if possible, so as to give effect to every part of it, it being presumed that the Legislature did not intend any of its provisions to be surplusage. *State v. Harvey,* 281 N.C. 1, 19, 187 S.E. 2d 706; *Clark v. Carolina Homes,* 189 N.C. 703, 710, 128 S.E. 20; *State v. Barksdale,* 181 N.C. 621, 625, 107 S.E. 505.

In *State v. Broadway,* 157 N.C. 598, 72 S.E. 987, a statute, providing for the punishment of the crime of incest, was amended so as to increase the penalty. The amending act provided that the amendment should be in force "from its ratification." This Court, speaking through Chief Justice Clark, said:

> "The change in the punishment took effect only by terms of the statute, 'from its ratification,' and hence did not apply to an offense which was committed prior to its enactment. Repeals by implication are not favored by the law. In this case there is neither express repeal of any part of the statute, nor any repeal by implication. The statute stands intact as it was, the Legislature simply adding ten years to the quantum of the punishment which the judge might impose. This additional ten years was to take effect in the future, and indeed under the constitutional provision forbidding *ex post facto* laws such additional punishment could not have been applied to such crime unless committed after the act."

In 73 AM. JUR. 2d, Statutes, § 422, it is said:

"Where a repealing statute contains a saving clause as to crimes committed prior to the repeal, or as to pending prosecutions, the offender may be tried and punished under the old law. * * *

"Similarly, where amendatory legislation carries a saving clause as to prior offenses * * * the law as it stood at the time of the offenses is applied to the prosecution and sentencing of the violator."

We construe the provision in the 1974 Act, "This act shall become * * * applicable to all offenses hereafter committed" as a saving clause, showing the intent of the Legislature to leave the preexisting statute in effect as to the elements of and punishment for the crime of rape committed prior to 8 April 1974. Otherwise, that provision of the Act would be a mere meaningless redundancy.

In 73 AM. JUR. 2d, Statutes, § 250, it is said:

"In the interpretation of a statute, the legislature will be presumed to have inserted every part thereof for a purpose. Thus, it should not be presumed that any provision of a statute is redundant. The statute should not be construed in such manner as to render it partly ineffective or inefficient if another construction will make it effective. Indeed, it is a cardinal rule of statutory construction that significance and effect should, if possible, without destroying the sense or effect of the law, be accorded every part of the act, including every section, paragraph, sentence or clause, phrase, and word."

In 82 C.J.S., Statutes, § 419, it is said:

"A statute will not be construed to operate retrospectively so as to take away a penalty or condone a crime unless such intention is clearly expressed."

In *State v. Perkins,* 141 N.C. 797, 808, 53 S.E. 735, this Court said:

"It can make no difference how the intention of the Legislature, that an act should have prospective operation, is expressed; whether it is done by unequivocal terms in the act, or by a proviso, or is to be gathered from its general

scope and tenor, so that it appears with sufficient clearness that such is the intention."

In that case and again in *State v. Harvey, supra,* this Court quoted with approval, the following statement from the opinion of the Court of Appeals of Virginia in Pegram's Case, 28 Va. 569:

> "A punishment affixed to an offense prior to the first of May, 1828 [the effective date of an amending statute], is not incompatible with a different punishment, either lighter or more severe, affixed to the same offense subsequent to that date. They may well stand together. The punishment prescribed by Laws 1827-'28 being different from that prescribed by Laws 1822-'23, is certainly an implied repeal of it, as to new offenses, from the time it goes into effect; but, by the very terms of the law, the new punishment is only applied to the offenses happening *after* 1 May 1828, leaving the old punishment to be applied to the offenses happening before that day."

In *State v. Harvey, supra,* at page 20, we said:

> "The same criminal offenses exist under the Controlled Substance Act as existed under the former Articles 5 and 5A of Chapter 90 of the General Statutes. The provisions for punishment under the new act are different from those contained in the former act. Thus, if the saving clauses contained in G.S. 90-113.7 do not save the punishment provisions of the former act, they are useless and redundant."

We do not perceive how effect can be given to the express declaration that the Act of 1974 "shall become * * * applicable to all offenses hereafter committed," unless it be construed to mean that the Act has no application to offenses committed prior to its effective date, 8 April 1974. We so construe it.

The defendant's remaining Assignments of Error, Nos. 2, 3, 4, 5, 6, 7, 8, 10, 11 and 12 relate to the admission of testimony by various witnesses for the State and to the Solicitor's cross-examination of the defendant's witnesses, Mrs. Williams and Mrs. Barefoot. All of these bits of testimony were trivia. We have carefully considered them all and the surrounding testimony, as shown by the record. We find no error in the rulings of the trial judge, certainly none which could conceivably be deemed to entitle the defendant to a new trial. Had all of these

ten bits of testimony been kept from the jury, it is inconceivable that, in view of the overwhelming mass of evidence as to the perpetration of the offense and the identity of the defendant as the perpetrator of it, the jury would not have reached the same verdict. No useful purpose would be served by a detailed discussion of any of these assignments. They are overruled.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The rape for which defendant was convicted occurred on 16 May 1973, a date during the period between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

I also dissent as to the death penalty in this case for the additional reasons stated below.

Prior to 8 April 1974 the crime of rape was defined and punished by G.S. 14-21 as follows: "§ 14-21. Punishment for rape. —Every person who is convicted of ravishing and carnally knowing any female of the age of twelve years or more by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of twelve years, shall suffer death: Provided, if the jury shall so recommend at the time of rendering its verdict in open court, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

Section 2 of Chapter 1201, Session Laws of 1973 (quoted below), rewrote G.S. 14-21 to divide rape into two degrees with different punishments.

"§ 14-21. *Rape; punishment in the first and second degree.* —Every person who ravishes and carnally knows any female

of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(a) First-Degree Rape:—

(1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or

(2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.

(b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court."

Under Chapter 1201, only two crimes are now punishable by death, namely, *first* degree murder and *first* degree rape. The death penalty previously provided for arson and first degree burglary was changed to life imprisonment.

In recognition of the fact that the question whether the death penalty can constitutionally be imposed for any crime was then (as now) awaiting a definitive ruling by the United States Supreme Court, the General Assembly provided in Section 7 of Chapter 1201:

"In the event it is determined by the North Carolina Supreme Court or the United States Supreme Court that a sentence of death may not be constitutionally imposed for any capital offense for which the death penalty is provided by this Act, the punishment for the offense shall be life imprisonment."

Section 8 of Chapter 1201 provides:

"This act shall become effective upon ratification and applicable to all offenses hereafter committed."

The rape for which this defendant was convicted falls within the definition of *second* degree rape as defined in Chapter 1201. The resistence of the alleged victim was not overcome,

or her submission procured, by the use of a deadly weapon or by the infliction of serious bodily injury to her. By *serious injury* the General Assembly obviously meant injury *in addition* to the fact of rape, which in itself is serious injury indeed.

Defendant argues that since he could not have been sentenced to death under the present law for the crime for which he was convicted, the court erred in imposing the death sentence. The majority rejects this contention on the ground that Section 8 required the sentence imposed. With that view I cannot agree.

Admittedly, the application to this case of rules of construction which have been employed in certain noncapital cases (*State v. Harvey,* 281 N.C. 1, 187 S.E. 2d 706 (1972); *State v. Cameron,* 284 N.C. 165, 200 S.E. 2d 186 (1973)) would support the majority's conclusion that Section 8 discloses the legislative intent to execute a defendant for a second degree rape committed one day and to imprison another for the same crime committed the following day. I am, however, unwilling to attribute such an intent to the General Assembly. The circumstances surrounding the enactment of Chapter 1201 are not consistent with such an intent.

The sole purpose of rules of construction is to aid the courts in ascertaining the legislative intent. Therefore, no rule, however appropriate in noncapital cases, should bind the Court when dealing with issues of life and death under circumtances such as those of this case.

Prior to the rewriting of G.S. 14-21 in 1974 this Court, in four-to-three decisions, had upheld death sentences for rape in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), and in *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974), and in *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974). When these cases were decided, the distinction between *first* degree rape and *second* degree rape as now defined in Chapter 1201 was unknown to our law.

At the time the General Assembly enacted Chapter 1201 on 8 April 1974 it knew the petitions for certiorari by each of the defendants in the four-to-three decisions cited above were pending in the Supreme Court of the United States for the further review of his case, and that execution of the death sentences had been stayed pending action by that Court. Until the United States Supreme Court ruled it could not be finally determined

whether this Court's decision in *Waddell* had reinstated death as the punishment for the State's four capital crimes or whether the decision in *Furman v. Georgia,* 408 U.S. 238 (1972) had invalidated entirely the death penalty provisions of the statutes which fixed the punishment for those crimes.

Under these circumstances of uncertainty, by the enactment of Chapter 1201, the General Assembly most certainly did three things: (1) It *abolished* capital punishment for arson, burglary in the first degree, and rape in the second degree in the event it should be finally determined that *Waddell* reinstated the death penalty in this State. (2) It *established* capital punishment for murder in the first degree and rape in the first degree in the event the State's death penalty statutes had been abrogated by the decision in *Furman v. Georgia, supra.* (3) It substituted life imprisonment for the death sentence if the Supreme Court of the United States should decide that the latter was constitutionally impermissible.

It seems inconceivable that, under these circumstances, the General Assembly could have intended that any person would thereafter be executed for a crime for which Chapter 1201 abolished the death penalty.

It is doubtful that the General Assembly was aware of any pending case involving *second* degree rape as defined in Chapter 1201. On the other hand, it was aware of the fact that it could not change any *final* decision of this Court in which the death penalty for rape had been upheld. It may be that the purpose of Section 8 was to dispel the unwarranted notion that the General Assembly contemplated *judicial reconsideration* of prior decisions of this Court in which the death penalty for rape had been upheld. This case, however, has not proceeded to final judgment; it is still within the jurisdiction and responsibility of the Court.

In my view to execute a death sentence for a crime which is not now punishable by death would be unconscionable and constitute cruel and unusual punishment in violation of Article I, Section 27, of the Constitution of North Carolina, and of the Eighth Amendment to the Constitution of the United States.

Justice COPELAND dissenting as to death penalty.

With extreme reluctance, I find it necessary to dissent from the affirmance of that portion of the judgment sentencing de-

fendant to death. With all due respect to the present members of this Court who constituted the majority in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), and *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974), I am not of the opinion that the impact of *Furman v. Georgia,* 408 U.S. 238 (1972) on G.S. 14-17 (first degree murder), 14-21 (rape), 14-52 (first degree burglary), and 14-58 (arson), as they were written prior to 8 April 1974, the effective date of Chapter 1201, 1973 Session Laws, was to require the mandatory imposition of death sentences.

Article I, Section 6, of the North Carolina Constitution declares that "[T]he legislative, executive, and supreme judicial powers of the State government *shall be forever separate and distinct from each other.*" (Emphasis supplied.) Under Article XI, Sections 1 and 2, of the North Carolina Constitution, the General Assembly is authorized to provide that the crimes of murder, rape, burglary, and arson, and *only* these crimes, may be punishable by death. Accordingly, I do not believe that the death penalty may be imposed under our State Constitution unless and until our General Assembly so declares it by legislative act. In my opinion, *Furman v. Georgia* did not repeal the discretionary provisions of G.S. 14-17, 14-21, 14-52, and 14-58. What it did was to declare unconstitutional the imposition of the death penalty under those statutes as then written. It did not rewrite those statutes. Therefore, the North Carolina General Assembly, not this Court, was the only constitutional branch of our tripartite system of State Government vested with the authority to redraft those statutes in a manner that would make the imposition of death constitutionally permissible.

In summary, my views on this matter are in complete accord with those expressed by Justice Sharp (now Chief Justice) in her dissenting opinion to *State v. Waddell:*

"In my view, there are no constitutional infirmities in capital punishment *per se* and, under the conditions prevailing today, I do not consider the death penalty cruel and unusual punishment for the crimes for which the State Constitution authorizes the General Assembly to prescribe it. Thus, were I to permit my personal views on capital punishment as a State policy to dictate my decision in this case, I would have voted with the majority. This, however, I am not at liberty to do." 282 N.C. 431, 476, 194 S.E. 2d 19, 47-48.

In this regard, I note that the adjourned session of the 1973 North Carolina General Assembly, presumably in response to *State v. Waddell,* elected to amend all of our capital statutes. Chapter 1201, 1973 Session Laws. This Act, effective 8 April 1974, provides for capital punishment in cases of first degree murder and first degree rape. See G.S. 14-17 and 14-21(a)(1) and (2). This Act further provides that any person convicted of second degree rape "shall be punished by imprisonment in the State's prison for life, or for a term of years in the discretion of the court." G.S. 14-21(b). It further provides that any person convicted of burglary in the first degree or of arson "shall be imprisoned for life in the State's prison." G.S. 14-52, 14-58. Section 8 of the Act provides: "This act shall become effective upon ratification *and applicable to all offenses hereafter committed.*" (Emphasis added.) I agree with Justice Lake in the majority opinion that the language used in the saving clause is written in clear and explicit terms and that it could not apply to crimes committed prior to 8 April 1974.

It is my firm conviction that the punishments provided for in Chapter 1201, 1973 Session Laws, are constitutionally permissible under both our Federal and State Constitutions. For this reason, I am prepared to apply these laws as written to all the offenses enumerated therein and committed on or after 8 April 1974, the date of ratification.

For the reasons above noted, I dissent as to punishment and vote to remand for the imposition of a sentence of life imprisonment.

Justice EXUM dissenting as to the sentence of death:

While I concur with the majority opinion insofar as it affirms the conviction of the defendant for the crime of rape, I dissent from that portion of the opinion which affirms the judgment imposing a sentence of death. The majority holds that the death sentence can be imposed in this case by virtue of the majority holding in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973), and Section 8 of Chapter 1201 of the 1973 Session Laws. I disagree with the interpretation given to *Furman v. Georgia,* 408 U.S. 238, 33 L.Ed. 2d 346, 92 S.Ct. 2726 (1972) by the majority in *Waddell* and with the effect given to Section 8.

The majority in *Waddell* correctly interpreted the opinions of five of the United States Supreme Court Justices in *Furman*

to mean that the imposition of the death penalty in North Carolina under our state's then existing capital punishment statutes was unconstitutional. *Waddell* held that all otherwise capital offenses committed in this state before the date of its decision (18 January 1973) were punishable only by life imprisonment. The Superior Court of Sampson County was ordered to sentence the defendant Waddell to life imprisonment.

The question which this Court in *Waddell* then addressed was whether and under what circumstances the death penalty might thereafter be imposed in this state. The majority felt that this Court could make that determination. It held that capital crimes which before *Furman* were punishable by death or life imprisonment were, if committed before *Waddell,* punishable only by life imprisonment, and, if committed after *Waddell,* punishable only by death.

After *Furman* it was, in my opinion, initially for the General Assembly of North Carolina and not this Court to determine as a matter of policy whether and under what circumstances the death sentence should be reinstated in this state. N. C. Const. Art. XI, §§ 1, 2. Before *Waddell* and *Furman* one convicted of a capital crime was sentenced to death unless the jury recommended a sentence of life imprisonment. Thus our legislature, recognizing there would be cases when a person guilty of one of these crimes ought not to suffer death, permitted the jury mercifully to intervene. It has not been the policy of this state since 1949 automatically to execute everyone convicted of a capital crime. *See* 1949 Sess. Laws, Chap. 299, §§ 1-3. The majority of this Court in *Waddell* through its interpretation of *Furman* created such a policy. Only the legislature, in my view, had the prerogative initially to do that.

I agree with the proposition in Justice Lake's concurring opinion in *Waddell,* 282 N.C. at 449, that in the aftermath of *Furman* it was the duty of this Court to determine its effect upon this state's capital punishment laws. I would have concluded, however, that the effect of *Furman* was simply to prohibit the imposition of the death penalty in North Carolina and that only life imprisonment, the other available statutory penalty, could be imposed upon persons convicted of otherwise capital crimes.

The five majority opinions in *Furman* seem to be an effort to restrict, not expand, the circumstances under which the death penalty can be imposed. Indeed Justices Brennan and Marshall

believe that under no circumstances could its infliction comport with the Eighth Amendment to the United States Constitution. Justice Brennan also wrote:

> "[A]lthough 'the death penalty has been employed throughout our history,' *Trop v. Dulles,* 356 U.S., at 99, 2 L.Ed. 2d at 641, in fact the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare." *Furman v. Georgia, supra,* 408 U.S. at 299, 33 L.Ed. 2d at 383.

Justice White pointed out:

> "The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course." 408 U.S. at 313, 33 L.Ed. 2d at 392.

To interpret *Furman* in a way that would, in effect, reverse this trend is contrary to the thrust of the views of a majority of the United States Supreme Court.

Neither do I find the same comfort in Section 8 of Chapter 1201 of the 1973 Session Laws as does the majority. To put this defendant to death for a crime which if committed today could be punished only by imprisonment for life or for a term of years, in the discretion of the trial judge, G.S. 14-21(b), is arbitrary, unconscionable, cruel, and unusual. If the legislature intended by enactment of Section 8 to permit such a result, then this section plainly violates the constitutional prohibitions against cruel and unusual punishment. U. S. Const. Amend. VIII; N. C. Const. Art. I, § 27. These constitutional prohibitions require, in my opinion, that a legislature body which determines to abolish the death penalty for any given crime do so both prospectively and retroactively so that all persons who stand convicted and sentenced for that crime but who have not yet been executed will receive the benefit of the abolition.

I vote to affirm the conviction and to remand this case to the Superior Court of Wake County for the purpose of vacating the sentence of death heretofore imposed and imposing instead a sentence of life imprisonment upon this defendant.

STATE OF NORTH CAROLINA v. FRANK PRUITT II

No. 30

(Filed 12 March 1975)

1. **Criminal Law § 76— on-the-scene investigation — no custodial interrogation — admissibility of defendant's statements**

In a prosecution for arson and first degree murder, the trial court did not err in admitting into evidence defendant's response to questions asked him by a deputy sheriff at the scene of the crime since, at the time defendant made his statement, the deputy was engaged in a general on-the-scene investigation which was obviously directed to whether there were persons in the burning dwelling and there was nothing to suggest an in-custody interrogation or that the investigation had been focused upon defendant as the perpetrator of a crime; furthermore, substantially the same testimony had been given earlier without objection.

2. **Criminal Law § 75— Miranda warnings given — voluntariness of confession**

Even though the technical procedural safeguards required by *Miranda* are recited by officers to a defendant, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made.

3. **Criminal Law § 76— Miranda warnings given — officers' language causing fear or hope — confession involuntary**

Both oral and written confessions obtained from defendant were made under the influence of fear or hope or both growing out of the language and acts of those who held him in custody, and both were involuntary and improperly admitted in an arson and murder prosecution where the interrogation of defendant took place in a police-dominated atmosphere, officers repeatedly told defendant that they knew he had committed the crime, his story had too many holes in it, they knew he was lying and they did not want to fool around, this language was then tempered by statements that the officers considered defendant the type of person that such a thing would prey heavily upon, that defendant would be relieved to get it off his chest, and that it would simply be harder on defendant if he did not go ahead and cooperate.

APPEAL by defendant from *Canaday, J.*, at the 21 January 1974 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried upon separate bills of indictment charging arson and the murders of Patricia Ellen Donlin, Christel Emmi Donlin, and Jeremiah William Donlin. The charges were consolidated for trial.

The evidence for the State tended to show the following facts:

Staff Sergeant Jeremiah Donlin testified that on 9 October 1973, after talking with his wife, he left his home at 5107 Cannon Street, Fayetteville, about 3:10 a.m. He left his wife and his two sleeping children, Patricia Ellen Donlin, aged seven, and Jeremiah William Donlin, aged four, in the house. His wife and children were in good health. At that time his house had not been burned or charred in any way. Sergeant Donlin further testified that his wife often went out alone in the evening to play Bingo at the N.C.O. Clubs at Fort Bragg. They had "at least the normal amount of marital difficulties" and had sought marriage counseling on the base. Defendant and his wife, who lived in a trailer some sixty feet behind the Donlin house on a lot separated therefrom by a fence, often baby-sat the Donlin children.

Christy Sue Johnson, a next-door neighbor of the Donlins, testified that, about 7:00 a.m. on 9 October 1973, she was awakened by someone screaming "fire." Upon going outside, she observed that the Donlin house was on fire, and after talking with defendant's wife, she called the fire department.

Jimmy Goodman, Chief of the Bonnie Doone Fire Department, testified that, at 6:58 a.m. on 9 October 1973, he received a message that a house was on fire on Cannon Street. He arrived on the scene approximately two minutes later and discovered that the residence at 5107 Cannon Street was on fire "with flames and smoke rolling out of the house through the front door." The back corner of the house had already caved in. He encountered defendant, standing shirtless in the street in front of the house, and inquired whether people were still inside. Defendant replied, "She's in there on the couch. She's been raped and cut open and they've set her house on fire." After calling for further assistance, Goodman returned to try to enter the house and found defendant still standing in the street and "just yelling out of his head." In response to Goodman's question, defendant said that the children were in the back bedroom. Goodman crawled towards the front door of the house and was able to see a body about eight feet within but could not enter because of the fire.

After controlling the fire, he and others entered the front room, where they discovered a body in roughly a kneeling posi-

tion, the knees on the floor and the upper part of the body lying at an angle on the couch. Some twenty-five or thirty minutes later firemen were able to get into the back bedroom, where they discovered the charred bodies of two children and a small dog.

R. D. Cone of the State Bureau of Investigation, an expert in arson investigation and crime-scene analysis, testified that he went to the Donlin residence on 9 October 1973. He described the burned dwelling and related that a towel, rags, parts of a gown and housecoat, a pellet or air rifle with a portion of its stock missing, a gun stock, two knives, and a pair of scissors were found in the debris. They also obtained part of a railing from the fence separating the Donlin and Pruitt premises. Agent Cone testified that it did not appear that accelerants were used in starting the fire.

Robert Hallisey, a technician with the City-County Bureau of Identification, testified that about 7:00 a.m. he went to the scene of the fire, where he saw defendant and asked whether any people were still in the house. Defendant replied, "There's a woman in the house, she's been raped and stabbed, and the house is burning." He also testified concerning pictures he later made of the house and the bodies therein.

Cuyler L. Windham, Assistant Supervisor of the Fayetteville District for the S.B.I., testified that pursuant to defendant's consent he carried defendant to the Cape Fear Valley Hospital, where blood samples and fingernail clippings were taken from defendant. The blood samples and clippings were given to S.B.I. Agent Cone.

At this point it was stipulated that the three victims were pronounced dead on arrival at Cape Fear Valley Hospital on 9 October 1973. It was further stipulated that the bodies were removed from the hospital to the office of the Chief Medical Examiner of North Carolina in Chapel Hill, where Dr. Page Hudson, the State Medical Examiner, performed autopsies upon the bodies.

Laura Ward, a forensic serologist, testified that she received certain exhibits from Agent R. D. Cone and that her tests revealed the presence of Group "A" blood on portions of a towel, on a fatigue shirt, and on a pair of fatigue pants. She also found evidence of blood stains on another towel, on a fabric which appeared to be a part of a nightgown, on a piece of

quilted material, and on a pellet gun. The amounts of blood on the latter items were not sufficient to allow a detailed analysis. No blood was found on the fingernail clippings taken from defendant, the fence railing, the knives, or scissors found within the Donlin house. Her tests disclosed that both defendant and Mrs. Donlin had Group "A," Sub-group "A-1" blood.

Dr. Page Hudson, Chief Medical Examiner of North Carolina, testified that he conducted an autopsy on the body of Mrs. Donlin and the two children. He testified that there were at least three blows by a blunt-surfaced instrument on the left side of Mrs. Donlin's face and head and one "more significant" blow to the right side of her face. She had been manually strangled and stabbed three times in the abdomen and chest area with a sharp instrument. In his opinion, her death was caused by trauma to the head, and she was dead at the time her body was burned. In his opinion, both children died from thermal burns.

Detective Sergeant Conerly of the Cumberland County Sheriff's Department testified that he talked with defendant during the morning hours of 9 October 1973. Defendant told him that, upon observing the fire in the Donlin residence about 6:45 that morning, he told his wife to call the fire department. He then ran to the Donlin residence and attempted unsuccessfully to get into the house. He did not know whether the children were in the house at that time. He attempted to fight the fire until firemen arrived. Pruitt further related that an unidentified man had also been at the scene and had told him that there was a hole in Mrs. Donlin's head.

Approximately 5:00 p.m. on the same day, Sergeant Conerly and other officers went to defendant's trailer home, and defendant consented to a search of his premises.

Detective Lieutenant Charles D. Smith testified that he was present about 5:00 p.m. when defendant consented to a search of his trailer home. At that time, the officers found army fatigues in the closet of the rear bedroom. There were stains which appeared to be blood on the sleeves and front of the jacket and on the seat and both legs of the pants. The fatigues were seized, and defendant was arrested on charges of murder and arson. Defendant was carried to the Sheriff's Department, where he made a statement to the officers. At this point, defendant's counsel objected and moved to suppress the statement. The trial judge conducted a *voir dire* hearing, and, after finding

facts and concluding that the statement was made voluntarily, denied the motion to suppress. Officer Conerly then testified before the jury as to an inculpatory statement made by defendant. The contents of the statement and its admission into evidence will be more fully considered in the opinion.

Roy Starling, a Cumberland County Deputy Sheriff, testified that on 10 October 1973 he was a bailiff in Cumberland County District Court No. 2. On that day he and defendant, among other persons, were in the identification room of the jail, and defendant asked him who would take him to get his clothes. The witness testified that he told defendant he could not get his clothes because his house had burned down. Defendant replied, "No, that house belonged to the woman that I killed." This testimony was corroborated by Gerline Smith, a technician with the Identification Bureau who was also present and overheard this conversation.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree as to each of the murder indictments and a verdict of guilty to the arson indictment. Judge Canaday imposed the mandatory death sentence in each case. Defendant appealed.

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

Donald W. Grimes, attorney for defendant.

BRANCH, Justice.

Defendant first contends that the trial court erred in denying his motions to quash each bill of indictment on grounds that the North Carolina statutes imposing the death penalty for the crimes charged are unconstitutional under the Eighth and Fourteenth Amendments to the Constitution of the United States. This Court considered and rejected this identical argument in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721. *Accord: State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6. This assignment of error is overruled on authority of these cases.

[1] Defendant next assigns as error the overruling of his objection to the admission into evidence of defendant's response

to questions asked him by Deputy Robert Hallisey at the scene of the fire. He relies upon a single paragraph from a written statement given by Fire Chief Goodman, which was offered into evidence solely to corroborate Goodman's testimony. The statement upon which defendant relies is as follows:

> "When I got the fire knocked down in the front, I turned and looked. The Rescue had arrived and the man that was standing in the street hollering was about a half block down the street. I called to the Rescue men to stop him, that I wanted to question him. Then the CID men arrived, and the Rescue men had him to take the man in custody and hold him. The next thing that I noticed was the Deputies had arrived on the scene and had this man in their car."

Deputy Hallisey testified that he arrived at the scene of the fire at 7:00 a.m. and talked with Fire Chief Jimmy Goodman. Hallisey further testified:

> ". . . Goodman told me the house was engulfed in flames and there might be people there. Chief Goodman said a subject who gave him some information was near a trailer and I went to the location and talked with him. I approached the man who was the defendant to get some information from him because I was actually the only deputy at the scene at that time.
>
> I was concerned about the lives of the subjects still in the house. I recall asking him regarding any people being in the burning house.
>
> Q. What, if anything, did the defendant say in response to your questions?
>
> MR. GRIMES: Objection.
>
> COURT: Overruled.
>
> A. He said, that is the subject, 'there's a woman in the home, she's been raped and stabbed, and the house is burning.'
>
> EXCEPTION:
>
> This constitutes
>
> DEFENDANT'S EXCEPTION No. 2."

We recognize that procedural safeguards effective to secure the privilege against self-incrimination are necessary whenever law enforcement officers question a person who has been "taken into custody or otherwise deprived of his liberty in any significant way." *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694. When custodial interrogation begins is a question which has generated much judicial discussion. *See* Annotation, 31 A.L.R. 3rd 565.

The holding in *Miranda* does not extend to normal investigative activities conducted prior to arrest, detention, or charge. *Miranda v. Arizona, supra; State v. Oxentine,* 270 N.C. 412, 154 S.E. 2d 529. Justice Bobbitt (later Chief Justice), writing for the Court in *State v. Meadows,* 272 N.C. 327, 158 S.E. 2d 638, aptly stated the rule distinguishing general police investigation from custodial interrogation:

> "A general investigation by police officers, when called to the scene of a shooting, automobile collision, or other occurrence calling for police investigation, including the questioning of those present, is a far cry from the 'in-custody interrogation' condemned in *Miranda.* Here, nothing occurred that could be considered an 'incommunicado interrogation of individuals in a police-dominated atmosphere.' . . ."

Accord: State v. Sykes, 285 N.C. 202, 203 S.E. 2d 849; *State v. Gladden,* 279 N.C. 566, 184 S.E. 2d 249; *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477; *State v. Hayes,* 273 N.C. 712, 161 S.E. 2d 185.

A careful contextual reading of the testimony of Deputy Sheriff Hallisey discloses that when defendant made the statement to Hallisey, the Deputy was engaged in a general on-the-scene investigation which was obviously directed to whether there were persons in the burning dwelling. There was nothing to suggest an in-custody interrogation or that the investigation had been focused upon defendant as the perpetrator of a crime.

Further, Chief Goodman had already testified without objection to substantially the same facts. It is well established that when evidence is admitted over objection and the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is lost. *State v. Jarrette, supra; State v. Perry,* 275 N.C. 565, 169 S.E. 2d 839; 1 D. Stansbury, North Carolina Evidence § 30 (Brandis Rev.).

We find no merit in this assignment of error.

Defendant next contends that the trial judge erred in denying defendant's motion to suppress the oral and written confessions allegedly made by defendant.

When Lt. Smith testified that defendant was carried to the Sheriff's Department and warned of his constitutional rights by Sgt. Conerly, counsel for defendant requested a *voir dire* to determine the admissibility of any statements made by defendant in the form of a confession. Thereupon, the trial judge excused the jury, and Sgt. Conerly, in summary, testified as follows: After Pruitt was placed under arrest, he was carried to a seven-by-seven fluorescent lighted room at the rear of the Sheriff's Department for interrogation. This room was used because its location insured privacy. Lt. Smith, Sgt. Conerly, Officer Martin, and defendant were in the room during the interrogation. All of the officers participated in the questioning. Before questioning commenced, Sgt. Conerly read the following material from a plastic card:

> "Warning as to your rights. You are under arrest. Before we ask you any questions, you must understand what your rights are. You have the right to remain silent. You are not required to say anything to us at any time or to answer any questions. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we question you and have him with you during questioning. If you cannot afford a lawyer and want one, a lawyer will be provided for you. If you want to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering any time until you talk to a lawyer."

Defendant indicated that he understood his rights and did not indicate that he wanted a lawyer. He then gave defendant a "Voluntary Statement" form (Exhibit 44), which defendant read and signed. The form reads as follows:

> "VOLUNTARY STATEMENT
>
> DATE 9 Oct 73 PLACE Fayetteville, N. C.
> TIME STARTED 5:20 P.M.
>
> I, Frank Pruitt, II, am 21 years old. My date of birth is 28 Dec 51. I live at 5105 Patton St, Lot 103, Fayetteville, N. C.

The person to whom I give the following voluntary statement, Lt. C. D. Smith, Sgt. Bob Conerly, Sgt. Danny Martin, having identified and made himself known as a Deputy Sheriff, Cumberland County, N. C., DULY WARNED AND ADVISED ME, AND I KNOW:

1. That I have the right to remain silent and not make any statement at all, nor incriminate myself in any manner whatsoever.
2. That anything I say can and will be used against me in a court or courts of law for the offense or offenses concerning which this statement is herein made.
3. That I can hire a lawyer of my own choice to be present and advise me before and during this statement.
4. That if I am unable to hire a lawyer I can request and receive appointment of a lawyer by the proper authority, without cost or charge to me, to be present and advise me before and during this statement.
5. That I can refuse to answer any question or stop giving this statement any time I want to.
6. That no law enforcement officer can prompt me what to say in this statement nor write it out for me unless I choose for him to do so.

A. No one denied me any of my rights, threatened or mistreated me, either by word or act, to force me to make known the facts in this statement. No one gave, offered or promised me anything whatsoever to make known the facts in this statement, which I give voluntarily of my own free will and accord.

B. I do not want to talk to a lawyer before or during the time I give the following true facts, and I knowingly and purposely waive my right to the advice and presence of a lawyer before and during this statement.

C. I certify that no attempt was made by any law enforcement officer to prompt me what to say, nor was I refused any request that the statement be stopped, nor at anytime during this statement did I request for the presence or advice of a lawyer.

I have read each page of this statement consisting of 1 pages, each page of which bears my signature, and corrections, if any, bear my initials, and I certify that the facts contained herein are true and correct.

This statement was completed at 5:30 P.M. on the 9th day of October, 1973.

WITNESS: s/ CHARLES D. SMITH
WITNESS: s/ BOB CONERLY
s/ FRANK PRUITT, II
Signature of person giving voluntary statement"

Defendant then made an oral statement which was reduced to writing.

On cross-examination Sgt. Conerly stated that the interrogation began immediately after defendant signed Exhibit 44. He further testified:

". . . We told him about the bloody fatigues, the money and the discrepancies in what he had said and we flat told him that he had done it. We told him that this was it, this was the time to get it off his chest. Besides telling him that it would be better for him to get it off his chest, we told him he would probably feel better. We told him in essence that we knew he had done it, there were too many holes in his story, that it was a terrible thing and that he would probably feel better to tell. Before making the statement and before answering our questions relative to what happened, he did indicate that he had told us all that he knew. That was before he said anything incriminatory.

* * *

"We advised him that we knew he was lying and there were too many holes in his story and that we considered him the type of person that such a thing would prey heavily upon, that he would be relieved to get it off his chest, that he hadn't fooled us, that we knew he was lying, that we knew he had committed the crimes. *It was during the time prior to his confession that we told him it would be better for him to just go ahead and get it off his chest.*

". . . I probably did tell him to quit playing games or words to that effect. . . . I recall advising him that this was serious and that we were not playing games.

* * *

". . . We indicated the discrepancies in his verbal and written statement, that we felt he was the guilty party and we didn't want to fool around. By fooling around we meant by his not making any further lying statements or untruths. . . . Each of us did say essentially that there were too many holes in his story, that we knew he had lied, that we knew he had killed them and set fire to their house and that we wanted to get to the bottom of it and get the truth. All three of us at one time or another prior to his confession did relate that to him.

"Pruitt answered questions all along. It was approximately 15 to 20 minutes before he confessed. . . . I believe he did state he would like to take a polygraph. . . . [H]e made several comments to me, one of which was to ask me if I thought he could get work release. *I possibly told him that he would be making it harder on himself by not making a statement.*

* * *

" . . . *Yes, I did tell Mr. Pruitt that it would simply be harder on him if he didn't go ahead and cooperate.*

* * *

"Pruitt was in the room, that is room A, approximately 15 to 20 minutes before he incriminated himself. . . ." (Emphasis supplied.)

The written statement which defendant signed before Magistrate J. B. Darden, Jr., was in pertinent part as follows:

"I declare that the following voluntary statement is made to the aforesaid person of my own free will without promise of hope or reward, without fear or threat of physical harm, without coercion, favor or offer of favor, without leniency or offer of leniency, by any person or persons whatsoever.

This morning, about 4:00 A.M., I left my trailer and went to the residence of a friend of mine, Jerry Donlin, who lives next door. I knocked on the front door and his wife, Chris, answered the door. Jerry had already gone to work. Chris and I talked for a while. She accused me of something and said that she was going to tell my wife but wouldn't tell me what she was going to tell my wife about.

I got mad and started choking her. We were in the living room. After I choked her for a while, I then went into the kitchen and went by the washing machine and got a rifle with a wooden stock. I struck her a few times on the head with the rifle. The wooden stock broke off of the rifle and I left it (the wooden stock) in the kitchen and laid the metal barrel under the couch. About this time her two children came into the living room crying. I tried to get them to stop crying but they wouldn't. I then took them into the front bedroom and talked to them but they still cried and they went into the back bedroom, the master bedroom. I followed them in there. I chocked them and thought they were dead. But they were not. I then choked them again and they seemed dead this time. I then found some matches and set two fires. One I set in the master bedroom closet and closed the door and the other one I started in the front bedroom. I also took around Fifty Dollars from Chris' purse. After setting the fires, I then went back to my trailer. End of Statement.

I have read this statement consisting of 1 page)s—, and I certify that the facts contained therein are true and correct. I further certify that I made no request for the advice or presence of a lawyer before or during any part of this statement, nor at any time before it was finished did I request that this statement be stopped. I also declare that I was not told or prompted what to say in this statement.

This statement was completed at 7:30 P.M. on the 9th day of October, 1973, Sworn before me this 10/9/73; Witness; J. B. Darden, Magistrate; Witness: Bob Conerly; Signature of Person giving voluntary statement, Frank Pruitt, II."

The Court found that the officers did not threaten defendant or offer him any inducement of any kind during the interrogation and that it appeared to Officer Conerly that defendant was normal in every respect during the interrogation. Upon these findings the Court concluded that defendant's statement was voluntarily and knowingly made without inducement and coercion and after defendant had been fully advised of his constitutional rights. The Court thereupon denied defendant's motion to suppress.

Defendant offered no evidence on *voir dire*.

The jury returned, and Sgt. Conerly testified before the jury to facts similar to those contained in defendant's confessions.

The trial judge properly excused the jury and heard evidence as to whether defendant's alleged oral and written confessions were voluntarily and understandingly made. *State v. Bishop,* 272 N.C. 283, 158 S.E. 2d 511; *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1, *cert. denied,* 386 U.S. 911, 87 S.Ct. 860; *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, *vacated and remanded on other grounds,* 375 U.S. 28, 84 S.Ct. 137, 11 L.Ed. 2d 45. Generally, facts found by the trial judge are conclusive on the appellate courts when supported by competent evidence. Nevertheless, the conclusions of law drawn from the facts found are not binding on the appellate court. *State v. Bishop, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833; *State v. Hines,* 266 N.C. 1, 145 S.E. 2d 363. Thus, whether the conduct and language of these investigating officers amounted to such threats or promises as to render a subsequent confession involuntary is a question of law reviewable on appeal. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492; *State v. Biggs,* 224 N.C. 23, 29 S.E. 2d 121.

As a result of the decision in *Miranda v. Arizona, supra,* a number of procedural safeguards must be employed prior to an in-custody interrogation, and unless the warnings and waivers demanded by *Miranda* are demonstrated by the prosecution, no evidence obtained by the interrogation is admissible.

[2] In instant case there was plenary evidence that the procedural safeguards required by the *Miranda* decision were recited by the officers and that defendant signed a waiver stating that he understood his constitutional rights, including his right to counsel. Even so, the ultimate test of the admissibility of a confession still remains whether the statement made by the accused was in fact voluntarily and understandingly made. *State v. Bishop, supra; State v. Gray, supra; State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569; *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572. The fact that the technical procedural requirements of *Miranda* are demonstrated by the prosecution does not, however, standing alone, control the question of whether a confession was voluntarily and understandingly made. The answer to this question must be found from a consideration of the entire record. *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895; *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753.

[3] The facts of instant case direct our inquiry to the question of whether the circumstances reveal that the challenged confession was obtained by the influence of hope or fear implanted in defendant's mind by the acts and statements of the police officers during defendant's custodial interrogation. This Court has considered this question many times against varied factual backgrounds, and we think it profitable briefly to review some of these decisions.

In the landmark case of *State v. Roberts*, 12 N.C. 259, the prisoner, after he was arrested, was told that, since he was in custody, any confession he might make could not be given in evidence against him at trial; therefore, he might as well come out with the whole truth. Another person present stated that if the prisoner made confessions, it would be to his credit thereafter. On these urgings, made in the presence of the prosecutor, the defendant made the confession which was offered into evidence at his trial. Several days later, of his own motion, the defendant requested the jailer to send for the prosecutor and stated that he wished to disclose to him the names of certain persons who had been concerned and involved in the commission of the offense charged. During the course of this second conference with the prosecutor, the defendant made certain statements which tended to establish his own complicity in the crime.

Rejecting the confessions as involuntary, Chief Justice Taylor, writing for the Court, in part, stated:

> ". . . The true rule is that a confession cannot be received in evidence where the defendant has been influenced by any threat or promise; for, as it has been justly remarked, the mind, under the pressure of calamity, is prone to acknowledge, indiscriminately, a falsehood or a truth, as different agitations may prevail; and therefore a confession obtained by the slightest emotions of hope or fear ought to be rejected. . . ."

Justice Henderson, concurring, set forth the rule as to voluntariness of confessions, a rule which still retains its vitality almost a century and a half after its writing:

> "Confessions are either voluntary or involuntary. They are called voluntary when made neither under the influence of hope or fear, but are attributable to that love of truth which predominates in the breast of every man, not operated upon by other motives more powerful with him, and

which, it is said, in the perfectly good man cannot be countervailed. These confessions are the highest evidences of truth, even in cases affecting life. But it is said, and said with truth, that confessions induced by hope or extorted by fear are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected. . . ."

In *State v. Whitfield,* 70 N.C. 356, the defendant was charged with larceny of a hog. The owner, a white man in company with two other white men, went into the field where the defendant, a Negro man in his employment, was working. He told the defendant that the hog had been stolen and said to him, "I believe you are guilty. If you are, you had better say so. If you are not, you had better say that." Thereupon, defendant confessed. Holding the confession to be involuntary, the Court employed the following language:

"It is contrary to the genius of our free institutions, that any admissions of a party should be heard as evidence against him unless made voluntarily. The common law looks with jealousy upon anything that has the semblance of torture, and declares that no confession of guilt shall be heard in evidence unless made voluntarily; for, if made under the influence of either hope or fear, there is no test of its truthfulness. . . . Such is the abhorrence of the common law in respect to extorting confessions, that it is a settled rule, no confession of one charged with crime shall be admitted in evidence against him when it appears that the confession was made by reason of hope or fear. . . . [W]e are satisfied, as a matter of legal inference, that the prisoner made the confession under the influence of hope or fear, or both feelings, excited by the conduct and language of the parties who had him in their power."

Another case factually similar to the case now before us is *State v. Stevenson,* 212 N.C. 648, 194 S.E. 81. There the evidence tended to show that the defendant had started to make a statement while in jail and was told by an officer that he need not lie because the officer already had more than enough evidence for his conviction. The defendant thereupon confessed. This Court awarded a new trial on the ground that the confession was not a free and voluntary confession but was instead a product of unlawful inducement on the part of the law enforcement officer.

In *State v. Drake,* 113 N.C. 625, 18 S.E. 166, the facts showed that while the defendant was being carried from the place of his arrest to a Justice of the Peace, a law enforcement officer said to him, "If you are guilty, I would advise you to make an honest confession. It might be easier for you. It is plain against you." At that time the defendant denied his guilt, but after the Justice of the Peace had committed him to jail, he confessed. The Court again held the confession to be involuntary and, in part, stated:

> ". . . The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It *may* have proceeded from this cause, from this hope so held out to him. If it *may* have proceeded from that cause, there is no guaranty of its truth, and it must be rejected. *S. v. Lawhorne,* 66 N.C., 638; *S. v. George,* 50 N.C., 233."

In *State v. Livingston,* 202 N.C. 809, 164 S.E. 337, the defendants were arrested, and after measuring their shoes and tracks at the scene of the crime, the officers told defendants that "it would be lighter on them to confess" and that "it looks like you had about as well tell it." The defendants forthwith confessed to the crime charged. There the Court, relying upon *State v. Roberts, supra,* held that the confessions were involuntary and inadmissible in evidence. *Accord: State v. Fox, supra* (Officer told defendant that it would be better for him in court if he told the truth and that he might be charged with a lesser offense of accessory to the homicide charge rather than its principal.) ; *State v. Fuqua,* 269 N.C. 223, 152 S.E. 2d 68 (A police officer told the incarcerated defendants that he [the officer] would be able to testify that they cooperated if they aided the State in its case.) ; *State v. Woodruff,* 259 N.C. 333, 130 S.E. 2d 641. (Officer obtained favors and concessions on the part of State officials to induce defendant to aid in solving the homicide and promised that if the evidence obtained involved defendant, he would try to help defendant.) ; *State v. Davis,* 125 N.C.

612, 34 S.E. 198 (Officer told defendant that he had "worked up the case and he had as well tell all about it.").

The rule set forth in *Roberts* has been consistently followed by this Court. The Court has, however, made it clear that custodial admonitions to an accused by police officers to tell the truth, standing alone, do not render a confession inadmissible. *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300; *State v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620; *State v. Thompson,* 224 N.C. 661, 32 S.E. 2d 24. Furthermore, this Court has made it equally clear that any improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage. *State v. Hardee,* 83 N.C. 619; *see State v. Pressley,* 266 N.C. 663, 147 S.E. 2d 33.

In instant case the interrogation of defendant by three police officers took place in a police-dominated atmosphere. Against this background the officers repeatedly told defendant that they knew that he had committed the crime and that his story had too many holes in it; that he was "lying" and that they did not want to "fool around." Under these circumstances one can infer that the language used by the officers tended to provoke fright. This language was then tempered by statements that the officers considered defendant the type of person "that such a thing would prey heavily upon" and that he would be "relieved to get it off his chest." This somewhat flattering language was capped by the statement that "it would simply be harder on him if he didn't go ahead and cooperate." Certainly the latter statement would imply a suggestion of hope that things would be better for defendant if he would cooperate, *i.e.,* confess.

We are satisfied that both the oral and written confessions obtained from defendant were made under the influence of fear or hope, or both, growing out of the language and acts of those who held him in custody. We hold that both the oral and the written confessions obtained in the Sheriff's Department on 9 October 1973 were involuntary and that it was prejudicial error to admit them into evidence.

The facts of this case disclose the commission of brutal and revolting crimes. Yet, we must apply well-recognized rules of law impartially to easy and hard cases alike lest me make bad

law which will erode constitutional safeguards jealously guarded by this Court for nearly a century and a half.

We would not be understood to hold that our ruling on the admissibility of the oral and written confessions obtained by police officers on 9 October 1973 is intended necessarily to vitiate the apparently volunteered statements made to Deputy Sheriff Ray Starling on 10 October 1973. At the next trial the admissibility of these statements should be determined by the trial judge after a *voir dire* hearing. *See State v. Godwin,* 216 N.C. 49, 3 S.E. 2d 347; *State v. Lowry,* 170 N.C. 730, 87 S.E. 62; 2 D. Stansbury, North Carolina Evidence § 185 (Brandis Rev.).

We do not deem it necessary to consider at length defendant's assignment of error concerning the argument of the district attorney. Suffice it to say that arguments which refer to the failure of defendant to testify are disapproved. *Griffin v. California,* 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed. 2d 106, *rehearing denied,* 381 U.S. 957, 85 S.Ct. 1797, 14 L.Ed. 2d 730; *State v. Roberts,* 243 N.C. 619, 91 S.E. 2d 589; *see* Annotation, 24 A.L.R. 3d 1093.

Neither do we see prejudicial error in the admission of defendant's negative answer to S.B.I. Agent Windham's question, "What's the matter Frank, are you sick about what you did?" We simply note in passing that this question and answer could have added little to the State's case.

For the reasons stated, there must be a

New trial.

STATE OF NORTH CAROLINA v. JAMES AVERY

No. 33

(Filed 12 March 1975)

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

The trial court in a capital case did not err in the allowance of the State's challenge for cause of a prospective juror whose answers to questions by the solicitor, when read as a whole, made it clear that she would refuse to render a guilty verdict regardless of the evidence.

2. **Arrest and Bail § 7; Criminal Law § 75— refusal to allow phone call — subsequent confession — harmless error**

In this first degree murder prosecution, refusal of the chief of police to allow defendant to make a phone call until he gave the officer his name, date of birth and address, if erroneous, was harmless beyond a reasonable doubt where, shortly thereafter and before making any incriminating statements, defendant was told by the sheriff that a telephone was available if he desired to use it, and where the State presented other overwhelming evidence of defendant's guilt, including positive identification of defendant by an eyewitness.

3. **Constitutional Law § 32—confinement without appointment of counsel — waiver by defendant**

Defendant was not deprived of his constitutional right to the presence of counsel and his rights under G.S. 7A-453 and G.S. 15-47 were not violated by his confinement in jail for eight days without appointment of counsel where defendant told police officers he intended to procure his own attorney through friends in Washington, D. C. and did not want appointed counsel, and when it first became apparent that he was unable to secure such attorney, an attorney was appointed to represent him without further delay.

4. **Constitutional Law § 36; Criminal Law § 135— constitutionality of death penalty**

Defendant's constitutional and statutory rights were not violated by the imposition of the death penalty upon his conviction of first degree murder.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death penalty.

APPEAL by defendant from *Peel, J.*, at the February 1974 Session of BERTIE Superior Court.

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

The testimony of Mrs. Nellie Ivy, a witness for the State, tends to show that on Saturday night, 29 September 1973, she was working part-time in Mr. Carlton Woodrow Barham's store just inside the city limits of Roxobel, N. C. She came to work about 5:30 p.m. At about 8:30 p.m., nearing closing time, she and Mr. Barham were alone in the store. She was standing near the cash register. Mr. Barham was proceeding toward the cash register from the back of the store where he had turned off the television. At this time, defendant came into the store with a hat over his hand. He removed the hat, uncovered a pistol, and said, "This is a hold-up. Give me your money." She then told

Mr. Barham, "For the Lord's sake, give it to him." Mr. Barham emptied his cash register and put the money in defendant's hat, saying that was all the money he had. Defendant ordered her and Mr. Barham out from behind the counter so he could check the cash register for himself. Defendant then took the money in the hat, started toward the door, and turned around. She said, "Please don't shoot us," at which time defendant shot at her, hitting her in the stomach. He was seven to ten feet from her and she could see him clearly. Defendant fired another shot over her at Mr. Barham. She heard a total of three shots after the shot that struck her. She also heard Mr. Barham cry out. Defendant then left the store. She waited until she heard a car leave and then dragged herself outside seeking help. She identified the defendant at trial as the man who robbed the store and shot her and Mr. Barham.

An autopsy conducted the following day disclosed that Mr. Barham died from massive hemorrhages in the abdominal area caused by a gunshot wound.

Thomas James Bishop testified that he is a resident of Roxobel and that on the night in question he saw a dark-colored 1963 two-door Chevrolet with an antenna on the right rear run a stoplight at a high rate of speed about a mile down the road from Barham's store. The automobile was proceeding toward Murfreesboro. Bishop and Joe Herman then went down to Barham's store and saw Mrs. Ivy lying in the yard.

Deputy Sheriff Milton Morris testified that, based on Bishop's description of the automobile, the sheriff's office in Bertie County issued an alert at about 9:05 p.m.

Sergeant Robert E. Harris of the Murfreesboro Police Department testified that shortly after receiving the alert, he set up a traffic check at the west end of Murfreesboro. Within a few minutes, a car meeting the above description was sighted. After some hesitation, the driver of the 1963 Chevrolet, who was alone, pulled over to the side of the road in response to Sergeant Harris's blue light and siren. The defendant was the driver. Sergeant Harris noticed that defendant was fumbling at his feet as Harris approached the driver's side of the automobile. Defendant was unable to produce an operator's license and the registration card showed the automobile to belong to one James F. Robertson. As Sergeant Harris was reaching for the registration card, which was located on the dash of the car,

he saw the stock of a pistol protruding from beneath the seat of the automobile. The pistol was a .38-caliber Smith and Wesson revolver with four "spent" cartridges and two "live" cartridges in the chamber.

Sergeant Harris took defendant to the police station in Murfreesboro after giving him his *Miranda* rights. A search there revealed eleven other "live" .38-caliber cartridges in defendant's right pocket and $136 in defendant's left pocket.

Sheriff Edward H. Daniels testified that shortly before 3:00 a.m. on the morning of 30 September 1973, defendant confessed to the robbery and murder after an interrogation of about one hour.

Special Agent Frank Satterfield of the State Bureau of Investigation testified that, in his opinion, the bullets taken from Mr. Barham's body had been fired from the revolver found in the 1963 Chevrolet driven by defendant.

James F. Robertson testified that he was the owner of the 1963 Chevrolet driven by defendant and that it had been missing since the morning of 29 September 1973. He further testified that he did not give anyone permission to drive it and that he never owned a revolver nor kept one in his automobile.

Other law enforcement officers testified at various stages of the trial for corroborative purposes.

Defendant offered no evidence.

Other facts pertinent to decision are set out in the opinion.

Attorney General Robert Morgan and Assistant Attorney General Lester V. Chalmers, Jr., for the State.

William W. Pritchett, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first contends that he was deprived of his constitutional right to trial by an impartial jury when the trial judge allowed juror Tilgiham to be dismissed upon challenge for cause by the State. Defendant asserts that Mrs. Tilgiham's objections to the death penalty were general and that she therefore should not have been dismissed for cause, citing *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968).

During *voir dire,* the following transpired between the solicitor and Mrs. Tilgiham:

"Q. And let me ask you this question. If you were satisfied from the evidence and beyond a reasonable doubt, would you vote for a verdict of guilty, realizing at the time you cast that vote that it would take this man's life?

"A. No. It is kind of a hard question about taking a person's life. I would have to think that over. I would hate to do that.

"Q. I am just asking you could you do that?

"A. I could if I . . . you know . . . I would have to think first.

"Q. Ma'am?

"A. Well, I could, you know, but I have . . . it is a hard thought to say what I would say about taking a man's life.

"Q. I am certainly not attempting to do anything except try to find out from you if you could and would do that.

"A. I can't. . . .

"Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?

"A. Well, it would be hard to take a person's life. It would be on my conscience.

"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that.

"Q. Under any circumstances regardless of the facts in any case would you vote for a verdict, in any case that would take this man's life?

"A. I wouldn't like to vote to take his life if I could help it.

"Q. Well, are you opposed under all circumstances and conditions to capital punishment?

"A. On the punishment, yes.

"Q. I said are you opposed to capital punishment?

"A. Well, yes.

"Q. You are?

"A. I think so as far as I know of taking his life.

"Q. Your Honor, I submit this woman for cause.

"COURT: All right. You may step down."

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), modified on other grounds, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), modified on other grounds, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971).

Whether a juror evidences absolute opposition to the death penalty so as to be excludable for cause under *Witherspoon* is a difficult question subject to seemingly inconsistent results on similar facts. See Annot., 39 A.L.R. 3d 550 (1971). We are aware of numerous decisions in other jurisdictions upholding challenges for cause on answers more equivocal than those of juror Tilgiham. *See, e.g., Paramore v. State*, 229 So. 2d 855 (Fla. 1969), modified on other grounds, 408 U.S. 935, 33 L.Ed. 2d 751, 92 S.Ct. 2857 (1972); *Williams v. State*, 228 So. 2d 377 (Fla. 1969), modified on other grounds, 408 U.S. 941, 33 L.Ed. 2d 765, 92 S.Ct. 2864 (1972); *State v. Conyers*, 58 N.J. 123, 275 A. 2d 721 (1971); *State v. Elliott*, 25 Ohio St. 2d 249, 54 Ohio Ops. 2d 371, 267 N.E. 2d 806 (1971), modified on other grounds, 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2872 (1972); *Koonce v. State*, 456 P. 2d 549 (Okla. Crim. 1969), modified

on other grounds, 408 U.S. 934, 33 L.Ed. 2d 748, 92 S.Ct. 2845 (1972); *Tezeno v. State,* 484 S.W. 2d 374 (Tex. 1972). We are also aware that a substantial number of death penalty cases have been reversed on the authority of *Witherspoon* in memorandum opinions by the United States Supreme Court. For a partial list, see *Tezeno, id.* at 383.

In *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974), we held that a prospective juror, Mrs. Rogers, was properly excused for cause after answering questions concerning her belief as to capital punishment as follows:

> " 'MR. PIERCE [the solicitor]: And Mrs. Rogers, let me ask you the same question, that I have been asking. Would it be impossible for you to bring in a verdict requiring the imposition of the death penalty, under any circumstances, no matter—even though the State proved to you the defendant's guilt beyond a reasonable doubt?
>
> JUROR ROGERS: I do not believe in capital punishment.
>
> MR. PIERCE: Let me ask you this question, again, with your answer in mind, please. Would it be impossible to bring in a verdict that required the imposition of the death penalty, no matter what the State showed you, by way of the evidence?
>
> JUROR ROGERS: I think so.' "

While it is clear that Mrs. Tilgiham, the prospective juror in this case, encountered some difficulty formulating answers to the questions, the solicitor was diligent in seeking to help the juror clarify her position. The solicitor stated that he was seeking by his questions only to find out, under *Witherspoon,* if the juror could or could not render a guilty verdict, the consequences of which would be death to the defendant. We believe the juror clarified her position to the extent that it was clear that she would refuse to return a guilty verdict regardless of the evidence. This is shown by her other answers, as well as by the following exchange:

> "Q. If you were satisfied from the evidence that the defendant was guilty of murder in the first degree, would you vote for a verdict of guilty realizing at the time that it would take his life?
>
> "A. Well, it would be hard to take a person's life. It would be on my conscience.

"Q. I just want you to tell me if you could or could not do that?

"A. No, I don't feel like I could do that."

As the Texas Court of Criminal Appeals said in *Tezeno:*

"We cannot believe that *Witherspoon* . . . requires certain formal answers and none other. We surely feel that the test of *Witherspoon* is 'not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. [Citation omitted.]' " 484 S.W. 2d at 383.

We think that, reading the juror's answers as a whole, she displayed an unequivocal reluctance to render a guilty verdict, knowing that defendant would be subjected to the death penalty. Furthermore, the record does not disclose that the State had exhausted its nine peremptory challenges, and had this challenge for cause not been sustained, the solicitor could have challenged this juror peremptorily.

This assignment is overruled.

Defendant next contends that the trial court erred in allowing into evidence the defendant's in-custody confession.

A *voir dire* hearing was held to determine the admissibility of the confession. On *voir dire,* Special Agent William Earl Godley of the State Bureau of Investigation testified that he read the defendant his rights at the Murfreesboro Police Station as follows:

"Before I ask you any questions, you must understand your rights. You have the right to remain silent and not make any statement. Anything you say can and will be used against you in court. You have the right to talk to a lawyer for advice before you answer any questions and to have him or anyone else with you during questioning. If you cannot afford a lawyer, one will be appointed for you by the Court before any questioning, if you wish. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer."

Defendant, a high school graduate, testified on *voir dire* that he had been taken into custody three times before and that

he understood his rights. He signed a written waiver of those rights at about 1:55 a.m. Defendant testified that "nobody mistreated me," that he knew and understood his rights, and that he had a Coca-Cola and was allowed to smoke. After a thorough *voir dire* hearing, covering eleven pages in the record, the trial court concluded that the defendant freely, understandingly and voluntarily made the statement to Sheriff Daniels without undue influence, compulsion and duress and without promise of leniency, and that defendant's constitutional rights had not been abridged in any way. Such conclusions, when supported by competent evidence, are conclusive on appeal. *State v. Thompson*, 285 N.C. 181, 203 S.E. 2d 781 (1974); *State v. Crews*, 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972); *State v. Hill*, 276 N.C. 1, 170 S.E. 2d 885 (1969).

[2] Defendant earnestly contends, however, that the confession was rendered incompetent due to an incident which occurred between him and Police Chief Wheeler earlier in the evening on 29 September at the police station.

Upon being arrested and placed in the police car around 9:15 p.m., defendant was read his rights. After arriving at the station, defendant asked to make a telephone call. Police Chief Wheeler told defendant he could make the telephone call after he gave the officers his name, date of birth and address. Defendant refused to give that information and was not allowed to make a telephone call at that time. Chief Wheeler testified that he needed the name of the defendant so he could complete his legal papers, draw a warrant promptly (as required by G.S. 15-47), and keep his phone log up to date as required by city regulations. He further testified: "The city requires me to make a log of each call that is made and who makes the call. If he had told me who he was, I would have let him make the call. I did not try to keep him from making the call but I had to know who he was going to call so I could log it." The information sought by Chief Wheeler was harmless to defendant yet necessary to the police in performing clerical duties accompanying arrest.

Later that night Sheriff Daniels of Bertie County took charge of the investigation. Sheriff Daniels recognized defendant as being one of the Avery boys from Lewiston whom he had arrested before. The sheriff was present when defendant

was advised of his rights by Agent Godley and when defendant signed the waiver of those rights. After the waiver was signed, Agent Godley left and Sheriff Daniels, after again reminding defendant of his rights, asked him if it would be all right if he talked to him without a lawyer being present. Defendant replied that this would be all right. Defendant did not request to use the telephone that night although the sheriff told him that there was a telephone available if there was anyone he wanted to call. Under these facts, we do not feel that the refusal of Chief Wheeler to allow defendant to make a phone call until he gave the officer his name, date of birth and address was such prejudicial error, if error, as to require a new trial. Especially so when shortly thereafter, and before making any incriminating statement, defendant was told by the sheriff that a telephone was available if he desired to use it. At that time defendant did not request to make a telephone call but told the sheriff he did not want an attorney or anyone else present at that time and if he decided to get an attorney he would get one himself later on.

Assuming, without deciding, that it was error for Chief Wheeler to refuse to let defendant make the telephone call when he first requested to do so, we believe that under the facts in this case it, at most, would be harmless error. As stated in *State v. Taylor,* 280 N.C. 273, 280, 185 S.E. 2d 677, 682 (1972):

> "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)."

In the present case defendant was positively identified by Mrs. Ivy who was present and who was also shot by defendant and who saw defendant shoot deceased. A car was seen leaving the vicinity of the shooting at a high rate of speed shortly after the shooting occurred. Soon thereafter, a car of the same description being driven by the defendant was stopped. A pistol was found in the car with four spent cartridges and two live ones.

Mrs. Ivy testified that three shots were fired after the one which struck her. A ballistics expert testified that the bullets which killed deceased were fired from the pistol found in defendant's possession in the car stolen from Mr. Robertson. Eleven live cartridges for the same caliber pistol and $136 in cash were found in defendant's pockets. A hat similar to the one which defendant had over the pistol when he first entered the store was also found in the car which defendant was driving. In view of this overwhelming evidence of defendant's guilt, we hold that the failure to allow defendant to make the telephone call as first requested, when he was allowed the opportunity to do so shortly thereafter, and before making any incriminating statement, was harmless beyond a reasonable doubt. We do not believe there is a reasonable possibility that this failure contributed to defendant's conviction. *See State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974); *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516 (1973).

[3] Defendant next contends that his constitutional and statutory rights were violated by virtue of his being confined in jail for eight days without appointment of counsel.

Defendant was arrested about 9:15 p.m. on 29 September 1973. He was taken to the Murfreesboro Police Department where he signed a written waiver of his rights at about 1:55 a.m. He made a full confession about 3:00 a.m. on 30 September. Counsel was appointed for defendant in District Court on 8 October 1973. Sheriff Daniels testified on *voir dire* that at no time during the week preceding 8 October did defendant request that counsel be appointed for him. Daniels further testified that defendant told him that he could get his own attorney through connections he had in Washington, D. C. Defendant testified on cross-examination during *voir dire* that he told police officers he could get his own attorney and that he did not want appointed counsel. He testified that he told officers this on Monday, Tuesday and Wednesday, following his confession on Sunday morning, and that he was given appointed counsel as soon as he discovered he could not employ his own attorney. This contention is without merit.

Defendant asserts that he was deprived of his constitutional right to the presence of counsel during these eight days, and cites *State v. Hill,* 277 N.C. 547, 178 S.E. 2d 462 (1971), and *State v. Pearce,* 266 N.C. 234, 145 S.E. 2d 918 (1966), in

support of his argument. Defendant's reliance is misplaced. In *Hill,* defendant was held to be unconstitutionally deprived of his right to counsel when his counsel, who had been summoned, was refused permission to see him. In this case, defendant was offered an opportunity to contact counsel, and he assured the officers he would seek his own counsel to assist him. In *Pearce,* defendant was held for two months before counsel was appointed, during which the officers elicited much damaging testimony from him. In that case, lack of presence of counsel was but one factor among several which induced this Court to rule the admissions of defendant to be involuntary. At no time in that case did the defendant assure the officers he would procure his own counsel. In the present case defendant continued to assure the officers that he intended to employ private counsel. Under these circumstances, we hold that defendant's constitutional rights were not violated by the eight days' delay in appointment of counsel.

Defendant contends specifically, however, that his rights under G.S. 7A-453 and G.S. 15-47 were violated by the eight days' delay in appointing counsel for him. Pertinent parts of those statutes are as follows:

> "G.S. 7A-453. *Duty of custodian of a possibly indigent person; determination of indigency.*— . . . .
>
> "(b) In districts which do not have a public defender, the authority having custody of a person who is without counsel for more than 48 hours after being taken into custody shall so inform the clerk of superior court. The clerk shall make a preliminary determination as to the person's entitlement to counsel and so inform any district or superior court judge holding court in the county. The judge so informed may assign counsel. The court shall make the final determination.
>
> "(c) In any district, if a defendant, upon being taken into custody, states that he is indigent and desires counsel, the authority having custody shall immediately inform the defender or the clerk of superior court, as the case may be, who shall take action as provided in this section.
>
> "(d) The duties imposed by this section upon authorities having custody of persons who may be indigent are in addition to the duties imposed upon arresting officers under G.S. 15-47."

> "G.S. 15-47. *Arresting officer to inform offender of charge, allow bail except in capital cases, and permit communication with counsel or friends.*— . . . [A]nd it shall be the duty of the officer making the arrest to permit the person so arrested to communicate with counsel and friends immediately, and the right of such persons to communicate with counsel and friends shall not be denied." (Repealed by Chapter 1286, Session Laws 1973, effective July 1, 1975.)

In this case, all the evidence is to the effect that defendant told the officers he intended to procure his own attorney through friends in Washington, D. C. He continued to tell the officers this for several days after his arrest. When it first became apparent that he was unable to secure such attorney, an attorney was appointed to represent him without further delay. As stated in *State v. McCloud,* 276 N.C. 518, 531, 173 S.E. 2d 753, 763 (1970):

> "The failure to observe the provisions of these statutes may well result in the violation of a person's constitutional rights. However, G.S. 15-46 and G.S. 15-47 do not prescribe mandatory procedures affecting the validity of a trial. *State v. Broome,* 269 N.C. 661, 153 S.E. 2d 384; *Carroll v. Turner,* 262 F. Supp. 486 (E.D.N.C. 1966)."

Defendant, both by words and acts, waived his right to earlier appointment of counsel. No violation of the quoted statutes is shown. This assignment is overruled.

[4] Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. *State v. Noell, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled.

In view of the seriousness of the charge and gravity of the punishment imposed, we have carefully examined each of defendant's assignments of error. An examination of the entire record

discloses that the defendant has had a fair trial free from prejudicial error.

No error.

Chief Justice SHARP dissenting as to the death penalty:

The murder for which defendant was convicted occurred on 29 September 1973, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-21 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—, I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissenting opinion of Chief Jusice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion filed this day in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. LAWRENCE McCALL

No. 32

(Filed 12 March 1975)

1. Homicide § 21— death by shooting — sufficiency of evidence

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that the victims

were murdered by a hidden assailant who fired two .12 gauge shotgun rounds, on the day of the crime defendant had several confrontations with decedents, at the time of his arrest defendant had a .12 gauge shotgun in his constructive possession, defendant was present at the time the crimes were committed, defendant hurriedly left the scene of the crime immediately after the two fatal shots had been fired without stopping to help the victims who were in his path, defendant denied owning or possessing a gun but a .12 gauge shotgun was subsequently found hidden in his home, a spent number four .12 gauge shotgun shell found near a trailer (the scene of the crime) was fired from this shotgun, defendant was the only person in the trailer 80 feet from the crime scene when the shots were fired, a shot was fired from a window in the trailer leaving a one-inch hole which was made by a .12 gauge shotgun, and a .12 gauge "shotgun wadding" was found on the ground between the trailer and the victims' bodies.

2. **Constitutional Law § 33— response of defendant to accusatory question — claim of right to remain silent**

Where an officer arrested defendant, advised him of his rights, and then asked him why he killed decedents, the trial court erred in admitting into evidence defendant's response, "You served your warrant, you handcuffed me; that's it," since that response amounted to a claim by defendant of his privilege to remain silent, and the State may not use against defendant at trial the fact that he claimed his privilege in the face of accusation.

3. **Constitutional Law § 33; Criminal Law § 102— failure of defendant to answer accusatory question — comment by prosecutor — failure to give curative instruction**

Defendant is entitled to a new trial where the private prosecutor commented directly on defendant's failure to deny an accusatory question put to him by the arresting officer and called attention to defendant's failure to testify in his own behalf at the trial, and where the court gave no proper curative instruction to the jury.

DIRECT appeal by defendant pursuant to G.S. 7A-27(a) from his trial before *Martin, J.*, at the 1 February 1974 Regular Criminal Session of TRANSYLVANIA County Superior Court.

Defendant was tried on two bills of indictment that charged him with the first-degree murders of Ruth Looker Hice and Billy Derwood Hice on 12 September 1973. Defendant was also tried on two bills of indictment that alleged defendant "did unlawfully, wilfully and feloniously conspire, agree and confederate with Lloyd McCall and Gary McCall" to murder both Billy Derwood Hice and Ruth Looker Hice "by concealing themselves and shooting [them] with a shotgun."

The above charges, along with identical charges of conspiracy to commit murder against Gary McCall and Lloyd McCall, were consolidated for trial. The court, in its discretion,

severed from the trial two first-degree murder charges against Gary McCall and two first-degree murder charges against Lloyd McCall. All of these charges arose out of the single occurrence described below.

The only evidence was that offered by the State. Summarized, except where quoted, this evidence tended to show the following.

On 12 September 1973 the decedents, Billy Derwood Hice (hereinafter referred to as Billy) and Ruth Looker Hice (hereinafter referred to as Ruth), and the co-defendants as to the conspiracy charge, Lloyd McCall (hereinafter referred to as Lloyd) and Gary McCall (hereinafter referred to as Gary), were all living in trailer-homes adjacent to the north fork of the French Broad River in an area of Transylvania County known as "Balsam Grove." The River separated this property from nearby State Highway #215. The only method of ingress and egress was by means of a "concrete bridge" that crossed the River.

Billy and Ruth had moved into this particular section of the Balsam Grove community sometime in 1969. At that time, access to the property was achieved by means of "a little wooden bridge." Billy, apparently desiring a sturdier structure, erected the "concrete bridge" shortly after his acquisition of the property. In spite of the fact that Billy had built this concrete bridge, the inference from the evidence is that all of his neighboring property owners had continuously used it, without objection, at least up until a point shortly before the incident in question. However, from at least 14 June 1973, up until the date of the incident, 12 September 1973, it appears that a boundary or access dispute had been brewing between Billy and Ruth and Lloyd and Gary.

On the date in question, Mr. Melvin Owens and his wife (hereinafter referred to as either Mr. or Mrs. Owens) were living "straight across" the French Broad River from Billy and Ruth, Lloyd, and Gary. Mr. Owens was the father-in-law of Lloyd, and the grandfather of Lloyd's son, Gary. At this point it should also be noted that defendant and Lloyd were brothers.

Mr. Owens testified as follows regarding the events leading up to the murders of Billy and Ruth.

He first saw defendant at approximately 8:00 a.m. on the day of the murder. At that time, defendant crossed the concrete

bridge in his Mustang automobile and stopped at the trailer-home of his brother, Lloyd. Shortly thereafter, defendant and Lloyd left in defendant's Mustang. They crossed the bridge and turned down Highway #215 in the direction of Rosman.

Defendant was next seen at approximately 12:00 p.m. when he and Lloyd returned to Lloyd's trailer-home. Thereafter, defendant drove his car down to Gary's trailer and parked it in the front yard. Several hours later, at approximately 3:00 p.m., Mr. Owens, who was sitting on his front porch, observed defendant "come out from behind Gary's trailer." He was holding a shotgun "up to his shoulder." Defendant fired the shotgun up in the air and the force of the discharge "walked him backwards between two and three steps." Mr. Owens, who had witnessed these events, began laughing "about that gun akicking Lawrence."

While the defendant was firing the shotgun, Billy was down near the bridge area (below Gary's trailer) attempting to erect some type of swinging "gate." After defendant fired the shotgun, Billy motioned for Mr. Owens to come down to where he was working. Upon his arrival, Billy inquired as to who had fired the shotgun, etc.

Following his conversation with Mr. Owens, Billy went back up to his trailer-home in order to get some additional materials for the construction of the gate. He returned in a few minutes and continued his work on the gate. Apparently, "things weren't a' fitting just right," so Billy once again went up to his trailer-home for materials. At this point, defendant entered his car, drove across the bridge, and headed down Highway #215 in the direction of his home (approximately ¼ of a mile). No one other than defendant came across the bridge and went down the highway at this particular time.

Defendant "was gone a right smart little bit." Subsequently, he drove back up Highway #215 and slowly passed by the bridge. A few minutes later he drove back by the bridge. This time he approached from the opposite direction. Defendant repeated this procedure approximately six to eight times. Finally, he pulled off of the highway and onto the bridge. Billy and Ruth were near the bridge, both working on the gate. Defendant stopped his vehicle on the bridge, remained there for a couple of minutes, backed off, and then drove back down the highway.

Shortly after defendant had backed off the bridge, Lloyd left his trailer and got into his pickup truck. He drove the truck down the "upper driveway" and struck the gate as he crossed the bridge. The force of this blow "staggered [Ruth] backwards."

Mr. Owens, having observed all of these events, once again walked over to the bridge area. He told Billy and Ruth that they should stop work on the gate and go back up to their trailer-home. During the course of this conversation, Lloyd returned and drove back across the bridge. He apparently did so without incident. Lloyd proceeded to drive on up the hill and eventually passed by Gary's trailer. Gary, who had been sitting in his back doorway, saw Lloyd go by and started running after the truck. The last time Mr. Owens saw either Lloyd or Gary the pickup truck was going around a curve "and Gary was just about three or four steps behind [it]."

In just a few minutes defendant reappeared. He drove his car onto the bridge near where Billy and Ruth had been working on the gate. Both Billy and Ruth threw up their hands in an effort to stop the defendant's vehicle. Defendant refused to stop. His vehicle "just pushed on into them," eventually knocking Ruth to the ground. Thereafter, defendant drove to the front of Gary's trailer, got out of the car, and ran "in . . . to Gary's front doorsteps."

Following the above incident, Mr. Owens approached Billy and said: "Listen here, Billy, you and Ruth quit this right now and go to the house. From the signs and looks of everything, it's going to pitch a big 'un around here. You get on to the house." Before Billy and Ruth could act on this advice, a gunshot rang out. Ruth, Billy, and Mr. Owens all fell to the ground. This occurred approximately one and one-half minutes after the defendant had forced his way across the bridge. The gunshot came from the left window in the north end of Gary's trailer which was approximately eighty (80) feet away. This was the trailer that the defendant had pulled up to after leaving the bridge.

Following the first shot, Billy was able to get up and to escort Mr. Owens to the edge of his nearby lawn. Thereafter, Billy walked back across the bridge to where Ruth was lying on the ground. At this point a second gunshot rang out. It was not as loud as the first. Mr. Owens, who was almost at his

house, turned and looked toward the bridge (a distance of approximately two hundred feet). He could not see either Billy or Ruth.

Afterwards, Mr. Owens entered his residence and told his wife what had happened. He said: "I've got to get somewheres to get this blood stopped. I'm bleeding to death, and Ruth's dead." Subsequently, he was able to get in his pickup truck and went for help.

After Mr. Owens had gone for assistance, Mrs. Owens went back to the bedroom where she began watching the bridge and adjacent area. She described the subsequent events as follows:

> "[W]hile I was sitting there, I seen Lloyd's pickup come and go on up into the yard [presumably at Gary's trailer], and just after it went into the yard, I saw Lawrence's car come out from here, at the trailer, and come and go on down the road.
>
> "Q. Now, did Lawrence's Mustang come right by where Mrs. Hice had fell to the ground?
>
> "A. Yes, sir, it did. It came right by where they was at there.
>
> "Q. Did it stop at any time?
>
> "A. No, sir.
>
> "Q. Did it come between the gateposts there that the Hices had been working on?
>
> "A. He came on out the way he went in.
>
> "Q. Was that between where the gateposts were?
>
> "A. Yes, sir."

Mrs. Owens also testified that she did not hear a second gunshot. As to events occurring immediately prior to the first shot, which she heard, she stated: "I saw Lawrence come up 215 and I didn't see nobody else in the car. Lawrence's car come down in behind Gary's trailer at the front steps. Well, in a minute and a half, I would say, the gun fired." (We note that in a prior statement given to SBI Agent Charles Chambers, Mrs. Owens estimated the time interval at eight minutes.) She also stated that she did not see anybody other than defendant leave Gary's trailer after the shots had been fired.

The first law enforcement officer to arrive at the scene was State Trooper Zeb Hawes. He arrived sometime after 5:00 p.m. When he turned his vehicle into the concrete driveway adjacent to Highway #215, he saw "two bodies lying in the middle of the road." The bodies were approximately twenty (20) feet from the end of the bridge; approximately two hundred (200) feet from the residence of Mr. and Mrs. Owens; approximately four hundred sixty (460) feet from Lloyd's trailer; and approximately eighty (80) feet from the left rear window in the north end of Gary's trailer. These were the bodies of Billy and Ruth Hice. They were both dead. Trooper Hawes did not observe anybody else at the scene at this time.

Dr. George Lacy, District Pathologist, testified that Billy Hice died from multiple gunshot wounds (twenty-one apparent wounds of entrance involving the chest, abdomen, both upper arms, head, and right knee) and specifically of one wound that penetrated the heart. He further testified that Ruth Hice's death was caused by shotgun wounds of the chest with internal bleeding. An examination of her body revealed two entrance wounds, one in the posterior aspect of the chest and one in the right side of the face.

After several additional law enforcement officers had arrived on the scene, they commenced a search of the immediate area. They were not able to find any weapons. However, they did find some "shotgun wadding" on the ground between Gary's trailer and the two bodies. The wadding was found approximately twenty-four (24) feet from Gary's trailer. This wadding was later determined upon analysis to be part of an over-the-shot wadding that compared favorably with the type of wadding manufactured by the Remington Arms Company in .12 gauge shotgun shells. Also, the search uncovered one spent shotgun shell on the ground near the trailer. This was a .12 gauge number four buckshot shell. This was apparently the shell from the shot defendant discharged earlier that afternoon at 3:00 p.m.

In searching the north end of Gary's trailer, officers found a one-inch hole in the left window screen. This hole was later determined to have been made by a shotgun, the muzzle of which was three (3) inches or less from the screen at the time the shot was fired. By looking through this screened window, officers could see the Hices' bodies on the roadway below. During this search, officers also found three (3) .12 gauge Remington shotgun shells in the top dresser of the north bedroom.

Defendant was subsequently arrested at his home at approximately 2:30 a.m. on the morning of 13 September 1973. He was informed of his constitutional rights. After waiving his rights by nodding his head "Yes" defendant was asked: "Lawrence, where is the gun that you killed Mr. and Mrs. Billy Hice with?" Defendant replied: "I don't have a gun; I don't own a gun." However, a subsequent "consent" search of defendant's residence uncovered a .12 gauge lever action Ithaca shotgun hidden beneath the quilts in the right side bedroom. It was later discovered that this particular shotgun belonged to Keith Hensley, a son-in-law of Lloyd McCall. Although this shotgun was introduced into evidence at defendant's trial, the State was unable to prove that any of the fatal shots were positively fired from this weapon. However, the State did establish that a spent number four .12 gauge shotgun shell found near Gary's trailer was fired by this gun.

There was also testimony as to an alleged "extra-judicial statement" made by defendant during the course of the above residence search. After searching the residence for a few minutes, and prior to the discovery of the .12 gauge shotgun, Officer Hubert Brown asked defendant, "Why did you kill the Hices?" Defendant responded: "You served the warrant, you handcuffed me, that's it."

The jury returned guilty verdicts as to both counts of first-degree murder. However, the jurors were unable to reach a verdict on any of the conspiracy to murder charges. Accordingly, Judge Martin withdrew a juror and declared a mistrial as to these charges. As to the two guilty verdicts of first-degree murder, judgment was entered sentencing defendant to death. Defendant excepted and appealed.

Other pertinent facts and evidentiary matters will be noted in the opinion.

Attorney General Robert Morgan and Assistant Attorney General Richard N. League for the State.

Jack H. Potts and Ransdell & Ransdell by William G. Ransdell, Jr. for defendant appellant.

COPELAND, Justice.

[1] Defendant assigns as error the denial of his motion for judgment as in case of nonsuit. G.S. 15-173. The question pre-

sented by this assignment is whether the evidence was sufficient to warrant the submission thereof to the jury and to support verdicts of guilty of the criminal offenses charged in the first-degree murder indictments.

The rules for testing the sufficiency of the evidence to withstand defendant's motion are well estalished. "Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom." *State v. McNeil,* 280 N.C. 159, 161-62, 185 S.E. 2d 156, 157 (1971), and cases cited. See also, 2 Strong, N. C. Index 2d, Criminal Law § 104 (1967). "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. (Citation omitted.)" *State v. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968).

"In any prosecution for a homicide the State must prove two things: (1) that the deceased died by virtue of a criminal act; and (2) that the act was committed by the defendant. (Citation omitted.)" *State v. Jones,* 280 N.C. 60, 66, 184 S.E. 2d 862, 866 (1971), and cases cited therein.

All the evidence in the case *sub judice* tends to show that Billy Derwood Hice and Ruth Looker Hice were murdered on the afternoon of 12 September 1973 by a hidden assailant who fired two .12 gauge shotgun rounds. Accordingly, the only remaining question is whether the State produced "substantial evidence" that the above acts were committed by the defendant, Lawrence McCall. *State v. Davis,* 246 N.C. 73, 76, 97 S.E. 2d 444, 446 (1957).

As to this second question, the State's evidence is entirely circumstantial. There was no eyewitness that saw defendant fire the fatal shots. Also, the State could not identify any of the fatal shots as having been fired from the shotgun found in defendant's residence at the time of his arrest. Of course, it was established that the fatal shots were fired from a .12 gauge shotgun. The defendant had a .12 gauge shotgun on the premises of Gary's trailer at approximately 3:00 p.m., 12 September 1973 and defendant had this same .12 gauge shotgun in his possession at the time of his arrest.

Specifically, the State introduced evidence that tended to show the following:

(1) *Motive.* On the day in question, defendant had several confrontations with the decedents apparently pertaining to access rights across the bridge. During the course of the last confrontation, and immediately prior to the firing of the fatal shots, defendant's vehicle knocked Ruth Hice to the ground as it crossed the bridge.

(2) *Means.* At the time of his arrest, defendant had a .12 gauge lever action Ithaca shotgun in his constructive possession. Defendant fired this weapon on the premises of Gary's trailer on the day in question. Decedents died as a result of wounds inflicted by .12 gauge shotgun pellets.

(3) *Opportunity.* Defendant was present at the time the crimes were committed. In fact, the testimony of both Mr. and Mrs. Owens placed defendant at the doorsteps of Gary McCall's trailer, from inside of which the first shot was fired, approximately one and one-half minutes after defendant had forced his way across the bridge.

(4) *Flight.* Defendant hurriedly left the scene of the crime immediately after the two fatal shots had been fired. Although defendant's vehicle passed by the Hices' bodies, both of which were lying "in the middle" of the roadway, he made no effort to stop or to summon help.

(5) *Prior Inconsistent Statement.* After his arrest, and during a search of his residence, defendant denied that he either owned *or possessed* a gun. The .12 gauge shotgun was subsequently found *hidden beneath the quilts* in one of defendant's bedrooms.

If the State's evidence tended to show only the above stated facts, then it might not be sufficient to withstand defendant's motion. *See State v. Jones, supra* at 66, 184 S.E. 2d at 866 (1971). See also *State v. Poole,* 285 N.C. 108, 119, 203 S.E. 2d 786, 793 (1974). However, in applying these well settled rules to the case *sub judice,* it is necessary to closely examine additional evidence introduced by the State.

In addition to the five facts listed above, the State also produced evidence that tended to show defendant was the ONLY person in Gary McCall's trailer when the shots were fired; that

a shot was fired from the left window in the north end of Gary's trailer; that there was a one-inch hole in the left screen window in the north end of Gary's trailer (said hole later determined to have been made by a .12 gauge shotgun shell discharged three inches or less from the screen); that a .12 gauge "shotgun wadding" was found on the ground between Gary's trailer and the Hices' bodies; and that a .12 gauge shotgun number four spent shell, found next to the picnic table in front of Gary's trailer, had been fired from the .12 gauge shotgun found in defendant's constructive possession at the time of his arrest. (This was presumably the spent shell from the 3:00 p.m. firing.)

When all of this evidence is viewed in the light most favorable to the State, including all reasonable inferences that may be drawn therefrom, we hold that it is sufficient to withstand defendants' motion for judgment as in case of nonsuit, and to permit the jury to find him guilty of first degree murder. *See, e.g., State v. McNeil, supra; State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971), and cases cited therein. Defendant's assignment of error is therefore overruled.

[2] In his next assignment of error defendant contends that the trial court committed prejudicial error in allowing into evidence defendant's invocation of his constitutional right to remain silent in the face of incriminating questions by the police and further in instructing the jury that the evidence was competent as to this defendant.

As previously noted, defendant was placed under arrest at his residence at approximately 2:30 a.m. on the morning of 13 September 1973. At trial, Deputy Sheriff Hubert Brown was permitted to testify as follows regarding an alleged statement made by the defendant at that time.

> "Q. Now, after you had advised Lawrence McCall at his residence on the morning of September 13, 1973, that you had a warrant for his arrest for the killing of Mr. and Mrs. Hice, did you ask him a question at that time?"
>
> "A. Immediately after?
>
> "Q. Yes, sir.
>
> "Q. I asked Mr. Lawrence—
>
> "MR. POTTS: Objection.

"COURT: Overruled.

"A. —I asked him only one other question during that morning.

"Q. What did you ask him?

"A. I asked him why he killed Mr. and Mrs. Billy Hice.

"Q. What was his reply?

"MR. POTTS: Objection.

"COURT: Overruled.

"A. He said, 'You served your warrant, you handcuffed me; that's it.' And he sat down on the couch at that time.

"COURT: Again, members of the jury, that statement which Officer Brown testified was made by Lawrence McCall to him, is not competent against Gary McCall or Lloyd McCall, *but you may consider it as to Lawrence McCall.*" (Emphasis supplied.)

Prior to permitting Deputy Brown to give the above testimony before the jurors, the trial court conducted a voir dire examination. Following the voir dire, the court made the following conclusions of law.

"On the foregoing findings of fact, the Court concludes as a matter of law that at the time in question the defendant was entitled to the protection of the Fifth Amendment to the Constitution of the United States, and the Constitution of North Carolina, and the requirements as set forth in the decision of MIRANDA v. ARIZONA; that the officers fully complied with said Constitutions and the law with respect to MIRANDA v. ARIZONA, and that the statements made by the defendant as testified to by Brown were made freely and voluntarily, and that they are admissible into the trial of this action, as to the defendant Lawrence McCall. They are not competent as to the defendants Gary McCall and Lloyd McCall."

The correctness of the above conclusion must be tested in light of the following well settled constitutional principles.

In the landmark case of *Miranda v. Arizona,* 384 U.S. 436 (1966), the United States Supreme Court stated: "In ac-

cord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." Id.* at 468 fn. 37. (Emphasis supplied.) Recent decisions by this Court relying upon then Section 11 (now Section 23) of Article I of the North Carolina Constitution and upon *Miranda, supra,* have held that if officers properly warn an accused of his constitutional rights, his silence may not be used against him. *See, e.g., State v. Fuller,* 270 N.C. 710, 155 S.E. 2d 286 (1967); *cf. State v. Moore,* 262 N.C. 431, 437, 137 S.E. 2d 812, 816 (1964).

This Court recently considered the admissibility of in-custody silence in *State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974). In that case the trial court admitted, over defendant's objection and motion to strike, testimony of a police officer to the effect that defendant failed to deny an accusatory statement made in his presence. In granting the defendant a new trial, this Court, in an opinion by Chief Justice Bobbitt, held that the admission of defendant's silence in the face of the accusation was erroneous, was prejudicial, and was not harmless beyond a reasonable doubt. Specifically, the Court stated:

> "The constitutional right against self-incrimination which defendant exercised by remaining silent when Elaine made accusatory statements when questioned by Barrier [the police officer] 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 circumstances 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 re-

sponse to an officer's questions." *Id.* at 291-92, 204 S.E. 2d at 852-53.

In the instant case, defendant's conduct does not technically fall within the "admission by silence" rule because he voluntarily made an affirmative statement, to wit, "You served your warrant, you handcuffed me; that's it." It cannot be said that this affirmative response, although somewhat equivocal, represented a desire not to communicate any reaction whatsoever to Deputy Brown's incriminatory assertion. However, since such a response could be considered by the jury as evidence of motive for failure to expressly deny the accusation, it is arguable that this situation is equivalent to the simple silence present in *State v. Castor, supra. See* McCormick, Evidence, 353-56, § 161 (2d ed. 1972). Whatever the merits of this argument might be, our decision is not based on this analogy. It is common knowledge that people from different regions have different ways of expressing themselves. Under the facts of this particular case, we believe that the language used by this defendant, although not as articulate or exact as one would desire, nevertheless, can only be construed to mean: "You have advised me of my right to remain silent and that is exactly what I intend to do." Accordingly, since we interpret this response to represent a desire NOT to communicate incriminating information, defendant's claim of privilege made in response to a police accusation during custodial interrogation was not admissible into evidence under authority of *Miranda v. Arizona, supra,* and *State v. Castor, supra.* Furthermore, under these circumstances, we cannot say that the admission of this evidence was harmless beyond a reasonable doubt. *State v. Castor, supra* at 292-93, 204 S.E. 2d at 853, and cases cited.

[3] The above error alone is grounds for the award of a new trial. However, this error is compounded by the following jury argument made by the private prosecutor:

> "If a man was ever called upon in this world to deny something, he was called upon when they said, 'You are charged with murder in the first degree of the Hices.' He didn't say a word. Didn't say a word. He hasn't denied it up to this minute, according to what I've heard from the evidence."

When the above argument was made, defendant objected and the court said simply, "Objection sustained." Other than

the following quoted portion of the court's charge, there is nothing in the record to indicate that the court made any attempt to cure the prejudicial effect of this comment.

> "In this case, the burden of proof is upon the State of North Carolina from the beginning to the end. The defendants, nor either of them, have any burden at all in any of these cases; the defendants, nor either of them, have any duty to produce any evidence, or testimony, or witnesses. They do not have the burden of disproving the charges of the State."

In making the above quoted jury argument, the private prosecutor committed two fundamental errors. (1) He commented directly and clearly upon the defendant's failure to deny Deputy Brown's accusatory question. (2) He called attention to defendant's failure to testify in his own behalf at the trial.

As to the first point, since *State v. Castor, supra,* prohibits the admission of defendant's silence in the face of accusatory statements, and further, since *Miranda v. Arizona, supra,* prohibits the admission of a claim of privilege made in the face of police accusations during custodial interrogation, it logically follows that prosecutorial comment on these matters is likewise prohibited.

As to the second point, G.S. 8-54 provides: "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 supplied.) The effect of this statute has been interpreted by this Court to prohibit the solicitor from making any reference to or comment on defendant's failure to testify. *See, e.g., State v. Roberts,* 243 N.C. 619, 621, 91 S.E. 2d 589, 591, (1956); *State v. McLamb,* 235 N.C. 251, 257-58, 69 S.E. 2d 537, 541, (1952); *State v. Buchanan,* 216 N.C. 709, 6 S.E. 2d 521 (1940); *State v. Spivey,* 198 N.C. 655, 658-59, 153 S.E. 255, 257 (1930). See also, *State v. Jones,* 19 N.C. App. 395, 198 S.E. 2d 744 (1973). *Cf. Griffin v. California,* 380 U.S. 609 (1965) (held unconstitutional a State statue allowing comment on defendant's failure to testify). *See also State v. White,* 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hines,* 286 N.C. 377, 211 S.E. 2d 201 (1975).

If the solicitor improperly comments on defendant's failure to testify, this Court has held the error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness. *State v. Lindsay,* 278 N.C. 293, 295, 179 S.E. 2d 364, 365 (1971) and cases cited; *State v. Clayton,* 272 N.C. 377, 385, 158 S.E. 2d 557, 562-63 (1968). In the instant case, we note that no proper curative instruction was given when the private prosecutor made these impermissible jury arguments. When the argument was objected to, the court simply said, "Objection sustained." The State contends that this error was "cured" by the court's charge to the jury that, "The defendants, nor either of them, have any burden at all in any of these cases; the defendants, nor either of them, have any duty to produce any evidence, or testimony, or witnesses." Under no circumstances can this instruction of the able trial judge be held curative. Additionally, we note the instruction was itself an incomplete statement of the pertinent rule of law. *See State v. Baxter,* 285 N.C. 735, 738-39, 208 S.E. 2d 696, 698-99 (1974) (failed to include statement that failure to testify "shall not create any presumption against" defendant). Under these facts, the court had a duty to give the jury proper instructions. *State v. Miller,* 271 N.C. 646, 659, 157 S.E. 2d 335, 346 (1967); *State v. Smith,* 279 N.C. 163, 166, 181 S.E. 2d 458, 460 (1971) and cases cited therein. Failure to do so constituted prejudicial error and was not harmless beyond a reasonable doubt. *See Anderson v. Nelson,* 390 U.S. 523 (1968); *Fahy v. Connecticut,* 375 U.S. 85 (1963).

Accordingly, for error in admitting the challenged testimony and for failure to properly instruct the jury with reference to the comments made by the private prosecution, the cause is remanded to the Transylvania County Superior Court for a

New trial.

RUFUS C. TAYLOR v. MARGARET J. CRISP, ROY PAYNE, GLEN THOMAS, W. E. MITCHELL, AND FRANK BURNETT, AS MEMBERS OF THE SWAIN COUNTY BOARD OF EDUCATION, AND THE SWAIN COUNTY BOARD OF EDUCATION

No. 85

(Filed 12 March 1975)

1. **Schools § 13— teachers — consideration for career status — recommendation of superintendent**

G.S. 115-142(m)(2) does not require a board of education to follow the recommendation of the superintendent of schools when it considers the election of career teachers at the end of their third consecutive school year as required by G.S. 115-142(c).

2. **Schools § 13— teachers — renewal of probationer's contract — employment of teacher not under contract — recommendation of superintendent**

The "recommendation of the superintendent" referred to in G.S. 115-142(m)(2) is advisory only and does not bind the board of education in its consideration of the renewal of a probationer's contract or the employment of a teacher who is not under contract.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

ON *certiorari* to review the decision of the Court of Appeals reversing the judgment of *Thornbury, J.*, entered 17 July 1973 Session of HAYWOOD, docketed and argued at the Fall Term 1974 as Case No. 44.

This action was instituted on 18 May 1973 by plaintiff, principal of the Bryson City Elementary School, against the Swain County Board of Education (the Board) and its individual members to require the Board to renew his contract for the 1973-1974 academic year and to restrain the Board from employing a principal other than himself pending the outcome of this action. In the alternative plaintiff seeks an adjudication that defendants' action in terminating his contract was arbitrary, capricious, and discriminatory for political or personal reasons. He also prays damages against defendants jointly and severally in the sum of $10,000.

Stipulations and admissions establish the following facts:

1. In the year 1966 plaintiff was employed as principal of the Bryson City Elementary School and served continuously in that capacity through the school year 1972-1973.

2. On 9 April 1973, at the regular meeting of the Board, the superintendent of schools for Swain County, Thomas Woodard, recommended to the Board that it renew plaintiff's contract as principal of the Bryson City Elementary School for the 1973-1974 school year. Notwithstanding, a majority of the Board voted against renewing plaintiff's contract. Plaintiff had no notice that the renewal of his contract would be considered at the meeting and was given no opportunity to be heard.

3. From and after 1 July 1972 plaintiff and defendants were subject to the provisions of N. C. Gen. Stats. 115-142 (1971 Supp. to N. C. Gen. Stats., Vol. 3A). Under the terms of his contract and G.S. 115-142, from 1 July 1972 through 30 June 1973, plaintiff was "no less than a probationary teacher."

4. Plaintiff holds a teaching certificate which qualifies him to serve as principal in the elementary schools of Swain County.

5. After the Board's decision not to renew plaintiff's contract it offered the position held by plaintiff during the 1972-1973 school year to one Morris A. Herron, subject to the outcome of this action. However, on 25 June 1973, Herron declined the position because of "the contract special condition and the question . . . regarding possible professional ethics infractions with the present principal."

The record discloses that, after plaintiff learned from newspaper accounts that the Board had voted not to renew his contract, on 24 April 1973 he requested the Board in writing to reconsider its action in light of G.S. 115-142 and to accord him an opportunity to be heard after reasonable notice. When that request was ignored this action was instituted. Plaintiff based his claim for relief upon two grounds: (1) that his contract had been illegally terminated without cause and after the superintendent of Swain County Schools had recommended his re-election; and (2) that his dismissal was arbitrary, capricious, and discriminatory, motivated by personal and partisan political considerations, and influenced by false statements which plaintiff was given no opportunity to refute.

Plaintiff's application for a preliminary injunction came on to be heard before Judge Thornburg on 23 June 1973. Upon the facts stipulated, he held that G.S. 115-142(m)(2) required the Board to continue plaintiff in his position as principal. He entered an order requiring the Board to continue plaintiff as principal "until further orders of this Court."

On 17 July 1973 plaintiff moved for summary judgment under G.S. 1A-1, Rule 56, and Judge Thornburg heard the matter at that time with the consent of all the parties. Upon the agreed facts he ruled that under G.S. 115-142, the Board could not refuse to renew plaintiff's contract unless the superintendent of schools for Swain County made "an affirmative recommendation" that it not be renewed. Whereupon, he entered judgment that the Board forthwith renew plaintiff's contract as principal of the Bryson City Elementary School for the school year 1973-1974. From this judgment defendant appealed to the Court of Appeals. (We note here that Judge Thornburg did not consider or rule upon plaintiff's second claim for relief.)

On 6 August 1973 plaintiff reported to the court that defendant had (1) failed to renew his contract as the court had directed it to do; (2) refused to sign pay vouchers for the services plaintiff was rendering as principal; and (3) failed and refused to accord plaintiff his rights and privileges as principal. Plaintiff moved the court under G.S. 1A-1, Rules 62 and 70 (1) that defendants be directed to show cause why they should not be held in contempt of court; (2) that a person be appointed to execute in behalf of the Board a teaching contract with plaintiff and to sign the pay vouchers to which plaintiff was entitled for work done; and (3) that the court, pursuant to Rule 62(c), require defendants to accord plaintiff his rights and privileges as principal of the Bryson City Elementary School.

On 6 August 1973 Judge Thornburg ordered defendants to appear before him at 4:00 p.m. on 9 August 1973 and show cause why plaintiff's motion should not be allowed. At the hearing, pursuant to the order to show cause, upon plaintiff's affidavit and the admission of defendants' counsel, the court found the following facts:

(1) Plaintiff had not been paid for his services as principal. (2) After the court had entered its judgment of 17 July 1973, defendants advised plaintiff he was not the principal and ordered him not to go upon the property of the Bryson City Elementary School. (3) On 9 August 1973, prior to 4:00 p.m., defendants deposited with the clerk of the court, "pursuant to G.S. 1-291," the contract which the court had ordered them to execute. This contract contained the special condition that if the North Carolina Court of Appeals reversed the judgment of

Judge Thornburg, such a ruling would render the contract null and void.

At the conclusion of the hearing Judge Thornburg accepted the teaching contract filed by defendants as "sufficiently in compliance" with the court's judgment of 17 July 1973 to require its execution by plaintiff. He entered an order that, after plaintiff executed the contract, the parties were bound by its terms in the same manner as if it had been voluntarily executed; that plaintiff should be paid the salary called for in the contract "unless and until the North Carolina Court of Appeals or the North Carolina Supreme Court shall void said contract or otherwise order to the contrary." To safeguard defendants in the event they should prevail upon appeal, plaintiff was ordered to execute an indemnifying bond in the amount of $1,000. On 10 August 1973 plaintiff posted the bond and executed the contract.

The Board and each member thereof appealed to the Court of Appeals, which reversed the decision of the Superior Court in an opinion reported in 21 N.C. App. 359, 205 S.E. 2d 102 (1974). Upon plaintiff's petition we allowed certiorari.

Adams, Hendon & Carson and Herbert L. Hyde for plaintiff appellant.

Coward, Coward, Jones & Dillard for defendant appellees.

SHARP, Chief Justice.

Prior to 1 July 1972 a teacher's contract continued from year to year unless, before the close of the current school year, the superintendent notified the teacher by registered mail of its termination. G.S. 115-142 [1967 Cum. Supp. to N. C. Gen. Stats., Vol. 3A (1966)]. This statute did "not limit the right of the employer board to terminate the employment of a teacher at the end of a school year to a specified cause or circumstance." Nor did it require the board to notify the teacher of the reason for the termination of his employment or to permit the teacher to appear before the board and be heard. *Still v. Lance,* 279 N.C. 254, 260, 182 S.E. 2d 403, 407 (1971). Dismissals during the school year for cause were governed by G.S. 115-67 and G.S. 115-145 (1966).

By N. C. Sess. Laws, Ch. 883 (1971), effective 1 July 1972 (hereinafter referred to as the Act), the General Assembly re-

wrote G.S. 115-142. Thus, the Board's right to dismiss plaintiff at the end of the school year 1972-1973 by refusing to renew his contract as principal of the Bryson City Elementary School for the year 1973-1974 is governed by the Act. As rewritten, the Act appears in codification form in the Editor's Note to G.S. 115-142 in the 1971 Cumulative Supplement to N. C. Gen. Stats., Vol. 3A (1966).

Pertinent provisions of the Act (cited as sections of G.S. 115-142 as codified in the 1971 Cumulative Supplement) are quoted or summarized below:

§ (a) (3) " 'Career teacher' means any teacher who has been regularly employed by a public school system for a period of not less than three successive years and who has been re-employed by a majority vote of the board of such public school system for the next succeeding school year."

§ (a) (6) " 'Probationary teacher' means any teacher employed by a public school system who is not a career teacher."

§ (c) "Election of Career Teachers.—After a teacher has been employed by the same public school system in this State for a period of three consecutive years, the board of that system is required to vote upon that teacher's employment for the next succeeding year. If a majority of the board votes to re-employ the teacher, he or she becomes a career teacher. *If a majority of the board votes against reemployment of the teacher, the teacher remains a probationary teacher whose rights are set forth in G.S. 115-142(m)(2).* If the board fails to vote, but reemploys the teacher for the next successive year, then the teacher automatically becomes a career teacher. All teachers employed by a public school system of this State at the time this section takes effect who, at the end of last school year, will either have been employed by that school system (or a successor system if the system has been consolidated) for a total of four consecutive years or will have been employed by a public school system of this State for a total of five consecutive years shall automatically be career teachers *if employed for a second year following July 1, 1972.* All other teachers employed by a public school system of this State on July 1, 1972, shall be probationary teachers." (Emphasis added.)

Section (m) deals with the discharge and dismissal of probationary teachers:

"§ (m) (1) The board of any public school system may not discharge a probationary teacher during the school year except for the reasons for and by the procedures by which a career teacher may be dismissed as set forth in subsections (e) and (h) (1) . . .

"§ (m) (2) The board, *upon recommendation of the superintendent,* may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract *for any cause it deems sufficient;* provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." (Emphasis added.)

Once a teacher attains the status of "career teacher" he is no longer "subject to the requirement of annual appointment nor shall he or she be dismissed, demoted, or employed on a part-time basis without his or her consent except as provided in subsection (e)." § (d) (1).

Sections (e), (h), (i), (j), (k) and (l) detail the grounds and procedures for the dismissal or demotion of a career teacher.

Section (h) (1) provides: "A board may dismiss or demote a career teacher *only* upon the recommendation of the superintendent." (Emphasis added.)

The parties stipulated that from 1 July 1972 through 30 June 1973 plaintiff was "no less than a probationary teacher," and Section (c) makes it quite clear that he was a probationary teacher. At the end of the school year 1971-72 on June 30, 1972, plaintiff had been employed by the Board for six years. Notwithstanding, he did not automatically become a career teacher on 1 July 1972, the effective date of the Act. Since he was reemployed for the year 1972-73, however, the first school year after the Act went into effect, had he been reemployed for the second school year thereafter (1973-74) he would have become a career teacher on 1 July 1973. Although Section (c) of the Act made this clear enough, the General Assembly "spelled it out" in N. C. Sess. Laws, Ch. 782, § 8 (1973) when it again rewrote G.S. 115-142(c) (codified in the 1973 Cum. Supp. to N. C. Gen. Stats., Vol. 3A). Rewritten G.S. 115-142(c) (1973) provides, *inter alia:* "(1) Status of Teachers Employed on July 1, 1972. No teacher may become a career teacher before July 1, 1973. . . ."

Plaintiff contends that, under Section (m) (2), the Board could not refuse to renew the contract of any probationary teacher whom the superintendent had recommended for reemployment; that since the superintendent had recommended the renewal of plaintiff's contract, defendants had no discretion in the matter. The trial judge adopted this view.

The Board's thesis is: After a teacher has served three consecutive years in its system Section (c) *requires* it to vote upon his reemployment for the fourth year and, if a majority of the Board votes to reemploy the teacher he then becomes a career teacher. When the Board considered the renewal of plaintiff's contract on 9 April 1973 the *issue* was whether he should be made a career teacher and the vote to reemploy or dismiss determined the question. This decision was in the sole discretion of the Board, for Section (c) contains no requirement that the Board either consider or follow the recommendation of the superintendent in determining whether a teacher shall be given tenure as a career teacher. Section (m) (2) applies only to the probationary teacher who is being considered for reemployment during the three years before he is eligible for election as a career teacher. The Court of Appeals adopted the Board's view.

The Board further contends that, if this Court should hold Section (m) (2) to have any application to its consideration of the renewal of a probationary's contract when his reemployment will constitute him a career teacher, we should hold the superintendent's recommendation to be advisory only and not binding upon the Board; that whether a probationary teacher shall become a career teacher is a matter within the discretion of the Board; provided, however, the Board may not refuse to renew a contract for "arbitrary, capricious, discriminatory or for personal or political reasons."

[1] Under Section (c) career teachers come from the ranks of probationary teachers, and a probationer can achieve career status only when a majority of the Board votes to reemploy him for the fourth consecutive year. If, therefore (as plaintiff contends), Section (m) (2) forces the Board to reemploy all probationary teachers whom the superintendent recommends for reemployment and to dismiss all whom he recommends for dismissal, the requirement that the Board vote upon the teacher's reemployment when he completes his third consecutive school year becomes meaningless. A board bound to conform to the

superintendent's recommendations is merely a rubber stamp. Had the General Assembly intended to give the superintendent the final word in tenure decisions, it is logical to assume it would have said so in the same positive terms it used in Section (h) (1) when it said: "A board may dismiss or demote a career teacher *only* upon the recommendation of the superintendent." (Emphasis added.) We hold that Section (m) (2) does not require the Board to follow the recommendation of the superintendent when it considers the election of career teachers as required by Section (c).

Plaintiff concedes—and we agree—that "G.S. 115-142 raises difficult questions as to the legislative intent, as to the relative strengths of superintendents and school boards, as to possible inconsistencies in statutory language, and for matters of precedent." This appeal presents one of those difficult questions, that is, what is the fate of the probationary teacher eligible for election as a career teacher on 30 June 1973, whose contract the Board declined to renew? With reference to this situation Section (c) provides: "If a majority of the board votes against the reemployment of the teacher [at the end of his third consecutive school year], the teacher remains a probationary teacher whose rights are set forth in G.S. 115-142(m) (2)."

Thus, after the Board voted 3-2 not to reemploy plaintiff he remained a probationary teacher. He was, however, a probationer *without a contract* whose rights are as follows: "The board, upon recommendation of the superintendent, may refuse . . . to reemploy any teacher who is not under contract for any reason it deems sufficient; provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons." G.S. 115-142(m) (2).

It seems incongruous indeed that a probationary teacher whose contract the county board of education had refused to renew for a fourth year should have a *right* to reemployment either with or without the recommendation of the superintendent. Yet if taken literally Sections (c) and (m) (2) would require the Board to reemploy the teacher whose contract it had refused to renew. Upon such a construction, in this case the question would immediately arise, in what capacity would plaintiff be reemployed? Surely not as principal after the Board, the State's agency with the sole authority to employ teachers, had just dismissed him from that position! Would he remain from year to year thereafter as a teacher "not under contract" whom

the Board would have to reemploy as long as the particular superintendent remained in office and continued to recommend him? We cannot believe the General Assembly envisioned such a class of teachers in limbo.

It is fully established that "the language of a statute will be interpreted so as a avoid an absurd consequence. . . . " *State v. Spencer,* 276 N.C. 535, 547, 173 S.E. 2d 765, 773 (1970). Where a literal reading of a statute "will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Freeland v. Orange County,* 273 N.C. 452, 456, 160 S.E. 2d 282, 286 (1968).

The manifest purpose of G.S. 115-142 was to provide teachers of proven ability for the children of this State by protecting such teachers from dismissal for political, personal, arbitrary or discriminatory reasons.

[2] Applying the foregoing rules of construction, and considering the differences in the mandatory language used in Section (h) (1) and the permissive language in Section (m) (2) with reference to the "recommendation of the superintendent," we hold that Section (m) (2) is advisory only. It did not bind the Board in its consideration of the renewal of a probationer's contract or the employment of a teacher who is not under contract. Obviously, a school board is necessarily dependent in large measure upon the superintendent, a professional in direct contact with school personnel, for advice and recommendations with reference to the employment of teachers. Ultimate responsibility for their employment, however, in the absence of a positive legislative mandate to the contrary, rests with the board.

Presumably in recognition of the ambiguity of G.S. 115-142(c), and the untenable situations which might result from it, the General Assembly of 1973 rewrote and clarified the section. As rewritten, the second paragraph of Section (c) (2) provides: "If a majority of the board votes against reemploying the teacher, he shall not teach beyond the current school term. If the board fails to vote on granting career status but reemploys him for the next year, he automatically becomes a career teacher on the first day of the fourth year of employment."

"An amendment to an act may be resorted to for the discovery of the legislative intention in the enactment amended, as

where the act amended is ambiguous." 82 C.J.S., *Statutes* § 384 (1953). As we said in *Childers v. Parker's, Inc.*, 274 N.C. 256, 260, 162 S.E. 2d 481, 484 (1968), "Whereas it is logical to conclude that an amendment to an unambiguous statute indicates the intent to change the law, no such inference arises when the legislature amends an ambiguous provision." In such case, the purpose of the variation may be "to clarify that which was previously doubtful." We have no doubt that clarification was the purpose of the 1973 amendment to G.S. 115-142(c).

We hold, as did the Court of Appeals, that the trial court erred when it allowed plaintiff's motion for summary judgment on the ground that under G.S. 115-142 the Board could not refuse to renew plaintiff's contract unless the superintendent recommended that it not be renewed. Plaintiff, therefore, is not entitled to relief as a matter of law upon the undisputed facts in his "First Claim for Relief."

Since the trial judge granted plaintiff's motion for summary judgment (albeit erroneously) upon the grounds set out in his "First Claim," plaintiff's "Second Claim" for the same relief on different grounds was ignored. The grounds for relief alleged in the "Second Claim" were denied in the answer, which raised genuine, material issues of fact.

Accordingly, the decision of the Court of Appeals with reference to the "First Claim" is affirmed, and this cause is remanded to that court with directions that it be returned to the superior court for trial of plaintiff's "Second Claim."

Affirmed and remanded.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

STATE OF NORTH CAROLINA v. REGINALD RENARD LAMPKINS

No. 11

(Filed 12 March 1975)

1. Constitutional Law § 29; Criminal Law § 135; Jury § 7— death penalty views — challenge for cause

The trial court in a rape case did not err in allowing the State's challenge for cause to two prospective jurors on account of their death

penalty views where one juror stated on *voir dire* that she does not believe in capital punishment, that her opposition thereto would affect her verdict in this case and that if the State presented evidence which, in her opinion, proved beyond a reasonable doubt that defendant committed the crime of rape, "capital punishment would have a bearing even in the face of that," and where the second juror stated that he would not return a verdict of guilty of rape, which would carry the death penalty, regardless of what the evidence was.

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

The State's evidence was sufficient for the jury in a rape prosecution where it tended to show that defendant seized the prosecutrix by the arm, pulled her to a place to which she did not want to go, threw her to the ground, choked her, bumped her head, removed her clothing and had sexual intercourse with her against her will.

3. **Criminal Law § 87; Witnesses § 1— witness not on list furnished by State**

The trial court in a rape case did not err in permitting the State to present a rebuttal witness whose name did not appear on the list of witnesses for the State given to defendant's counsel by the solicitor before the trial began since the solicitor was not aware the witness had knowledge of any matter material to the case until a conversation between the witness and his wife was overheard in the courthouse hall after the trial commenced, there is nothing to indicate that the solicitor withheld the name of the witness from defendant's counsel in bad faith, and defendant in a criminal case is not entitled to a list of the State's witnesses.

4. **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 State's evidence tended to show commission of the crime of rape and defendant's evidence was that he never had sexual intercourse with the prosecutrix and that he did not touch her in a manner constituting an assault.

5. **Rape § 6— failure to submit lesser offenses — disbelief of part of testimony**

The mere fact that the jury might believe part but not all of the testimony of the prosecutrix in a rape case is not sufficient to require the court to submit to the jury the issue of defendant's guilt or innocence of a lesser offense than that which the prosecutrix testified was committed.

6. **Criminal Law § 135; Rape § 7— Act dividing rape into two degrees — nonretroactivity**

The Act dividing the crime of rape into two degrees and providing that the punishment for second degree rape shall be imprisonment for life or for a term of years is not retroactive and is not applicable to a crime of rape committed prior to its enactment on 8 April 1974. Ch. 1201, Session Laws of 1973.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death penalty.

State v. Lampkins

APPEAL by defendant from *Armstrong, J.*, at the 7 January 1974 Criminal Session of FORSYTH.

By an indictment, proper in form, the defendant was tried on the charge that on 13 November 1973 he raped Rosa Mae Barr. The jury found him guilty as charged and he was sentenced to death.

It is not disputed that the defendant, 17 years of age, and Rosa Mae Barr, 22 years of age, not previously acquainted, were guests at a party in the home of Barbara Ann Garner for some two hours on the evening of 13 November 1973; they danced together one or more times, she drank alcoholic beverages, sat in the defendant's lap, kissed him and "flirted" with him; about 11:30 p.m., after the departure of the other guests, she left the house, announcing her intention to walk home; and immediately, at the request of the hostess that he see Rosa Mae Barr home, the defendant also left the house, overtook and walked with her.

Rosa Mae Barr testified to the following effect: When the defendant overtook her after they left Barbara Ann Garner's house, she told him she was trying to find a telephone booth in order to call a taxi. He said he would show her the way to a telephone booth. He started to take her along a pathway between two houses. When she protested, he grabbed her arm and started pulling her along the path. She screamed. He then choked her, told her to "shut up" and kept pulling and choking her, holding her by one arm and by her neck. Reaching a grassy area, he shoved her, jerked her coat off, threw her to the ground, tore her coat, bumped her head very hard, choked her and told her to "be quiet before he killed" her. He pulled her underclothing off and had sexual intercourse with her against her will. Thereupon, he refused to let her return to Barbara Ann Garner's house, insisted that he was going to show her where a telephone booth was so that she could call a taxi. They walked to a telephone booth together and he called a taxi with coins taken from her pocketbook. When a taxi arrived she was screaming and crying. The driver called the police who took her to the hospital. She did not consent to the defendant's having intercourse with her and "resisted by trying to fight, push, get up and run," but he kept choking and holding her. He did not use any kind of weapon. She was afraid of him. She had been drinking but was not drunk. When the taxi came in response to his call, the defendant said, "Here comes the cab," and thereupon "may have left and went away."

The State offered medical evidence to the effect that Rosa Mae Barr had had sexual intercourse within a few hours prior to her arrival at the hospital, that she was "crying and upset," and there was grass in the area of her private parts.

Other witnesses for the State testified, in effect, that her coat was torn at the shoulder prior to the party but not as badly as it was at the time it was offered in evidence at the trial. When they were observed at the telephone booth, the defendant was acting normally but she was "walking up and down" and "looked hysterical." Nothing about her actions caused this observer, who knew the defendant, to think she was in trouble or was trying to run away. The defendant requested this witness, who was in an automobile, to take Rosa Mae Barr to her home but the witness told him he could not do so. When the taxi driver arrived, he noticed "a man and a woman coming down the street about 20 or 30 feet away from the phone booth," the man having his arm around the woman's neck. Nothing in their appearance caused the driver to believe the woman was in trouble. The woman crossed the street and got into the cab. When she asked the driver if he knew her companion, the driver looked back but the man had disappeared. She then told the driver that the man had raped her and the driver called the police. She then appeared to have been in a scuffle or fight and had grass on her. When she got in the cab she was calm and did not appear to be drunk, but while waiting in the cab for the arrival of the police, she was screaming and "almost out of her mind." The police arrived eleven minutes after midnight and took her to the hospital. She appeared to be sober but was "screaming and hysterical," and said she had been raped. The sleeve was torn out of her coat.

The defendant, a witness in his own behalf, testified to the following effect: At the party Rosa Mae Barr was drinking alcoholic beverages of various kinds and smoking "reefers." They danced together. She sat in his lap, kissed him and "flirted" with him. He did not smoke any "reefers" and drank no alcoholic beverage at the party except a part of one bottle of beer. When the hostess asked him "to see Rosa home," he said that he would do so and followed Rosa Mae Barr out of the house. She was then angry with the hostess and the "boyfriend" of the hostess and was crying. The defendant offered to "walk her to the phone booth." They walked together to the phone booth and he called a taxi. She remained outside the phone booth, "walking

up and down." He asked a friend (above mentioned), who passed in an automobile, to take her home but the friend "had something else to do and left." At that time another friend of the defendant came up and told him that his mother wanted him, so he went on home and went to sleep. He testified positively, "I did not touch Rosa after leaving the house," and "I have never had intercourse with Rosa Barr." The first time he saw her was at the party and when he left her at the phone booth she was not "hollering and screaming."

The defendant's friend, who came up and told the defendant his mother wanted him to come home, testified he observed Rosa Mae Barr "on the sidewalk pacing or walking." She was not crying or upset. He and the defendant left immediately.

Over objection, the court permitted the State to call in rebuttal Oliver Lee Montgomery. The basis of the objection was that this witness was not included in the list of witnesses for the State given to the defendant's counsel by the Solicitor before the trial began. He testified: He was arrested on 23 November and was confined in the same cell block with the defendant. The witness was released on bond on 14 December and was out on bond at the time of the defendant's trial. While in jail together, they discussed the charges against them and the defendant said that he was charged with rape, that he did not rape the girl but had had intercourse with her and she became angry with him because he would not pay her. The witness testified that his own case was supposed to be tried on the day preceding his testimony in the present case and, while waiting in the hall of the courthouse, he and his wife were talking and were overheard by the Solicitor, who asked the witness if the witness knew anything about this case and if he would testify. The witness told the Solicitor he was afraid that if he did and then was put in the same cell block with the defendant something would happen to him or something would be done to his wife while the witness was "pulling time." The Solicitor replied that "the only thing he could promise me was to help me not to be in the same cell block." The Solicitor promised the witness nothing in return for his testimony and no officer or anyone else promised the witness anything.

Attorney General Robert Morgan and Assistant Attorney General Ralf F. Haskell for the State.

Annie Brown Kennedy for defendant.

LAKE, Justice.

[1] The defendant's Assignment of Error No. 1 is to the allowance of the State's challenges for cause to two prospective jurors on account of their views concerning the imposition of the death penalty. The record discloses that of the 31 prospective jurors examined, only seven expressed opposition to the imposition of the death penalty. Of these, three were passed by the State and served on the jury which convicted the defendant. Two were challenged peremptorily by the State. Two, Mr. Godfrey and Mrs. Edwards, were challenged by the State for cause.

Mrs. Edwards stated on voir dire that she does not believe in capital punishment, that her opposition thereto would "affect" her verdict in this particular case and that if the State presented evidence which, in her opinion, proved beyond a reasonable doubt that the defendant did commit the crime of rape, "capital punishment would have a bearing even in the face of that." The Solicitor having challenged Mrs. Edwards for cause, defendant's counsel stated to the court that counsel did not "make any point about it." Thereupon, the court excused this prospective juror and the record shows no exception to that ruling.

Mr. Godfrey stated, in response to a question by the Court, after the Solicitor challenged him for cause, that he "would not return a verdict of guilty of rape, which would carry the death penalty, regardless of what the evidence was." The Solicitor's challenge for cause was thereupon allowed and the record shows no exception to the ruling.

Both of the foregoing challenges for cause were properly sustained under the ruling of the Supreme Court of the United States in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776. The sustaining of these two challenges for cause was in accord with our decisions in numerous cases decided since the Witherspoon case. *State v. Jarrette,* 284 N.C. 625, 639, 202 S.E. 2d 721; *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; *State v. Watson,* 281 N.C. 221, 188 S.E. 2d 289; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652; *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671; *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572; *State v. Sanders,* 276 N.C. 598, 174 S.E. 2d 487.

The State challenged peremptorily six prospective jurors who stated they had no objection to the death penalty and challenged, for a different cause, one other prospective juror. The

defendant challenged peremptorily seven prospective jurors and challenged no juror or prospective juror for cause.

There is no merit in this assignment of error.

[2] The defendant's Assignments of Error No. 2 and No. 9 are directed to the overruling of the defendant's motions for judgment of nonsuit at the close of the State's evidence and at the close of all the evidence. It is elementary that, upon a motion for judgment of nonsuit, the evidence for the State is taken to be true and the State is entitled to every reasonable inference which may be drawn therefrom, contradictions and discrepancies in the State's evidence are disregarded and the evidence of the defendant in conflict with that of the State is not taken into consideration. Strong, N. C. Index 2d, Criminal Law, § 104, and the numerous cases there cited. So considered, the evidence for the State is sufficient to carry to the jury the question of the defendant's guilt or innocence on the charge of rape. These assignments of error are without merit.

[3] The defendant's Assignment of Error No. 3 is to the ruling of the Court permitting the State to call Oliver Montgomery as its witness, in rebuttal. The basis of this assignment of error is that the name of this witness was not given to the defendant's counsel by the Solicitor as a prospective witness for the State. Trial of this case began 15 January 1974 and was concluded 18 January 1974. Montgomery testified just prior to the end of the presentation of evidence. Obviously, he could not have testified prior to 17 January, the third day of the trial. The testimony of this witness, as summarized in the foregoing statement of facts, shows that the Solicitor was not aware that this witness had knowledge of any matter material to this case until a conversation between the witness and his wife was overheard in the hall of the courthouse the day before the witness was called to the stand; that is, after the trial of the case commenced. The defendant does not contend that the Solicitor withheld the name of this witness from the defendant's counsel in bad faith and there is nothing whatever to indicate that such was the case. In *State v. Hoffman*, 281 N.C. 727, 734, 190 S.E. 2d 842, Justice Sharp, now Chief Justice, said:

> " 'The common law recognized no right of discovery in criminal cases.' *State v. Goldberg*, 261 N.C. 181, 191, 134 S.E. 2d 334, 340 (1964). In the absence of a statute requiring the State to furnish it, the defendant in a criminal case

is not entitled to a list of the State's witnesses who are to testify against him. [Citations omitted.] There is no such statute in this State."

There is no merit in this assignment of error.

[4] The defendant's Assignment of Error No. 11 is to the failure of the Court to submit to the jury the question of the defendant's guilt or innocence of lesser offenses included within the charge of rape—assault with intent to commit rape and assault on a female.

The testimony of the prosecutrix, Rosa Mae Barr, was that the defendant, by force and against her will, seized her by the arm, pulled her to a place to which she did not want to go, threw her to the ground, choked her, bumped her head, removed her clothing and had sexual intercourse with her. This is evidence of rape, not of one of the lesser included offenses. The defendant's evidence is that he never had sexual intercourse with the prosecutrix and that he did not touch her after leaving the party; i.e., he did not touch her in a manner constituting an assault. This is evidence that the defendant committed neither the crime of rape nor any lesser offense included therein.

[5] When, upon all the evidence, the jury could reasonably find the defendant committed the offense charged in the indictment, but could not reasonably find that (1) he did not commit the offense charged in the indictment and (2) he did commit a lesser offense included therein, it is not error to restrict the jury to a verdict of guilty of the offense charged in the indictment or a verdict of not guilty, thus withholding from their consideration a verdict of guilty of a lesser included offense. Under such circumstances, to instruct the jury that it may find the defendant guilty of a lesser offense included within that charged in the indictment is to invite a compromise verdict whereby the defendant would be found guilty of an offense, which he did not commit, for the sole reason that some of the jurors believe him guilty of the greater offense. The mere possibility that the jury might believe part but not all of the testimony of the prosecuting witness is not sufficient to require the Court to submit to the jury the issue of the defendant's guilt or innocence of a lesser offense than that which the prosecuting witness testified was committed.

In *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750, as in the present case, the prosecuting witness testified that the defend-

ant had raped her. The defendant testified that he had never seen her prior to the trial. In finding no error in the trial resulting in the defendant's conviction of rape, Justice Moore, speaking for the Court, at page 699, said:

> " 'The trial court is not required to charge the jury upon the question of the defendant's guilt of lesser degrees of the crime charged in the indictment when there is no evidence to sustain a verdict of defendant's guilt of such lesser degrees.' 3 Strong, N. C. Index 2d, Criminal Law § 115 (1967). In the present case defendant's defense was that of an alibi—that he was not present when the alleged offense occurred. He, therefore, completely denies assaulting the prosecutrix or forcing her to have sexual intercourse with him. The prosecutrix testified positively that after the defendant had choked her and threatened to kill her, he forcibly and against her will had sexual intercourse with her, and that he did in fact penetrate her. Thus, there was no evidence of an assault with intent to commit rape, and the trial court was not required to charge on the lesser included offense. 'G.S. 15-169 and G.S. 15-170 [providing for convictions of lesser included offenses] are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense.' *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488 (1969)."

To the same effect see: *State v. Jarrette, supra,* at page 650; *State v. Bryant,* 280 N.C. 551, 556, 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; *State v. Smith,* 201 N.C. 494, 160 S.E. 577; Strong, N. C. Index 2d, Criminal Law, § 115.

In *State v. Smith, supra,* the defendant was indicted for first degree burglary and rape. The Court, sustaining the conviction of rape, said:

> There is no evidence in contradiction of the prosecutrix except that of an alibi. According to her testimony, which contains a full recital of the crime, the prisoner was guilty of rape; according to his own evidence he was guilty of no offense. There is no aspect of the case that would justify a verdict merely of a simple assault or an assault with intent, and refusal to instruct the jury in reference to the lesser offense did not constitute reversible error. *State v. White.* 138 N.C. 704; *State v. Kendall,* 143 N.C. 659."

In *State v. Carnes, supra,* the defendant was indicted for armed robbery. The State introduced evidence which, if true, showed the commission of the offense charged. The defendant assigned as error the failure of the Court to instruct the jury that they might find him guilty of some lesser degree of the offense charged, such as common law robbery, attempted robbery, assault wtih a deadly weapon, or simple assault. Chief Justice Bobbitt, speaking for the Court, said:

> "G.S. 15-169 and G.S. 15-170 are applicable *only when there is evidence* tending to show that the defendant may be guilty of a lesser offense. *State v. Jones,* 249 N.C. 134, 139, 105 S.E. 2d 513, 516 (1958), and cases cited; *State v. Williams,* 275 N.C. 77, 88, 165 S.E. 2d 481, 488 (1969). 'The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *The presence of such evidence* is the determinative factor.' *State v. Hicks,* 241 N.C. 156, 159, 84 S.E. 2d 545, 547 (1954); *State v. Williams, supra.*"

There is no merit in this assignment of error.

The defendant's Assignment of Error No. 8 is that the Court erred in stressing the contentions of the State without giving equal stress to the contentions of the defendant. Assignment No. 13 is that the Court erred in relating facts to the jury that were not in evidence. We have carefully examined the entire charge of the Court with reference to these two assignments of error and we find no merit in either of them. We find no intimation in the charge of any opinion of the Court as to the weight or credibility of the evidence or as to the guilt or innocence of the defendant. The record does not disclose that any error or omission in the Court's review of the evidence or in its statement of the contentions of the parties was brought to the attention of the Court so that it might be corrected. Ordinarily, this must be done or the misstatement or omission is waived. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Feaganes,* 272 N.C. 246, 158 S.E. 2d 89; *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; Strong, N. C. Index 2d, Criminal Law, §§ 113, 118.

The defendant's Assignment of Error No. 20 is that the Court erred in entering a judgment imposing the death sentence

upon the verdict that the defendant was guilty of the offense of rape. The defendant's contentions with respect to the validity of the death sentence for rape have been carefully considered and found without merit by this Court in a number of recent decisions. See: *State v. Noell, supra; State v. Jarrette, supra; State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. No useful purpose would be served by further demonstration of the lack of merit in this assignment of error.

The defendant's remaining assignments of error relate to the admission of certain testimony of the State's witnesses Oliver Montgomery and Eula Wilkinson, and to alleged failures of the Court to charge with reference to the burden of proof and the presumption of innocence, or are formal and directed to the discretion of the trial court. We have examined all of these carefully and find no merit in any of them. A detailed discussion of these assignments of error would serve no useful purpose.

This is a case in which there is a clear, sharp conflict between the testimony of Rosa Mae Barr and the testimony of the defendant with reference to what the defendant did from the time the two left the house of Barbara Garner to the arrival of the taxi driver at the telephone booth. She testified to the completed offense of rape. He testified that no criminal offense whatever was committed. The conflict raised a question of fact for the determination of the jury, it being the sole judge of the credibility of the witnesses.

[6] Neither in his brief, nor in oral argument, did the defendant contend that the death sentence imposed upon him is invalid because of the enactment, on 8 April 1974, after the offense, after his trial and after the imposition upon him of the death sentence, of Chapter 1201 of the Session Laws of 1973, dividing the crime of rape into first degree rape and second degree rape and providing that the punishment for second degree rape shall be imprisonment for life or for a term of years. We have, however, considered what effect, if any, the enactment of this 1974 Act has upon the validity of the sentence imposed upon this defendant. Our conclusion is that no reasonable basis exists for construing this 1974 Act to be retroactive and thus applicable to the sentence imposed upon this defendant. The reasons for this conclusion are fully set forth in Case No. 25, *State v. Williams,* decided this day, and need not be repeated here. A judge's personal reluctance to impose or affirm a sentence of death is not

a permissible ground for refusing to impose or affirm such a sentence required by the law applicable to the case before the Court.

This Court has authority to review the record on appeal and to grant a new trial or give other appropriate relief for an error of law committed by the trial court. It has no authority to grant a new trial or other relief to a defendant convicted of a criminal offense in a trial free from such error for the reason that it disagrees with the jury concerning the credibility of a witness for the State. It must accept as conclusive the verdict of the jury, so far as the credibility of witnesses is concerned. The Executive Department of the State Government, in the exercise of the power of pardon and commutation conferred upon it by the Constitution of North Carolina, Article III, § 5(6), is not so limited. In our opinion, the trial court committed no error of law which can properly serve as the basis for granting the defendant a new trial or other relief from the sentence imposed upon him by the Superior Court.

No error.

Chief Justice SHARP dissents as to the death penalty for the reasons stated in her dissenting opinion filed this day in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion filed this day in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

STATE OF NORTH CAROLINA v. ISAAC SHERRILL MONK

No. 26

(Filed 12 March 1975)

1. **Jury § 7— jurors opposed to death penalty — challenge for cause proper**

Jurors who indicated that they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence were properly excused for cause.

2. **Jury § 7— general reservations of juror about death penalty — excusal for cause improper**

The trial court erred in excusing for cause a juror who voiced general reservations about the death penalty but who made no affirmative, unequivocal statement that she was unwilling to consider the death penalty or that she was irrevocably committed to vote against it regardless of the facts and circumstances that might be revealed by the evidence; however, the erroneous allowance of the improper challenge for cause does not entitle defendant to a new trial.

3. **Criminal Law § 102— argument of counsel — discretionary control by trial judge**

Argument of counsel must be left largely to the control and discretion of the presiding judge and counsel must be allowed wide latitude in the argument of hotly contested cases.

4. **Criminal Law § 102— jury argument — matters arguable**

Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom; however, counsel may not place before the jury incompetent and prejudicial matters, may not travel outside the record by injecting into his argument facts of his own knowledge or other facts not included in evidence, and may not argue principles of law not relevant to the case.

5. **Constitutional Law § 33; Criminal Law § 102— jury argument — comment on defendant's failure to testify**

The prosecuting attorney's remark, "Now, it is a principle of law that, when applied in these trials, that the State nor the defense cannot show a person's criminal record unless that person testified from this witness stand . . . , " amounted to a suggestion in unmistakable terms that defendant had failed to testify, and such remark violated the rule of G.S. 8-54 that counsel may not comment upon the failure of a defendant in a criminal prosecution to testify.

6. **Criminal Law § 88— cross-examination — inquiry as to prior convictions and misconduct for impeachment only**

The law is that a witness, including the defendant in a criminal case, may be cross-examined for purposes of impeachment with respect to prior convictions of crime, and the witness may also be cross-examined about specific acts of misconduct and may be asked disparaging

questions concerning collateral matters relating to his criminal and degrading conduct.

7. **Criminal Law §§ 88, 102— jury argument concerning prior criminal record — impropriety — failure of court to give curative instruction**

Argument of the prosecuting attorney which suggested to the jury that defendant had a prior criminal record which, but for the "legal principle" that "the State . . . cannot show a person's criminal record unless that person testified . . . , " the State would have offered evidence to prove was improper and erroneous, and failure of the court to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it required that defendant be given a new trial.

DEFENDANT appeals from judgment of *Smith, J.*, 13 August 1973 Session of NEW HANOVER Superior Court.

Defendant was charged in separate bills of indictment with armed robbery and murder of Donnie P. Christian in New Hanover County on 5 April 1973. The murder indictment is proper in form and drawn in conformity with G.S. 15-144. The cases were consolidated for trial. The jury convicted defendant of murder in the first degree, and he was sentenced to death.

The State offered ample evidence to carry the case to the jury and support a verdict of guilty of murder in the first degree. We deem it unnecessary to make a full recital of the facts since a new trial must be awarded for prejudicial error committed by the prosecution in arguments to the jury. A proper factual setting for discussion of this error will be recited in the opinion. Likewise, the opinion will narrate the facts surrounding the voir dire examination of prospective jurors sufficient to project defendant's assignment of error that challenges for cause were erroneously allowed.

Robert Morgan, Attorney General; James E. Magner, Jr., Assistant Attorney General, for the State of North Carolina.

Harold P. Laing, Attorney for defendant appellant.

HUSKINS, Justice.

Defendant's first assignment of error is grounded on the contention that the trial court erred in excusing for cause eleven jurors named in his brief.

We have interpreted *Witherspoon v. Illinois*, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S.Ct. 1770 (1968), with respect to jury

selection in capital cases, to hold that "(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." *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974).

[1] With questions that often missed the *Witherspoon* target entirely, the assistant district attorney who prosecuted this case and defense counsel both attempted to make appropriate inquiries concerning each venireman's moral or religious scruples, beliefs and attitudes toward capital punishment. The record of the voir dire examinations of these prospective jurors, however, is often muddled and incoherent, making it practically impossible to determine with any degree of certainty the total number of jurors dismissed for cause and the total number of peremptory challenges exercised by either side. Nevertheless, we have carefully reviewed the record as best we could with respect to the examination of the eleven jurors named in defendant's brief who were excused for cause. We conclude that all but Mrs. Bowen and Mrs. Lewis eventually indicated they were irrevocably committed to vote against a verdict carrying the death penalty regardless of the facts and circumstances that might be revealed by the evidence. The nine jurors so committed were properly excused for cause. *State v. Ward,* 286 N.C. 304, 210 S.E. 2d 407 (1974); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Crowder, supra.*

Mrs. Bowen was challenged and excused for cause by reason of her acquaintance and friendship for many years with the family of the murder victim.

The record discloses the following interrogation of Mrs. Lewis, who for some obscure reason is designated "J-3" instead of by name:

> "Q. Now, let me ask the three of you this. Do either of the three of you have such strong views about the death penalty that you feel like it would be difficult or impossible for you to return verdicts of guilty to first degree murder

against the defendant in this case knowing that such a verdict would lead to the imposition of the death penalty?

MR. LAING: Objection.

COURT: As to that question sustained.

J-3: I would hate to pass on it.

COURT: Don't answer the question.

Q. Let me rephrase the question. Do any of you have such strong views about the death penalty that it would be impossible for you to render a verdict of guilty to first degree murder no matter how overwhelming the evidence may be against the defendant because of your feelings about the death penalty?

MR. LAING: Objection.

COURT: Overruled.

J-3: I don't believe in the death penalty.

Q. You don't believe in the death penalty?

J-3: No, sir, I don't.

Q. Are you saying that no matter how overwhelming the evidence might be against the defendant that you could not render a verdict of guilty of first degree murder?

J-3: Well, I want him to be convicted if he were guilty. I don't know about the death penalty. I would want him to be punished.

* * * *

MR. STROUD: May it please the Court, the State would challenge Mrs. Lewis for cause because of her feelings about the death penalty and would challenge Mrs. King peremptorily.

MR. LAING: Objection to the challenge for cause, your Honor.

COURT: Let me ask Juror No. 3 this question. What the Solicitor wants to know is this. If the evidence and the law in this case should be such that you were convinced of the defendant's guilt beyond a reasonable doubt would you still vote to return a verdict of not guilty or refuse to

return a verdict of guilty of first degree murder because of your personal feelings with reference to the death penalty?

J-3: I don't know.

COURT: You do not know?

J-3: No, sir. I don't know how I would feel.

COURT: Step down. Challenge for cause is allowed as to Juror Lewis."

[2] It is quite apparent that while Mrs. Lewis voiced general reservations about the death penalty, she made no affirmative, unequivocal statement that she was unwilling to consider the death penalty or that she was irrevocably committed to vote against it regardless of the facts and circumstances that might be revealed by the evidence. Had anyone seen fit to ask her the precise question and insist on an unequivocal answer, she probably would have said as much. But this was not done. She was therefore erroneously excused for cause. *Maxwell v. Bishop,* 398 U.S. 262, 26 L.Ed. 2d 221, 90 S.Ct. 1578 (1970); *Boulden v. Holman,* 394 U.S. 478, 22 L.Ed. 2d 433, 89 S.Ct. 1138 (1969); *Witherspoon v. Illinois, supra; State v. Crowder, supra.*

Even so, when the mandates of *Witherspoon* are followed in the selection of other jurors, as here, "the erroneous allowance of an improper challenge for cause does not entitle the adverse party to a new trial, so long as only those who are competent and qualified to serve are actually empaneled upon the jury which tried his case." *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971). A defendant has no "vested right to a particular juror." *State v. Vann,* 162 N.C. 534, 77 S.E. 295 (1913). We adhere to this view. *Accord, Bell v. Patterson,* 402 F. 2d 394 (10th Cir. 1968), *cert. denied,* 403 U.S. 955, 29 L.Ed. 2d 865, 91 S.Ct. 2279 (1971); *State v. Conyers,* 58 N.J. 123, 275 A. 2d 721 (1971). Unpersuasive decisions contra include *Marion v. Beto,* 434 F. 2d 29 (5th Cir. 1970), *cert. denied,* 402 U.S. 906, 28 L.Ed. 2d 646, 91 S.Ct. 1372 (1971); *Woodards v. Cardwell,* 430 F. 2d 978 (6th Cir. 1970); *People v. Washington,* 71 Cal. 2d 1170, 459 P. 2d 259, 81 Cal. Rptr. 5 (1969). When no systematic exclusion is shown, defendant's right is only to *reject a juror prejudiced against him;* he has no right to *select one prejudiced in his favor. State v. Washington,* 283 N.C.

175, 195 S.E. 2d 534 (1973), *cert. denied,* 414 U.S. 1132, 38 L.Ed. 2d 757, 94 S.Ct. 873 (1974); *State v. Peele,* 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied,* 393 U.S. 1042, 21 L.Ed. 2d 590, 89 S.Ct. 669 (1969); *State v. Vann, supra.* Thus the improper exclusion of Mrs. Lewis was not prejudicial and does not necessitate a new trial. Defendant's first assignment is overruled.

It is entirely appropriate to say at this point that counsel involved in the trial of capital cases, and prosecuting attorneys in particular, should take greater pains to utilize the exact language of *Witherspoon* when interrogating veniremen to ascertain those whose scruples and attitudes irrevocably commit them to vote against any conviction that carries the death penalty regardless of the evidence adduced in the course of the trial. Since *Witherspoon* has so clearly specified the ultimate question that must be answered, the voir dire examination of prospective jurors should be based on questions phrased in *Witherspoon* language. Unless this course is followed, new trials will often be necessary in cases otherwise free from prejudicial error.

The record shows that defendant interposed numerous objections to various statements of the prosecuting attorney in his closing argument to the jury. Eight of these exceptions are grouped and constitute the basis for defendant's fifth assignment of error.

In that portion of the argument to which Exception No. 65 is addressed, the prosecuting attorney stated that no fingerprints were recovered from a certain exhibit offered in evidence "because it was in dew and certainly moisture having contact with any item that's got a fingerprint on it is going to affect the fingerprint." Our search of the record reveals no evidence to that effect.

The portion of the argument to which Exceptions Nos. 78 and 79 are addressed reads as follows:

> "Now, it is a principle of law that, when applied in these trials, that the State nor the defense cannot show a person's criminal record unless that person testified from this witness stand —
>
> MR. LAING: Objection.
>
> MR. STROUD: When that principle of law —
>
> COURT: Overruled. EXCEPTION No. 78

MR. STROUD: — is applied in criminal cases, you can't put on any evidence of a person's criminal record unless the person testified and can be cross examined about it.

MR. LAING: Objection.

COURT: Sustained. EXCEPTION NO. 79"

Defendant contends the prosecuting attorney exceeded the bounds of propriety in his argument to the jury, as illustrated by the foregoing exceptions, and that these transgressions were prejudicial and denied him a fair trial.

It is the duty of the prosecuting attorney to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. In the discharge of that duty he should not be so restricted as to discourage a vigorous presentation of the State's case to the jury. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); 23A C.J.S., Criminal Law §§ 1081, 1083.

[3, 4] We have held in numerous cases that argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466 (1949); *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947). Counsel for both sides are entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668 (1956); *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899 (1954); *State v. Campo,* 233 N.C. 79, 62 S.E. 2d 500 (1950). Language may be used *consistent with the facts in evidence* to present each side of the case.

On the other hand, we have held that counsel may not place before the jury incompetent and prejudicial matters, and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Westbrook, supra; State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954); *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953); *State v. Little, supra.* Nor may counsel argue principles of law not relevant to the case. *State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236 (1956);

State v. Buchanan, 216 N.C. 709, 6 S.E. 2d 521 (1940). Under G.S. 84-14 (1965) counsel may argue to the jury "the whole case as well of law as of fact." Even so, argument is not without its limitations. The trial court has a duty, upon objection, to censor remarks not warranted by either the evidence or the law, or remarks calculated to mislead or prejudice the jury. *In re Will of Farr,* 277 N.C. 86, 175 S.E. 2d 578 (1970); *see State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *Jenkins v. Hines Co.,* 264 N.C. 83, 141 S.E. 2d 1 (1965); *State v. Howley,* 220 N.C. 113, 16 S.E. 2d 705 (1941). If the impropriety is gross it is proper for the court even in the absence of objection to correct the abuse *ex mero motu. State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954).

[5] Applying the foregoing principles to the present case, we are constrained to hold that the prosecuting attorney's argument represents a departure from the evidence and the legitimate inferences to be drawn therefrom and injects incompetent and prejudicial matters not legally admissible. Exception No. 65 is a minor transgression and, nothing else appearing, when the court sustained defendant's objection the impropriety was cured. But Exceptions Nos. 78 and 79 are more serious. There the prosecuting attorney said: "Now, it is a principle of law that, when applied in these trials, that the State nor the defense cannot show a person's criminal record *unless that person testified from this witness stand . . .* " (Emphasis added.) The thrust of the statement at that point is to suggest in unmistakable terms that defendant had failed to testify. Such remark violates the rule that counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. This is forbidden by G.S. 8-54 (1969). *See State v. Roberts,* 243 N.C. 619, 91 S.E. 2d 589 (1956); *State v. McLamb,* 235 N.C. 251, 69 S.E. 2d 537 (1952); *State v. Farrell,* 223 N.C. 804, 28 S.E. 2d 560 (1944).

Improper comment on defendant's failure to testify may be cured by an instruction from the court that the argument is improper followed by prompt and explicit instructions to the jury to disregard it. *State v. Clayton,* 272 N.C. 377, 158 S.E. 2d 557 (1968). See *State v. Lindsay,* 278 N.C. 293, 179 S.E. 2d 364 (1971), for an instruction on this point which we approve. In the instant case no proper curative instruction was given. Defendant's objection to the argument was overruled. The general instruction on defendant's right to testify or not at his

option, given later by the court in the course of the charge, was insufficient to remove the prejudice because no reference was made to the offending argument and the damage done by it remained largely unrepaired.

Continuing, the prosecuting attorney said: "When that principle of law is applied in criminal cases, you can't put on any evidence of a person's criminal record unless the person testifies and can be cross-examined about it." Defendant's objection was simply sustained with no further action by the trial court to cure this impropriety or to remove its prejudicial effect.

[6] At the outset, it must be observed that there is no such principle of law. The law is that a witness, including the defendant in a criminal case, may be *cross-examined for purposes of impeachment* with respect to prior convictions of crime. *State v. Miller*, 281 N.C. 70, 187 S.E. 2d 729 (1972); *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971); *State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 778 (1970); *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied*, 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970); *State v. Goodson*, 273 N.C. 128, 159 S.E. 2d 310 (1968); *State v. Sheffield*, 251 N.C. 309, 111 S.E. 2d 195 (1959); *State v. March*, 46 N.C. 526 (1854). Under that general principle the witness may also be cross-examined about specific acts of misconduct and may be asked disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Williams, supra; State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied*, 397 U.S. 1050, 25 L.Ed. 2d 665, 90 S.Ct. 1387 (1970). The scope of such cross-examination is subject to the discretion of the trial judge and the questions must be asked in good faith. *State v. Williams, supra.*

[7] This portion of the prosecuting attorney's challenged argument suggests to the jury that defendant has a prior criminal record which, but for the "legal principle" mentioned, the State would have offered evidence to prove. This the law does not permit the State to do. Cross-examination by the State is permitted for the purpose of impeaching the credibility of the witness and not for the purpose of proving prior offenses. *State v. Neal*, 222 N.C. 546, 23 S.E. 2d 911 (1943). Denial of prior offenses by the witness may not be contradicted by introducing the record of his conviction or otherwise proving by other witnesses that he was, in fact, convicted. *State v. Gaiten, supra;*

State v. Heard, 262 N.C. 599, 138 S.E. 2d 243 (1964); 1 Stansbury's North Carolina Evidence § 112 (Brandis Rev. 1973).

It was the duty of the court not only to sustain objection to the prosecuting attorney's improper and erroneous argument but also to instruct the jury that the argument was improper with prompt and explicit instructions to disregard it. Since no proper curative instruction was given, the prejudicial effect of the argument requires a new trial.

We deem it unnecessary to discuss the remaining assignments of error since they are largely inconsequential and are not likely to recur upon retrial. For the reasons stated, the judgment is vacated and the cause remanded to the Superior Court of New Hanover County for a

New trial.

MASTER HATCHERIES, INC. v. J. HOWARD COBLE, NORTH CAROLINA COMMISSIONER OF REVENUE

No. 83

(Filed 12 March 1975)

Taxation § 31— use tax — commercial hatchery — manufacturing industry

A commercial chicken hatchery is a manufacturing industry or plant within the meaning of G.S. 105-164.4(1)(h); therefore, machinery purchased for use in the hatchery is subject to a use tax of only 1% rather than the regular rate of 3%.

Justice LAKE dissenting.

Justice BRANCH joins in dissenting opinion of Justice LAKE.

Justice HUSKINS dissenting.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals reversing the judgment of *Hall, J.,* 20 August 1973 Civil Session of CHATHAM Superior Court, docketed and argued as Case No. 19 at Fall Term 1974.

Plaintiff-taxpayer sues under G.S. 105-267 to recover from the Commissioner (now Secretary) of Revenue sales and use taxes paid under protest. The facts are stipulated.

Plaintiff operates a commercial hatchery, in which approximately 362,000 eggs are incubated and 300,000 baby chicks

are hatched each week. Plaintiff purchases "hatching eggs" in cases containing twenty-four dozen eggs each. The eggs are removed from the cases to an egg-traying table, where they are cleaned and oversized or undersized eggs are removed. A vacuum lift then picks up forty-eight eggs at a time and places them in an incubation tray holding 144 eggs. Each tray is placed in a buggy which transfers thirty trays at a time from the grading-cleaning-traying room into the incubator room. There the trays are removed from the buggy and placed on racks in the incubator, where the temperature is maintained at 99° and the humidity at 87%.

The eggs remain in the incubator for eighteen days, during which time they are mechanically turned every hour so as to change the position of the embryo. On the fifteenth day the lower trays are moved to the top racks and the higher trays to the bottom racks. On the eighteenth day the trays are removed from the incubator, placed in buggies, and rolled into the hatching room. The eggs are then transferred by hand to larger hatching trays, and the incubator trays are taken to a washing machine where they are cleaned and disinfected for a new cycle. The hatching trays are placed in a "hatching machine," where the eggs remain in one position for three days at a temperature of 98° and a humidity of 90%.

On the twenty-first day the baby chicks emerge from the shell and are taken, still in the hatching trays, to a grading room. There the chicks are placed on a conveyor belt which carries them past employees who vaccinate and debeak them. The chicks are then placed in boxes, one hundred to a box, and shipped. The hatching trays are cleaned and disinfected for the next cycle. Eggs which did not hatch are dumped on the county landfill.

Hatching cycles are started twice each week. Each cycle "must be accompanied by continuous vigilance as to temperature and humidity and by constant cleaning and disinfecting of trays, hatchers, incubators, floors and walls."

In 1972 plaintiff purchased certain machinery for use in its hatchery business. As it had done prior to 28 December 1972, plaintiff paid use tax on this machinery at the rate of 1% of the sales price, subject to a maximum tax of $80.00 per article. This is the rate imposed upon the sale or use "of mill machinery or mill machinery parts and accessories to manufacturing indus-

tries and plants." G.S. 105-164.4(1) (h) and G.S. 105-164.6(1). The Commissioner of Revenue, contending that plaintiff was not a manufacturing industry or plant within the meaning of G.S. 105-164.4(1) (h), computed the use tax at the regular rate of 3% which G.S. 105-164.6(1) imposes upon the cost price of each item of tangible personal property not entitled to the lower rate under G.S. 105-164.6(1). He then assessed plaintiff with the unpaid balance he claimed to be due.

On 28 December 1972, under protest, plaintiff paid the amount in controversy, $5,864.60, and demanded its return. Upon the Commissioner's failure to refund the money, plaintiff instituted this action. The matter came on to be heard before Judge Hall, who entered judgment that "the plaintiff is not entitled to the lesser rate of tax provided by G.S. 105-164.4(1) (h) and G.S. 105-164.6(1) on its purchases of machinery and equipment for use in the operation of its commercial hatchery." Upon appeal, the Court of Appeals reversed and ordered that the additional use tax of $5,864.60 assessed against plaintiff be refunded. *Hatcheries v. Coble,* 21 N.C. App. 256, 204 S.E. 2d 395 (1974). One member of the panel having dissented, the Secretary of Revenue appealed to this Court as a matter of right.

Ray F. Swain for plaintiff appellee.

Robert Morgan, Attorney General; Myron C. Banks, Assistant Attorney General; and Norman L. Sloan, Assistant Attorney General, for defendant appellant.

SHARP, Chief Justice.

The parties stipulate that the question presented is whether plaintiff, a commercial hatchery, is a manufacturing industry or plant *within the meaning of G.S. 105-164.4(1)(h).*

It is everywhere conceded that the term *manufacturing* as used in tax statutes is not susceptible of an exact and all-embracing definition, for it has many applications and meanings. Where, as here, the statute does not define the term, courts have resorted to the dictionaries to ascertain its generally accepted meaning and have then undertaken to determine its application to the circumstances of the particular case. There are many holdings and statements to the effect that to constitute manufacturing, the operation, process, or activity in question must produce a new and different commodity or work a

substantial change in the basic material. *See* Annot., 17 A.L.R. 3d 7, 23, 27 (1968); *Duke Power Co. v. Clayton, Comr. of Revenue,* 274 N.C. 505, 164 S.E. 2d 289 (1968); *Bleacheries Co. v. Johnson, Comr. of Revenue,* 266 N.C. 692, 147 S.E. 2d 177 (1966); *State v. Chadbourn,* 80 N.C. 479 (1879); 55 C.J.S., *Manufacturers* § 1 (1), (2) (1948).

While the use of sophisticated automated equipment is not determinative of whether a particular operation is manufacturing, many courts have used the fact that such machinery was involved to support their conclusion that the production constituted manufacturing. Annot., 17 A.L.R. 3d 7, 33-34 (1968). *See Hearst Corp. (News Amer. Div.) v. State Dept. of A. & T.,* 269 Md. 625, 639-640, 308 A. 2d 679, 687-688 (1973).

Plaintiff contends that, by means of complicated, precision equipment, it incubates eggs from which are hatched 300,000 chicks a week—production on a scale which could not otherwise be obtained; that by the application of skill and labor to raw material (eggs), a new and more valuable property (chicks) is produced; that the fact plaintiff has duplicated a natural process is immaterial; that this operation constitutes manufacturing within the meaning of the applicable taxing statute as defined by this Court in *Duke Power Co. v. Clayton, Comr. of Revenue, supra.*

Defendant argues that "since 'only God can make a tree' . . . only God can make a baby chick"; that "manufacturing can never occur when the end product is a living organism"; that "the hatchery does not by its skill and labor convert the eggs into baby chicks, because the eggs convert themselves."

Certainly a commercial hatchery could never produce a chick without the fertilized egg which only a hen and rooster can create. Yet it is equally true that, left alone, an egg could never convert itself into a living organism; it would merely become the odious rotten egg. It is also true that when the setting hen comes off the nest with her small brood, we do not say she has manufactured her chicks. However, her uncomplicated operation in the undisinfected hen house is a far cry from the mass production which the commercial hatchery achieves by the use of modern technology.

Only three decisions on the question here presented have come to our attention. Two support defendant's contentions: *Perdue, Inc. v. State Dept. of Assessment & Taxation,* 264 Md.

228, 286 A. 2d 165 (1972); *Peterson Produce Co. v. Cheney,* 237 Ark. 600, 374 S.W. 2d 809 (1964). As did the Court of Appeals, however, we find convincing the rationale of the third case, *Miller v. Peck,* 158 Ohio St. 17, 106 N.E. 2d 776 (1952).

In *Miller v. Peck, supra,* the Supreme Court of Ohio held that the mechanical equipment utilized by a commercial hatchery was used in manufacturing within the meaning of its tax statute which reduced the assessed valuation on "all engines, machinery, tools and implements of a manufacturer." That court adopted the Century Dictionary's definition of *manufacturing,* "the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties or combinations, whether by hand labor or by machinery." It then inquired, "Does the fact that the process had to do with the mechanical stimulation and development of an animal germ to a living animal itself as the end product for immediate sale in the channels of commerce take the operation out of the category of manufacturing?"

In answering the question NO the court noted: (1) "Usually, where, through the use of tools and machinery commodities or items of personal property are by special treatment or processing transformed into other more valuable items of personal property as a commercial business, the operation is that of manufacturing." (2) In certain "clearly manufacturing processes" living organisms are used to make new products such as commercial yeast, beer, bread. (To this list we add commercial vaccines.) (3) "The reason for the partial exemption from taxation of tools and machinery used in . . . manufacturing is to encourage such use since it results in the production of more valuable personal property which in turn becomes subject to taxation." (4) The machinery and equipment of a commercial hatchery are "within the spirit and purpose of the statute" and are therefore entitled to the partial exemption it provides.

In view of the adequate opinion of the Court of Appeals we deem further discussion of the parties' contentions unnecessary. We hold that plaintiff, a commercial hatchery, is a manufacturing industry within the meaning of G.S. 105-164.4(1) (h). The decision of the Court of Appeals is

Affirmed.

Justice LAKE dissenting.

It is not the function of this Court to establish tax policies for the State so as to promote desirable segments of the economy, or so as to do economic or social justice among groups of taxpayers. Those are functions of the Legislature. Our authority is limited to construing the Revenue Act as written by the Legislature and, when the question is properly raised, to determine the constitutional validity of a provision thereof. Thus, we are not here concerned with whether it is economically wise, or just, to tax sales of equipment to commercial hatcheries at the same rate as sales of groceries to the housewife, while taxing at a much lower rate sales of mill machinery to textile plants or furniture factories.

The cardinal principle of statuory construction is, of course, that the words of the statute must be construed so as to carry out the intention of the Legislature. *Sellers v. Refrigerators, Inc.*, 283 N.C. 79, 194 S.E. 2d 817; *Person v. Garrett*, 280 N.C. 163, 184 S.E. 2d 873; *Pipeline Co. v. Clayton*, 275 N.C. 215, 166 S.E. 2d 679; *In re Watson*, 273 N.C. 629, 161 S.E. 3d 1, 35 A.L.R. 2d 1114. Subordinate principles are that, in order to determine the legislative intent, in the absence of a clear indication to the contrary, words in a statute must be given the meaning they have in ordinary usage, *Power Co. v. Clayton*, 274 N.C. 505, 164 S.E. 2d 289, and *Bleacheries, Inc. v. Johnson*, 266 N.C. 692, 147 S.E. 2d 177, 17 A.L.R. 3d 1, and provisions in a taxing statute granting an exemption or a lower tax rate are to be strictly construed against the claimant of such exemption or special privilege. *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 210 S.E. 2d 199; *Good Will Distributors v. Shaw, Comr. of Revenue*, 247 N.C. 157, 100 S.E. 2d 334; *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E. 2d 754.

In ordinary speech one does not talk of manufacturing eggs and chickens but of producing, hatching and raising them. "Mill machinery" and "accessories to manufacturing industries and plants" are terms which do not readily come to mind as one contemplates a farmer buying materials with which to make nesting boxes for his hens or feeding pens for his baby chicks. The inapplicability of those terms to that activity is no less when the farmer has hundreds of hens instead of half a dozen. The process of chicken production is not generically different when the farmer becomes a corporation and the carefully regulated temperature of an electrically powered incubator and the turn-

ing of the eggs by a mechanical device are substituted for the warm body and stirring feet of the loving, though irascible, natural mother. "Mill machinery" and "manufacturing industries" simply do not suggest the production of baby chicks. If the special tax rate should be extended to those engaged in this activity, it is a simple matter for the Legislature, now in session, to do so.

Justice BRANCH joins in this dissenting opinion.

Justice HUSKINS dissenting.

I respectfully dissent from the majority view that a commercial chicken hatchery "manufactures" the baby chicks which are hatched in its place of business. If the hen that lays and hatches her eggs is not in the "manufacturing" business, certainly a commercial hatchery doesn't qualify for the title. I would interpret G.S. 105-164(1)(h) and G.S. 105-164.6(1) accordingly and leave it to the General Assembly to include commercial hatcheries among the industries entitled to the one percent use tax rate on machinery purchased for use in such business.

As a matter of equal treatment, commercial hatcheries are entitled to the favorable one percent tax rate the same as manufacturing and industrial plants which use mill machinery or mill machinery parts and accessories. But there is a limit to interpretative reaching and stretching for the sake of uniformity beyond which courts should not go. Such is the case here. Every layman of normal intelligence knows that a hatchery does not "manufacture" baby chicks, and the law does not require judges to be more ignorant than other people. I therefore vote to reverse the Court of Appeals and reinstate the judgment of the trial court that the hatchery operated by plaintiff is not a manufacturing industry or plant within the meaning of the tax statutes involved.

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. 86

(Filed 12 March 1975)

1. **Rules of Civil Procedure § 50— motion for directed verdict — specific grounds**

The requirement of G.S. 1A-1, Rule 50(a), that a motion for directed verdict state the specific grounds therefor is mandatory.

2. **Rules of Civil Procedure § 8; Schools § 11— action against school board — allegation of waiver of immunity — insufficiency of responsive pleading**

In an action by a father and son against a county board of education to recover medical expenses and damages on account of personal injuries sustained by the son in the school gymnasium, plaintiffs' allegations that defendant had waived its immunity from tort liability by the purchase of liability insurance were prerequisite to recovery by plaintiffs and required a responsive pleading by defendant, and defendant's answer that such allegations "are not admitted, to the extent that they apply to the accident in question" was not sufficient to raise an issue of fact as to waiver of governmental immunity. G.S. 1A-1, Rules 8(b), 8(d) and 9(c).

3. **Schools § 11; State § 6— waiver of governmental immunity to any extent — motions for directed verdict**

In a tort action against a county board of education, waiver of governmental immunity to any extent by the purchase of liability insurance was sufficient to preclude the granting of motions for directed verdict on the ground of governmental immunity.

4. **Appeal and Error § 6; Rules of Civil Procedure § 50— motion for directed verdict — consideration of specific grounds — withdrawal of prior opinion**

In a tort action by a father and son against a county board of education, the Supreme Court should consider whether defendant's motions for directed verdicts should have been granted only on either of the two specified grounds asserted therein—that the evidence failed to show actionable negligence on the part of defendant and established contributory negligence as a matter of law on the part of plaintiff son. The decision in *Clary v. Board of Education*, 285 N.C. 188, which granted defendant's motion for directed verdict on the grounds there was no evidence of the father's medical expenses and no evidence of waiver of governmental immunity, is withdrawn.

5. **Schools § 11— high school basketball player — collision with wire-glass window — negligence by school board**

In an action against a county board of education to recover medical expenses and damages on account of personal injuries received by a high school basketball player when he collided with a wire-glass window near the end of the basketball court while running windsprints, plaintiffs' evidence was sufficient to permit a jury finding that actionable negligence by defendant was a proximate cause of the injuries where it tended to show that candidates for the school team practiced under the supervision of coaches provided by defendant; that in practicing windsprints, a candidate's momentum often would carry him beyond the end line of the court and into one of the large glass windows; that these windows consisted of wire glass which breaks into jagged sections with sharp edges; that tempered glass is stronger and shatters into small particles when it breaks; that defendant continued to use wire glass although tempered glass was available; and that the player's injuries consisted of lacerations from sharp edges of the broken sections of wire glass.

6. **Schools § 11— high school basketball player — collision with glass window — contributory negligence**

The evidence did not disclose that a high school basketball player was contributorily negligent as a matter of law when he collided with and broke through a large wire-glass window near the end of the court while running windsprints during basketball practice where there was evidence that he and others had collided with the windows on prior occasions and that similar glass in transoms of the gym doors had cracked when struck by a basketball, but there was no evidence that the glass had broken into heavy sections with jagged edges, that the glass in the large window had broken or cracked from contact by a player doing a windsprint or from any other cause, or that the player had knowledge or notice of the composition of the wire glass, or its relative strength, or any special hazard to a person who might collide with it with sufficient force to break it.

Justice LAKE dissents.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

ON REHEARING.

Plaintiffs' petition for a rehearing of our decision filed 10 April 1974, reported in 285 N.C. 188, 203 S.E. 2d 820, having been allowed, the case was redocketed and reargued in the Supreme Court as No. 49 at Fall Term 1974.

These two actions were filed 23 March 1971 to recover medical expenses and damages on account of personal injuries sustained by Roger Dale Clary on 8 October 1968. Roger, then seventeen, was a senior at the Stony Point High School and a member of its varsity basketball team. He was injured in the school gymnasium while practicing running sprints. Specifically,

while running a "windsprint," he collided with and broke through a wire-glass window at the entrance end of the gymnasium. As a result he was cut and injured by portions of the broken glass.

Roger's action is for damages "for physical and mental pain and suffering as well as physical disfigurement." It was brought in his name by his father, Fred H. Clary, who was denominated his "Guardian ad Litem." Roger now prosecutes this action in his own name and right.

The other action was instituted by Fred H. Clary in his own name and right to recover $2,656.00 "to compensate him for that amount of expenses incurred for medical treatment, hospitalization and physical therapy for his son, Roger Dale Clary." Upon Fred's death, Phyllis Clary, Roger's mother, qualified as administratrix of Fred's estate. She now prosecutes the action as such administratrix.

The two actions were consolidated and tried at the 9 April 1973 Session of Alexander County Superior Court before Winner, S. J.

Reference is made to 285 N.C. at 189-192, 203 S.E. 2d at 822, for a summary of the allegations of each complaint and of the evidence presented by plaintiffs.

At the conclusion of plaintiffs' evidence, Judge Winner allowed defendant's motions for directed verdicts and dismissed the actions with prejudice. The Court of Appeals affirmed. 19 N. C. App. 637, 199 S.E. 2d 738 (1973). The decisions of the trial judge and of the Court of Appeals were based on the specific ground that Roger Dale Clary was contributorily negligent as a matter of law.

This Court upheld the decision of the Court of Appeals in respect of the dismissal of the actions. However, our decision was put on the ground that the record did not show facts sufficient to support plaintiffs' right to recover in that it contained no stipulations, admission or evidence (1) that defendant had waived its immunity from liability for torts by the procurement of liability insurance in accordance with G.S. 115-53, or (2) that Fred H. Clary had incurred any medical and hospital expenses on account of Roger's injuries. We made no ruling concerning the sufficiency or significance of the evidence with reference to the issues of negligence and contributory negligence.

Plaintiffs' petition to rehear was allowed 15 July 1974.

Collier, Harris, Homesley, Jones & Gaines for plaintiff appellants.

Hedrick, McKnight, Parham, Helms, Warley & Kellam by Philip R. Hedrick and Edward L. Eatman, Jr., for defendant appellee.

SHARP, Chief Justice.

Our first question is whether we should withdraw our decision — 10 April 1974 and decide whether plaintiffs' evidence would support a finding that defendant was actionably negligent and, if so, whether it establishes Roger's contributory negligence as a matter of law.

In each case, defendant moved "for a Judgment of Dismissal with Prejudice and a directed verdict in favor of the defendant on the grounds that the evidence offered by the plaintiff was insufficient upon which to submit the case to the jury and *for the reason that plaintiff had failed to offer sufficient evidence of actionable negligence on the part of the defendant* upon which to submit the case to the jury and *upon the further ground that the plaintiff was negligent as a matter of law so as to bar* any claim that he had for damages against the defendant." (Our italics.)

[1] G.S. 1A-1, Rule 50(a), requires that "[a] motion for a directed verdict *shall state the specific grounds therefor.*" (Our italics.) This requirement is mandatory. *Anderson v. Butler*, 284 N.C. 723, 728-29, 202 S.E. 2d 585, 588 (1974), and cases cited.

Defendant's motions for directed verdicts stated *two* specific grounds therefor. They were stated as the reasons or grounds underlying the conclusory allegation "that the evidence offered by the plaintiff was insufficient upon which to submit the case to the jury." Defendant stated *no specific ground* other than the two set forth in italics in the quoted portion of its motions. These were the only grounds discussed by defendant's counsel in his argument before Judge Winner in support of the motions for directed verdicts. Defendant's counsel concluded his argument as follows: "I submit to the court at this time that even if there is a scintilla of evidence on the question of negligence, which I submit there is not, that this young man was

contributorily negligent as a matter of law, and that this case should not go to the jury." These are the only grounds discussed in the briefs filed in the Court of Appeals and in those filed in this Court prior to 10 April 1974.

With reference to medical and hospital expenses, uncontroverted allegations in the petition to rehear disclose that defendant stipulated the medical and hospital bills incurred by Fred H. Clary on account of Roger's injuries in the total amount of $2,967.24 would be considered as having been introduced in evidence without the necessity of putting them in "one by one." Although the petition to rehear does not disclose a stipulation with reference to waiver of immunity, the unchallenged allegations thereof disclose that the parties, the trial judge, and the Court of Appeals, considered there had been a waiver of governmental immunity *to some extent* and therefore it was unnecessary to determine *the exact extent* of such waiver when passing upon defendant's motions for directed verdicts.

[2] By leave of court, each plaintiff amended his complaint by alleging: "That the defendant has procured liability insurance to cover negligent or other tortious conduct and that the defendant has thereby waived its immunity for tort liability; and that the defendant has otherwise waived its immunity from liability for torts as authorized in North Carolina General Statutes 115-53."

This allegation alleged facts prerequisite to recovery by plaintiff. In the absence thereof, demurrers to the complaint would have been sustained. *Fields v. Board of Education,* 251 N.C. 699, 111 S.E. 2d 910 (1960). Hence, Rule 8(b) and 8(d) required defendant to file a responsive pleading.

Defendant answered the allegation quoted above as follows: "The allegations of Paragraph XV [or XVIII] of the Complaint as amended, are not admitted, to the extent that they apply to the incident in question."

Rule 8(b) in part provides: "*Defenses; form of denials.*—A party shall state in short and plain terms his defenses to each claim asserted and shall *admit* or *deny* the averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial. *Denials shall fairly meet the substance of the averments denied. When a*

pleader intends in good faith to deny only a part of or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. . . . "

Defendant's answer to the quoted allegation of each amended complaint falls far short of the unequivocal denial thereof required by Rules 8(b) and 9(c). In this connection see *Rumbough v. Improvement Co.*, 106 N.C. 461, 11 S.E. 528 (1890).

Rule 8(d) provides: "*Effect of failure to deny.*—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage *are admitted when not denied* in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided." (Our italics.)

Rule 9(c) provides: "*Conditions precedent.*—In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. *A denial of performance or occurrence shall be made specifically* and with particularity." (Our italics.)

Further consideration impels the conclusion that defendant's answer to plaintiffs' allegations in respect of waiver of governmental immunity was not sufficient to raise an issue of fact. We note that our Rules 8(b), 8(d) and 9(c) contain the same provision as Rules 8(b), 8(d) and 9(c) of the Federal Rules of Procedure. Decisions based on these federal rules are in accord with our present conclusion. *See* 2A Moore's Federal Practice, § 8.21, pp. 1819-1821; § 8.23, pp. 1825-1829; § 8.29, pp. 1875-1877; § 9.04, pp. 1943-1946. Also, see Federal Practice and Procedure, Civil, Wright and Miller (1969), § 1261 and § 1304.

Here we note that the procurement of liability insurance waives governmental immunity "*only to the extent* that said board of education is indemnified by insurance for such negligence or tort." (Our italics.) G.S. 115-53. The equivocal phraseology of the answer suggests that defendant was denying there had been a waiver to *an extent* sufficient to cover the amount of plaintiffs' asserted claims. We prefer to treat the answer as equivocal rather than as evasive.

G.S. 115-53 also contains the following: "No part of the pleadings which relate to or allege facts as to a defendant's

insurance against liability shall be read or mentioned in the presence of the trial jury in any action brought pursuant to this section. Such liability shall not attach unless the plaintiff shall waive the right to have all issues of law or fact relating to insurance in such an action determined by a jury and *such issues shall be heard and determined by the judge without resort to a jury* and the jury shall be absent during any motions, arguments, testimony or announcement of findings of fact or conclusions of law with respect thereto unless the defendant shall request a jury trial thereon: . . . . "

[3] Although there is no allegation or admission *as to the amount* of liability insurance defendant had procured and therefore nothing to show the extent of defendant's waiver of governmental immunity, waiver of governmental immunity to *any extent* was sufficient to preclude the granting of motions for directed verdicts on the ground of governmental immunity. Incidentally, we note that the opinion of the Court of Appeals states parenthetically that defendant had waived the defense of sovereign immunity by purchasing a liability insurance policy. It does not appear whether this statement was based on the record or upon response to inquiry during the argument before the Court of Appeals. At the next trial in Superior Court, any questions of fact in respect of the procurement by defendant of liability insurance and the amount thereof and its applicability to these actions will be for determination by the trial judge.

If there were facts within the knowledge of defendant which negate waiver of liability in respect of plaintiffs' actions, it seems inconceivable such facts would not have been brought to the attention of Judge Winner, the Court of Appeals, or this Court. Nothing in the record or brief indicates defendant's counsel has ever contended that governmental immunity was a ground for allowance of its motions for directed verdicts. For these reasons it may not be determinative of the issue of liability on appeal.

[4] It is unfortunate that plaintiffs did not include in the record a succinct statement to the effect that evidence concerning the amount of medical and hospital bills was offered and admitted in evidence, and a succinct statement to the effect defendant had procured liability insurance *in some amount* and thereby had waived its governmental immunity. Be that as it may, the conclusion reached is that this Court should consider whether the

motions for directed verdicts should have been granted on either of the *two specified grounds* asserted therein.

The evidence pertinent to the issues of negligence and contributory negligence is summarized in 285 N.C. at 190-192, 203 S.E. 2d at 822-23. In respect of both of these issues, all the evidence is to be considered in the light most favorable to plaintiffs. *Kelly v. Harvester,* 278 N.C. 153, 179 S.E. 2d 396 (1971).

[5] When considered in the light most favorable to plaintiffs, there was evidence tending to show the large glass window with which Roger collided was in close proximity to the end line of the basketball court; that candidates for the school team practiced under the general supervision and direction of the coaches provided by defendant; that, in practicing windsprints, a candidate would run at full speed and often his momentum would carry him beyond the end line and into one of the large glass windows; that these windows consisted of wire glass which breaks into jagged sections with sharp edges; that tempered glass is stronger and shatters into small particles when it breaks; that defendant used and continued to use wire glass although tempered glass had been and was available; and that Roger's injuries consisted of lacerations from the sharp edges of the broken sections of wire glass.

In our view, the evidence, when considered in the light most favorable to plaintiffs, was sufficient to permit, but not to compel a finding that negligence on the part of defendant was the proximate cause or one of the proximate causes of Roger's injuries.

Contributory negligence is an affirmative defense; therefore, the burden of proof on the contributory negligence issue rests on defendant. A directed verdict will not be entered on the ground of contributory negligence unless the evidence, taken in the light most favorable to plaintiff, so clearly establishes contributory negligence that no other reasonable inference or conclusion can be drawn therefrom. *Dennis v. Albemarle,* 242 N.C. 263, 267, 87 S.E. 2d 561, 565 (1955).

[6] Basketball practice was a part of the school athletic program. There was evidence Roger had been running windsprints under similar circumstances during the three preceding years as well as during the early weeks of the 1968-1969 season; and that, on prior occasions, he and others, including the coaches,

had collided with these glass windows. There was evidence that similar glass in the transoms had cracked when struck by a basketball, but no evidence the glass had broken into heavy sections with jagged edges. There was no evidence that the glass in the large window on each side of the double doors had been broken or cracked from contact by a basketball player doing a windsprint or from any other cause. There was no evidence Roger had knowledge or notice of the composition of the wire glass, or its relative strength, or any special hazard to a person who might collide with it with sufficient force to break it.

Conceding the evidence was sufficient to permit the jury to find that negligence on the part of Roger contributed to his injuries as a proximate cause thereof, we cannot say that this is the only reasonable inference or conclusion which can be drawn therefrom. Our conclusion is that the evidence before Judge Winner was sufficient to require the submission of the issues of negligence and of contributory negligence.

We note that our present decision is in substantial accord with *Stevens v. School District*, 270 N.Y.S. 2d 23, aff. 21 N.Y. 2d 780, 288 N.Y.S. 2d 475, 235 N.E. 2d 448 (1966).

[4] In view of the foregoing, we withdraw our decision filed 10 April 1974, reported in 285 N.C. 188, 203 S.E. 2d 820, and treat the case as before us for hearing *de novo* on the question whether the motions for directed verdicts and for dismissals should have been allowed on the grounds therein stated. Thus considered, the decision of the Court of Appeals affirming the judgments of Judge Winner is reversed. Accordingly, the case is remanded to the Court of Appeals with direction to remand to the Superior Court of Alexander County for trial *de novo*.

Reversed and remanded.

Justice LAKE dissents.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

JOSEPH B. SETZER AND WIFE, JOAN Q. SETZER v. RONNIE ANNAS

No. 84

(Filed 12 March 1975)

1. **Injunctions § 13— preliminary injunction — showing required**

Ordinarily to justify the issuance of a preliminary injunction it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiff's rights during the litigation.

2. **Injunctions § 13— preliminary injunction — purpose**

The purpose of a preliminary injunction is to preserve the status quo pending trial on the merits.

3. **Appeal and Error § 58— preliminary injunction — review of evidence by court on appeal — findings made by court on appeal**

On appeal from the order of a superior court judge granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself; *a fortiori*, the Supreme Court may make its own findings of fact when neither the hearing judge nor the Court of Appeals made any findings of fact.

4. **Easements § 8— grant of way — right to maintain gates across way**

Generally, the grant of a way without reservation of the right to maintain gates does not necessarily preclude the owner of the land from having them; unless it is expressly stipulated that the way shall be an open one or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way if they are constructed so as not to interfere unreasonably with the right of passage.

5. **Injunctions § 13— preliminary injunction — question of defendant's right to do what plaintiffs seek to enjoin — preliminary injunction improper**

A preliminary injunction should not be granted if a serious question exists in respect of the defendant's right to do what the plaintiffs seek to restrain and the granting thereof would work greater injury to the defendant than is reasonably necessary for the protection *pendente lite* of the plaintiffs' rights.

6. **Injunctions § 13; Easements § 8— grant of way — right to maintain gates across way — preliminary injunction improper**

The trial court erred in granting plaintiffs a preliminary injunction prohibiting defendant from obstructing a right-of-way over his property based on the premise that plaintiffs had an unqualified right to the use of the existing roadway without obstruction by fence, gates, or otherwise where the trial court failed to consider the crucial question in respect of defendant's legal right to enclose his land by

fence and to place gates across the roadway as a part of such enclosure of his property.

Justice HUSKINS dissents.

APPEAL by defendant under G.S. 7A-30(2) from the decision of the Court of Appeals dismissing his appeal from an order of *Falls, J.*, 17 September 1973 Session of the Superior Court of CALDWELL, docketed and argued as Case No. 39, Fall Term 1974.

Plaintiffs and defendant own adjoining tracts of land in Kings Creek Township, Caldwell County, North Carolina. Defendant acquired his tract of 25.6 acres by deed dated 25 September 1967. Plaintiffs acquired their tract of 31 acres by deed dated 17 September 1971.

By deed dated 28 April 1972 James C. Barlow and wife, Sandra B. Barlow, Lona Beaver, widow, and defendant Ronnie Annas and wife, Carolyn Annas, conveyed to plaintiffs, their heirs and assigns, as appurtenant to plaintiffs' land, "a right-of-way and easement for ingress and egress over that existing roadway which runs from the properties of the parties of the second part through the properties of the parties of the first part to State Road No. 1510."

Plaintiffs instituted this action 5 September 1973 to enjoin the obstruction by defendant of the right-of-way and easement "above referred to" and to recover actual and punitive damages. Plaintiffs alleged defendant had "wilfully and maliciously erected two gates across the right-of-way thus severely hindering the plaintiffs in their use of the same"; and that, on 3 September 1973, defendant, "while ordering the plaintiffs to close said gates, maliciously threatened and assaulted them by pointing a gun in their direction." Plaintiffs also alleged that, on 3 September 1973, defendant "wilfully and maliciously" bulldozed across the boundary lines between his property and plaintiffs' property and threatened to continue such bulldozing until he had "leveled a strip of land belonging to plaintiffs approximately sixty feet in width."

A temporary restraining order, signed by Judge Falls on 5 September 1973 without notice to defendant, restrained and enjoined defendant "from obstructing the right-of-way described in the complaint, from threatening and assaulting the plaintiffs, and from continuing to bulldoze the property belonging to the plaintiffs." Plaintiffs gave bond conditioned as prescribed in the

amount of $1,000.00. The order fixed September 17, 1973 in Caldwell Superior Court as the time and place for defendant "to show cause, if any he has, why this order should not be continued until the final judgment in this action."

At the hearing before Judge Falls in Caldwell Superior Court on September 17, 1973 testimony was presented by plaintiffs and by defendant. Reference was made by the witnesses to the drawing offered in evidence as Defendant's Exhibit No. 1, reproduced herewith, which indicates the location of the properties of the several parties to the deed of 28 April 1972.

At the conclusion of the hearing Judge Falls announced he would "continue the restraining order" and directed plaintiffs' counsel to "draw [his] order."

A preliminary injunction signed by Judge Falls on 19 September 1973 recites: "[I]t appears to be the undersigned, upon hearing proofs and allegations offered by both parties, that the plaintiffs are entitled to a Temporary Injunction until the final judgment in this action." It continues and concludes as follows:

"IT IS, THEREFORE, ordered, adjudged and decreed that the defendant be, and he is hereby restrained and enjoined from obstructing the right-of-way and easement of the plaintiffs described in the complaint, from threatening and assaulting the plaintiffs, and continuing to bulldoze the property belonging to the plaintiffs until the final judgment in this action.

"IT IS FURTHER ORDERED that the written undertaking in the sum of $1,000.00 given by the plaintiffs on the 5th day of September 1973, justified and approved by the Clerk of the Superior Court, shall be sufficient."

Defendant appealed to the Court of Appeals. In a two to one decision that court dismissed the appeal. *Setzer v. Annas,* 21 N.C. App. 632, 205 S.E. 2d 553 (1974).

Fate J. Beal and Dickson Whisnant for plaintiff appellees.

Wilson, Palmer and Simmons for defendant appellant.

SHARP, Chief Justice.

The Court of Appeals held defendant was not deprived of any *substantial* right by the preliminary injunction of 19 Sep-

tember 1973 and therefore had no right under G.S. 1-277 to appeal. Under G.S. 1A-1, Rule 65, the term *preliminary injunction* refers to an interlocutory injunction issued after notice and hearing which restrains a party pending trial on the merits.

[1] Ordinarily, to justify the issuance of a preliminary injunction it must be made to appear (1) there is probable cause that plaintiff will be able to establish the right he asserts, and (2) there is reasonable apprehension of irreparable loss unless interlocutory injunctive relief is granted or unless interlocutory injunctive relief appears reasonably necessary to protect plaintiffs' rights during the litigation. *Edmonds v. Hall,* 236 N.C. 153, 156, 72 S.E. 2d 221, 223 (1952); *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 139, 123 S.E. 2d 619, 626 (1962).

[2] The purpose of a preliminary injunction is to preserve the status quo pending trial on the merits. *Huskins v. Hospital,* 238 N.C. 357, 360, 78 S.E. 2d 116, 119 (1953).

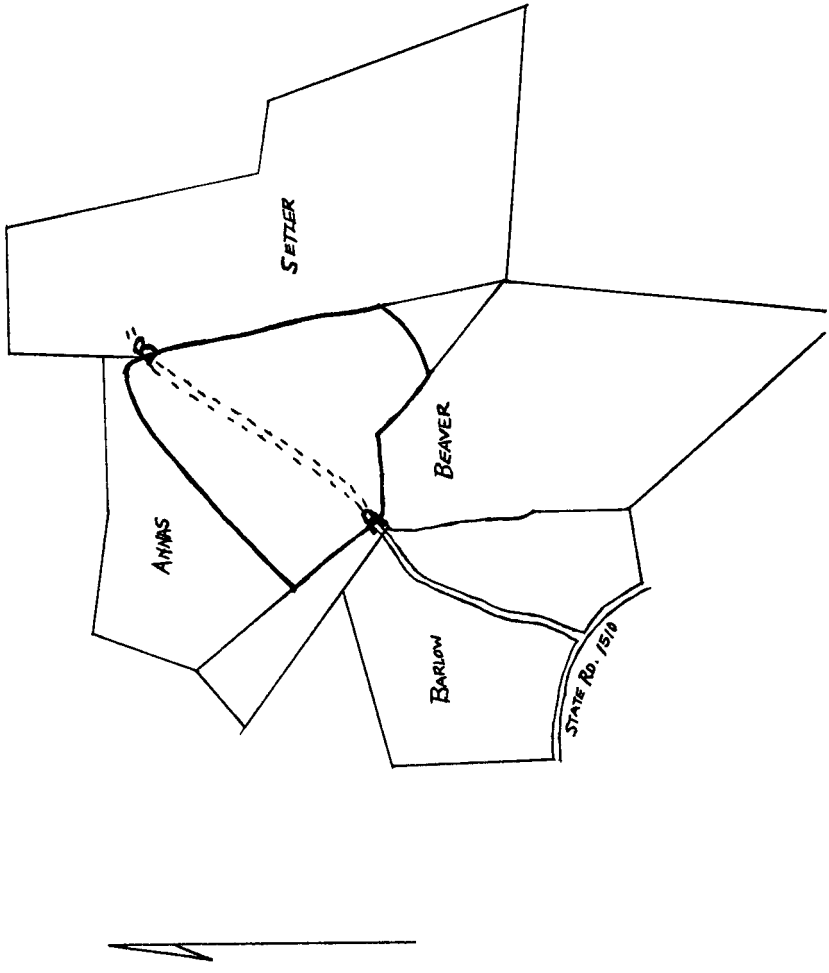
At the hearing on 17 September 1973 the burden was on plaintiffs to establish their right to a preliminary injunction. G.S. 1A-1, Rule 65(b); *Board of Elders v. Jones,* 273 N.C. 174, 182, 159 S.E. 2d 545, 550 (1968).

The majority opinion of the Court of Appeals sets forth in general terms the gist of the evidence offered by plaintiffs and by defendant. Specific evidential facts are set forth in the dissenting opinion.

[3] On appeal from the order of a superior court judge granting or refusing a preliminary injunction the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself. *Huskins v. Hospital, supra* at 362, 78 S.E. 2d at 121; *Conference v. Creech* and *Teasley v. Creech and Miles, supra* at 140, 123 S.E. 2d at 626-627. *A fortiori,* the Supreme Court may make its own findings of fact when, as here, neither the hearing judge nor the Court of Appeals made any findings of fact.

The evidence before the hearing judge strongly supports a finding that the portion of defendant's property within the heavy black lines on Defendant's Exhibit No. 1 was enclosed by fence, and that gates of some type had been erected and were maintained thereon at the points indicated by the letters A and B, on and prior to 28 April 1972; that plaintiffs had knowledge

DEFENDANT'S EXHIBIT NO. 1



of these conditions; and that these conditions continued without substantial change until the service on defendant of the ex parte temporary restraining order of 5 September 1973. For present purposes, this Court so finds.

As noted in plaintiffs' brief in the Court of Appeals, evidence before the hearing judge "showed that road had been in existence and used as ingress and egress to property of plaintiffs and their predecessors in title since about 1887 and that fences and gates were in place prior to execution by defendant of deed of right-of-way."

Plaintiffs alleged defendant *severely hindered* their use of the right-of-way by the two gates. Plaintiffs contend the easement conveyed by deed of 28 April 1972 vested in them the right to use the "existing roadway" without any interference by fence, gates or otherwise. Seemingly, the hearing judge and the Court of Appeals based decision on this view. Unquestionably, unequivocal acceptance of this view would require dismissal of the appeal on the ground it was frivolous.

However, the crucial question is whether defendant has a legal right to continue to enclose the portion of his property within the heavy black lines on Defendant's Exhibit No. 1 and to maintain gates at A and B. If defendant has such legal right, the preliminary injunction of 19 September 1973 deprived him of a valuable property right during the pendency of the litigation.

Defendant does not challenge plaintiffs' right to use the "existing roadway" as a means of ingress and egress; however, he denies plaintiffs' right to require him to remove the gates at A and B and thereby deprive him of his right to fence his land.

[4] In 25 Am. Jur. 2d, *Easements and Licenses* § 91 (1966), the author states: "Generally, the grant of a way without reservation of the right to maintain gates does not necessarily preclude the owner of the land from having them; unless it is expressly stipulated that the way shall be an open one or it appears from the terms of the grant or the circumstances that such was the intention, the owner of the servient estate may erect gates across the way if they are constructed so as not to interfere unreasonably with the right of passage. In the absence of an express reservation of such right, however, it is the general rule that whether he may erect and maintain gates, bars, or fences across and along the easement of way depends on

the intention of the parties connected with the original creation of the easement, as shown by the circumstances of the case, the nature and situation of the property subject to the easement, and the manner in which the way has been used and occupied. This is a question of fact and is to be determined as such." *Accord,* 28 C.J.S., *Easements* § 98(b) (1941). Relevant decisions of this Court include *Chesson v. Jordan,* 224 N.C. 289, 29 S.E. 2d 906 (1944), and *Merrell v. Jenkins,* 242 N.C. 636, 89 S.E. 2d 242 (1955).

[5] A preliminary injunction should not be granted if a serious question exists in respect of the defendant's right to do what the plaintiffs seek to restrain and the granting thereof would work greater injury to the defendant than is reasonably necessary for the protection *pendente lite* of the plaintiffs' rights. *Huskins v. Hospital, supra* at 361, 78 S.E. 2d at 120; *Board of Elders v. Jones, supra* at 182, 159 S.E. 2d at 551-552. Where a serious question exists the hearing judge considers the relative conveniences and inconveniences of the parties in determining the propriety of a preliminary injunction and the terms thereof if granted.

[6] The crucial question, whether defendant has a legal right to establish and maintain gates at A and B and, if so, the kind of gates which would be reasonably appropriate, has not been discussed in any of the briefs. Hence, we make no definitive decision in respect thereof. Evidence at trial may bear significantly upon the ultimate decision of this question. For the present, it is sufficient to say it was error to grant the preliminary injunction on the premise that plaintiffs had an *unqualified* right to the use of the "existing roadway" without obstruction by fence, gates or otherwise. We hold that, in failing to consider the crucial question in respect of defendant's legal right to enclose his land by fence and to place gates at A and B, the hearing judge based his decision upon a misapprehension of the applicable law.

Although plaintiffs and defendant testified at the hearing on 17 September 1973, no testimony was offered pertinent to the portion of the temporary injunction relating to assault and the bulldozing of property along the boundary lines.

We have not overlooked appellant's contention that the preliminary injunction is deficient in that it does not meet the requirements of Rule 65(d) that every injunction or restraining order "shall set forth the reasons for its issuance; shall be

specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained; . . . . " However, we deem it unnecessary to discuss the legal effect of the deficiencies in Judge Fall's order granting the preliminary injunction since it is being vacated on another ground.

The decision of the Court of Appeals is reversed, and the cause is remanded to that court with the direction to vacate the preliminary injunction of 19 September 1973 (miscalled *temporary* injunction in Judge Fall's order) and remand the cause to the Superior Court for a *de novo* hearing on plaintiffs' motion for a preliminary injunction. Obviously, the necessity for such further hearing may be avoided by prompt trial on the merits.

Reversed and remanded.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Justice HUSKINS dissents.

STATE OF NORTH CAROLINA v. WELDON RAY CRABTREE

No. 3

(Filed 12 March 1975)

1. **Criminal Law § 146— constitutional questions — decision on other ground**

Appellate courts will not pass upon constitutional questions, even when properly presented, if there is some other ground upon which the case can be decided, since the authority of the court to declare an act of the Legislature in conflict with the Constitution arises out of and as an incident of its duty to determine and adjudge the rights of parties in litigation before it.

2. **Automobiles § 117— failure to decrease speed — insufficiency of warrant**

Warrant was insufficient to charge defendant with failure to decrease speed in violation of [former] G.S. 20-141(c) where it did not allege the existence of any of the conditions specified in the statute and did not allege that the duty to use due care made a decrease in the speed of the defendant's vehicle necessary at the time and place in question.

3. Criminal Law § 13— jurisdiction — valid warrant or indictment

A valid warrant or indictment is essential to the jurisdiction of the court in a criminal case.

APPEAL by defendant from the decision of the Court of Appeals, reported in 23 N.C. App. 491, 209 S.E. 2d 299, finding no error on the appeal of the defendant from *Chess, S. J.*, at the 2 May 1974 Session of DURHAM.

The defendant was tried in the District Court of Durham County upon a warrant which charged:

> "[T]he above-named defendant, on or about Sunday 2:30 PM, the 13th day of January 1974 in the above named county, did unlawfully and willfully operate a motor vehicle on a public street or public highway: Without decreasing speed to avoid colliding with any vehicle then on the highway in violation of and contrary to, the form of the statute in such case made and provided, and against the peace and dignity of the State."

In the District Court, the defendant entered a plea of "Not Guilty." He was found guilty and from a sentence that he pay the costs of court he appealed to the Superior Court. There, before entering a plea, he moved to quash the warrant on the ground that "the statute under which it attempts to charge is vague and indefinite and does not set out any standard by which you violate the criminal law."

The motion to quash was denied. The defendant, thereupon, entered a plea of "Not Guilty." The jury returned a verdict of "Guilty as charged," and the defendant was sentenced to pay the costs of court. He appealed to the Court of Appeals, assigning as error the denial of his motion to quash the warrant and certain other alleged errors. He contended that G.S. 20-141(c) was so vague as to violate Article I, §§ 19, 20 and 23, of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States.

The Court of Appeals having found no error in the judgment of the Superior Court, the defendant appealed to the Supreme Court on the ground that his rights, guaranteed by the said provisions of the Constitution of North Carolina and of the Constitution of the United States, have been violated.

Attorney General Edmisten and Assistant Attorney General Boylan for the State.

Blackwell M. Brogden for defendant.

LAKE, Justice.

At the time the warrant was issued G.S. 20-141, entitled "Speed restrictions," provided in subsection (a) that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions then existing and provided in subsection (b) and subsection (b1) specific maximum and minimum speed limits. It then provided in subsection (c):

> "The fact that the speed of a vehicle is lower than the foregoing limits shall not relieve the driver from the duty to decrease speed *when* approaching and crossing an intersection, *when* approaching and going around a curve, *when* approaching a hill crest, *when* traveling upon any narrow or winding roadway, or *when* special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions, *and speed shall be decreased as may be necessary to avoid colliding with any person, vehicle, or other conveyance* on or entering the highway, and to avoid causing injury to any person or property either on or off the highway, *in compliance with legal requirements and the duty of all persons to use due care.*" (Emphasis added.)

[1] Upon this appeal we do not reach the constitutional question raised by the defendant. It is well established that appellate courts will not pass upon constitutional questions, even when properly presented, if there is some other ground upon which the case can be decided, since the authority of the court to declare an act of the Legislature in conflict with the Constitution arises out of and as an incident of its duty to determine and adjudge the rights of parties to the litigation before it. *Nicholson v. Education Assistance Authority,* 275 N.C. 439, 447, 168 S.E. 2d 401; *Carbide Corp. v. Davis,* 253 N.C. 324, 116 S.E. 2d 792; *State v. Blackwell,* 246 N.C. 642, 99 S.E. 2d 867; *State v. Jones,* 242 N.C. 563, 89 S.E. 2d 129; *Lutz Industries, Inc. v. Dixie Home Stores,* 242 N.C. 332, 342, 88 S.E. 2d 333; *State v. Muse,* 219 N.C. 226, 13 S.E. 2d 229; *State v. Lueders,* 214 N.C. 558, 200 S.E. 22. Thus, where the warrant upon which a defendant was tried was insufficient to charge

violations of an ordinance, this Court, though observing the invalidity of the warrant *sua sponte*, refused to determine the constitutionality of the ordinance upon appeal from a conviction of the defendant for its violation. *State v. Nichols*, 215 N.C. 80, 82, 200 S.E. 926; *State v. Smith*, 211 N.C. 206, 189 S.E. 509.

[2] It will be observed that if the statute here in question was within the power of the Legislature under the Constitution, it applied only when one of the specified conditions existed and, in such a situation, the motorist was commanded thereby to decrease his speed as might be necessary to avoid a collision "in compliance with legal requirements and the duty of all persons to use due care." The warrant upon which this defendant was tried and convicted does not allege the existence of any of those conditions nor does it allege that the duty to use due care made a decrease in the speed of the defendant's vehicle necessary at the time and place in question.

[3] A valid warrant or indictment is essential to the jurisdiction of the court in a criminal case. *State v. McBane*, 276 N.C. 60, 170 S.E. 2d 913; *State v. Stokes*, 274 N.C. 409, 163 S.E. 2d 770; *State v. Yoes*, 271 N.C. 616, 630, 157 S.E. 2d 386; *State v. Banks*, 263 N.C. 784, 140 S.E. 2d 318; *State v. Sossamon*, 259 N.C. 374, 130 S.E. 2d 638. An indictment or warrant charging a statutory offense must allege all of the essential elements of the offense. *State v. McBane, supra; State v. Cook*, 272 N.C. 728, 158 S.E. 2d 820; *State v. Sossamon, supra; State v. Nichols, supra; State v. Smith, supra;* Strong, N. C. Index 2d, Indictment and Warrant, § 9; id., Criminal Law, § 127.

By Chapter 1330, § 7, of the Session Laws of 1973, G.S. 20-141 was rewritten and subsection (c), which is the basis of this prosecution, was deleted, effective 1 January 1975. Since the warrant upon which the defendant was tried does not charge a violation of subsection (c), it is not necessary for us to determine in this action whether the repeal of the statute, effective upon a future date, was intended by the Legislature to bar prosecution and punishment for violations of the statute prior to the effective date of its repeal. See, *State v. McCluney*, 280 N.C. 404, 185 S.E. 2d 870. It is sufficient for the present that the failure of the warrant to charge the statutory offense is a bar to the imposition upon this defendant of a sentence in this proceeding.

Judgment arrested.

IN RE WILL OF LOFTIN

No. 19 PC.

Case below: 24 N.C. App. 435.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975.

JOLLIFF v. WINSLOW

No. 66.

Case below: 24 N.C. App. 107.

Appeal dismissed for lack of substantial constitutional question 11 March 1975.

McCARLEY v. McCARLEY

No. 16 PC.

Case below: 24 N.C. App. 373.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 March 1975.

McGRADY v. QUALITY MOTORS

Nos. 118 PC and 63.

Case below: 23 N.C. App. 256.

Petition for writ of certiorari to North Carolina Court of Appeals improvidently granted 30 December 1974 (reported 286 N.C. 336) is denied 11 March 1975.

STATE v. BYRD

No. 55.

Case below: 23 N.C. App. 718.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 March 1975.

STATE v. DUFFEY

No. 135 PC.

Case below: 23 N.C. App. 515.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975.

STATE v. EDWARDS

No. 15 PC.

Case below: 24 N.C. App. 393.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975.

STATE v. GRIFFITH

No. 10 PC.

Case below: 24 N.C. App. 250.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975.

STATE v. PEARSON

No. 14 PC.

Case below: 24 N.C. App. 410.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 March 1975.

STATE v. SMITH

No. 184 PC.

Case below: 24 N.C. App. 97.

Petition for writ of certiorari to North Carolina Court of Appeals denied 4 March 1975.

STATE v. STANLEY

No. 12 PC.

Case below: 24 N.C. App. 323.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 4 March 1975.

PETITIONS TO REHEAR

CONSUMERS POWER v. POWER CO.

No. 87.

Reported: 285 N.C. 434.

Petition by plaintiffs to rehear denied 9 September 1974.

DUKE v. INSURANCE CO.

No. 101.

Reported: 286 N.C. 244.

Petition by plaintiff to rehear denied 4 February 1975.

EARLE v. WYRICK

No. 67.

Reported: 286 N.C. 175.

Petition by defendant to rehear denied 5 February 1975.

IN RE WILLIS

No. 32.

Reported: 286 N.C. 207.

Petition by N. C. Board of Law Examiners to rehear allowed 24 February 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

KAPLAN v. CITY OF WINSTON-SALEM

No. 27.

Reported: 286 N.C. 80.

Petition by defendant to rehear denied 27 December 1974.

STATE v. LITTLE

No. 54.

Reported: 286 N.C. 185.

Petition by defendant to rehear denied 10 January 1975.

STATE OF NORTH CAROLINA v. ALBERT COOPER

No. 89

(Filed 14 April 1975)

1. **Criminal Law § 29— mental capacity to stand trial**

The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental 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.

2. **Criminal Law § 29— mental capacity to stand trial — determination prior to trial**

When the question of defendant's mental capacity to stand trial is properly raised before the defendant pleads to the indictment, it should be determined prior to the commencement of the trial.

3. **Criminal Law § 29— mental capacity to stand trial — determination by court or jury**

The mental capacity of defendant to stand trial may be determined by the trial court with or without the aid of a jury.

4. **Criminal Law § 29— mental capacity to stand trial — determination by court — appellate review**

When the court conducts without a jury the inquiry into a defendant's mental capacity to stand trial, the court's findings of fact, if supported by evidence, are conclusive on appeal.

5. **Criminal Law § 29— mental capacity to stand trial — effect of previous determination**

The fact that, at an earlier date, a judge had found the defendant was, at that time, lacking in capacity to stand trial does not prevent the same or a different judge from conducting another hearing and reaching a different conclusion at a later date.

6. **Criminal Law § 29— mental capacity to stand trial — medication during trial**

The trial court did not err in finding that defendant was competent to plead to the murder charges against him and to stand trial, notwithstanding defendant had to be given medication periodically during the trial in order to prevent exacerbation of his mental illness by the tensions of the courtroom, where the undisputed medical testimony was that the medication did not have the effect of dulling his mind and that the specified dosage was adequate to keep his mental illness in remission, and an expert in psychiatry testified that, in his opinion, the defendant had the capacity to comprehend his position, to understand the nature and object of the proceedings against him, to cooperate with his counsel in his defense, and to remember what happened on the night of the alleged offenses and to discuss those events intelligently with his counsel, if he would.

7. **Criminal Law § 75— confession to hospital attendants — voluntariness — understanding**

The confessions of defendant to hospital attendants must have been made voluntarily and understandingly in order to be admissible in evidence against him.

8. **Criminal Law § 75— confessions — understanding — mental capacity**

For a confession to have been made understandingly, the defendant, at the time of making it, must have had the requisite mental capacity.

9. **Criminal Law § 75— confession to hospital attendants — mental capacity**

In a prosecution for the murder of defendant's wife and children, the trial court did not err in the admission of defendant's confessions to hospital emergency room personnel where the court found that, at the time defendant made the statements, he had a sufficient understanding to apprehend the obligation of an oath, he was capable of giving a correct account of the matters he had seen and heard with respect to the deaths of his wife and children, and he made the statements freely, voluntarily and understandingly, the attending physician, the nurse and the hospital attendant who heard the statements gave opinion testimony that defendant, when making them, was in his right mind, could comprehend what he was saying, responded normally to questions, knew and understood the meaning of what he was saying and was capable of relating recent facts stored in his memory, a psychiatrist treating defendant testified that, in his opinion, defendant was in contact with reality when he made the statements, and all the evidence was that the statements were made spontaneously by the defendant to persons who knew nothing of and were not interrogating him about the subject matter of his statements prior to his making them; evidence that defendant, at frequent intervals while in the emergency room, was nervous and shaking and from time to time stared off into space did not show a lack of memory and understanding so as to make his confessions inadmissible as a matter of law.

10. **Criminal Law §§ 5, 63; Homicide §§ 7, 18— brutality in slaying — intent to kill — insanity**

Brutality in a slaying is evidence of intent to kill, not, *per se*, a basis for finding the defendant insane.

11. **Criminal Law § 5— insanity as defense to crime**

The test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation.

12. **Criminal Law § 5; Homicide § 7— insanity as defense to murder — jury question**

In this prosecution for the murder of defendant's wife and children, defendant's motion for directed verdict on the ground of insanity was properly overruled, the issue of insanity being for the jury, where a nurse who observed defendant in a hospital emergency room some

24 hours after the crimes testified that he seemed to be in his right mind, a hospital attendant gave opinion testimony that defendant knew right from wrong at that time, the attending physician at the emergency room gave opinion testimony that defendant then knew right from wrong, although he was suffering from paranoid schizophrenia and that, assuming the killings occurred while defendant was under a delusion that his children were from outer space, defendant nevertheless knew right from wrong and was able to control his behavior and adhere to the right and acted according to his free will in killing his wife and children, and an expert psychiatrist testified that defendant did have the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation.

13. Criminal Law § 5; Homicide §§ 7, 28— defense of insanity — first issue for jury

Where there is evidence justifying the submission to the jury of the question of insanity as a defense to a murder charge, the better procedure would be to submit the issue of insanity as the first issue for the jury's consideration since an affirmative answer to that issue would end the case; however, it was not error for the court to instruct the jury to consider the issue of whether defendant was not guilty by reason of insanity if it found that defendant committed either first degree murder or second degree murder.

14. Criminal Law §§ 5, 113; Homicide §§ 7, 28— recapitulation of evidence — testimony as to irresistible impulse

The trial court in a homicide case did not err in failing to include in its recapitulation of the evidence a doctor's statement that defendant knew right from wrong but "at the time of the alleged offense was not able to apply his knowledge of right and wrong and the alleged offense was a product of his mental illness" since this was opinion testimony that defendant acted under an irresistible impulse and irresistible impulse is not a defense under the law of this State.

15. Homicide § 7— mental capacity — premeditation and deliberation

A defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication, or some other cause.

16. Criminal Law §§ 5, 63; Homicide §§ 7, 28— evidence of mental disease — effect on premeditation and deliberation — failure to instruct

Failure of the trial court in a first degree murder case to instruct the jury that it should consider evidence of defendant's mental disease on the question of premeditation and deliberation did not constitute reversible error where the jury, by its verdict of guilty of first degree murder, established that defendant had the mental capacity to know right from wrong with reference to the acts in question, since the mental capacity to determine the moral quality of the acts included the lesser capacity to form a purpose to do such acts.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Chief Justice SHARP dissenting.

APPEAL by defendant from *Webb, S. J.*, at the 30 October 1972 Session of WAYNE. This case was docketed and argued as No. 3 at the Fall Term 1973.

By separate indictments, each proper in form, the defendant was charged with the murder of his wife, Catherine Cooper, and four of their five children, whose ages ranged from six years to seven months. The five cases were consolidated for trial. The jury found the defendant guilty of murder in the first degree in each case. In each case a sentence to imprisonment for life was imposed, the first three to run concurrently, the fourth to commence to run at the expiration of the sentences imposed in the first three and the fifth to run concurrently with the fourth.

Prior to the commencement of the trial, the defendant, through counsel, requested that, prior to a plea, the court determine whether he was capable of pleading to the indictment and cooperating with his counsel conducting his defense. A hearing was had upon this question in the absence of members of the jury panel.

At the hearing it was shown that at the April 1972 Session of the Superior Court, Judge Cowper, the then Presiding Judge, ordered the defendant returned to Cherry Hospital on the ground that he was suffering from mental illness to such an extent that he could not stand trial and could not assist counsel in the preparation of a satisfactory defense. Subsequently, on 12 September 1972, the defendant was returned by the hospital to the court for trial. The discharge summary, signed by Dr. Maynard, Director of Forensic Psychiatry at Cherry Hospital, stated that the defendant had paranoid schizophrenia but "medication has alleviated some of the more obvious manifestations of the disease."

The defendant then contended that a "drugged man" should not be put on trial. Dr. Maynard testified that the defendant was then suffering from paranoid schizophrenia but the disease had been "put in remission by means of drugs," that continued administration of the drug three times daily was necessary to keep the defendant's mental disease in a state of remission, there

being "no heal to schizophrenia." He further testified that, in his opinion, although the defendant had told him he did not remember any of his activities, the defendant, at the time of the pretrial hearing, was competent to stand trial, having the capacity to comprehend his position, understanding the nature and object of the proceedings against him and being able to cooperate with his counsel to the end that any available defense might be interposed. He further testified that, in his opinion, "on the date of the alleged offenses he did understand the nature and quality and wrongness of his actions," and did have "such recall of these offenses that he can intelligently discuss them with his counsel at this time." It was his opinion that the defendant "can recall what happened that night but he is going to tell his attorney he cannot."

In the opinion of Dr. Maynard, "If the defendant * * * went home as the result of this trial he would be a danger to himself and others if he did not take this medicine three times a day," but the defendant's mind was not dulled by the drug so administered, and he should continue to receive the drug three times a day during the course of the trial. (This was done, in the absence of the jury, throughout the trial.)

Dr. Ladislaw Peter, Superintendent of Cherry Hospital, testified at this pretrial hearing to the effect that, in his opinion, the defendant was suffering from paranoid schizophrenia, presently in partial remission due to treatment with psychiatric drugs in adequate doses. His evaluation of the disease was that, at the time of the alleged offense, the defendant "was not able to exercise his capacity to distinguish beween right and wrong;" that his delusional thinking centered around the idea that his wife had been or was unfaithful to him; that "*assuming* that as a result of his mental disorders he has formed in his mind a delusion as to what occurred and that's all he recalls about it, and *if* that delusion is based upon irrational thinking or irrational mental processes and that's all he has to communicate to his counsel," the defendant could not rationally participate in his defense of these charges. (Emphasis added.) Dr. Peter further testified that when the defendant, while his patient at Cherry Hospital, told him a story of intruders into his home tying up his family and killing them and attempting to kill the defendant, this was not a delusion but was an indication that "Now that he is aware of what he has done, his mind is working, he's in a desperate situation so to say and his mind worked out a defense for himself."

At the conclusion of the pretrial hearing the court found:

"The defendant is competent to understand the charges against him, the nature of the charges against him; that he is able to plead to the charges. He is competent to confer with his counsel, and the court, therefore, concludes as a matter of law that he is competent to stand trial."

The defendant thereupon entered pleas of not guilty to the several indictments and the trial proceeded. The evidence for the State was to the following effect:

On 1 December 1971, the defendant, his wife and the four small children were living in an apartment on Lincoln Drive in the City of Goldsboro, a fifth child, Boney, also less than six years of age, being temporarily with the defendant's mother in Kansas City. The defendant had previously expressed doubt that the children, other than Boney, were his. (The record discloses no basis for such doubt.)

On 1 December 1971, about 11 a.m. and again about 5 p.m., neighbors observed the defendant beating his wife and dragging her back into their apartment when she tried to flee. Following the morning episode, a neighbor heard Catherine in the house screaming and the sound of furniture being knocked over. At 7 p.m. another neighbor went to the door of the Cooper apartment and called the defendant, who did not open the door but said he could not see the neighbor then. All was then quiet in the apartment. Catherine and the four children were not seen alive by the neighbors after 5 p.m. All through the night the radio in the Cooper apartment played loudly.

At approximately 5 p.m. on 2 December 1971, the defendant, nervous, trembling and wet with perspiration, left the apartment, went to a neighbor's apartment and called a taxi, telling the neighbor, "Cat is sick." He left in the taxi and never returned. Thereafter, the neighbor knocked at the Cooper apartment door, which was locked, receiving no answer. The radio was still playing.

About 8 p.m. on 2 December, Sergeant Whaley of the Goldsboro Police Department, knowing nothing of any events at the Cooper apartment, observed the defendant in the locker room of a bowling alley, apparently quite nervous. He was wearing a house slipper on one foot and a laced shoe or boot on the other. He told the officer there was nothing wrong and that he

wanted to go home. The officer replied that he thought the defendant needed to see a doctor but offered to take him home. He patted the defendant down with his consent. He found no weapon but found strapped to the defendant's abdomen, under his clothing, a package, which the officer suspected to be three sticks of dynamite but which was later found to be three legs from a small table in the Cooper apartment. The defendant then appeared to Sergeant Whaley "to be in his right mind," but, at times, he would stop talking and would "just look out like he was staring in space."

Sergeant Whaley carried the defendant to the Wayne County Memorial Hospital for medical observation. The defendant was not then placed under arrest. He was taken to the emergency room and delivered into the care of a nurse. He was "nervous and shaky." The officer suspected that he might be "on drugs," but laboratory tests of body fluids, taken at the hospital, revealed no indication of drug use. He walked into the hospital examination room without assistance and was cooperative in being disrobed and examined. Except in the intermittent periods when he was shaking and staring off into space, he appeared to the officer to be in his right mind. He said, "Something has happened at the house," but did not say what had occurred there.

After the defendant had been taken to the hospital, another officer, Lieutenant Harvell, went to the Cooper apartment, arriving there about 8:30 p.m. Another officer and Catherine Cooper's mother were there. The apartment was locked but, by putting a small child through a window to open the door, they entered the apartment and found Catherine Cooper and the four small children dead. Each was bound with an electric appliance cord. The furniture and contents of the apartment were greatly disarrayed. The television screen, light switches and floor sockets were covered with masking tape. The bodies were in different places, partially or completely covered with bed clothing and other articles. One child's body was substantially stuffed into a pillow case.

Catherine died from a knife slash of her throat. Each child died from a severe skull fracture, inflicted in some instances with a baseball bat, in others with a hammer. Legs had been removed from a number of chairs and other articles of furniture and were scattered about the apartment. In the opinion of the County Medical Examiner, Catherine and the four children died

between 5:30 p.m. and 7:00 p.m. on 1 December 1971, shortly after the observed injuries were inflicted, and the bodies were tied up before death.

Meanwhile, the defendant was being examined and interviewed in the hospital emergency room by Nurses Bass and Johnson, Dr. Parmelee and Medical Attendant Williams in an effort to determine the nature of his difficulty. They knew nothing of what had occurred at the defendant's apartment. Before permitting Nurse Bass to testify as to statements made to her by the defendant, the court, in the absence of the jury, conduced a lengthy voir dire, at the conclusion of which the court found the defendant had not been placed under arrest at the time he made the statements in question; he had a sufficient understanding to apprehend the obligation of an oath, was capable of giving a correct account of the matters which he had seen or heard with respect to the deaths of his wife and children in the past 36 hours and made the statements in question, freely, voluntarily and understandingly. (The defendant was, of course, not under oath when making the statements to the hospital attendants.)

Thereupon, the court concluded that the statements to Nurse Bass and Williams were admissible in evidence and that the ends of justice required that they testify as to statements made by the defendant to them. The court further concluded that the ends of justice did not require that Dr. Parmelee testify to statements made by the defendant to him, or concerning specimens of body fluids taken from the defendant in the course of his examination of the defendant, these being privileged communications. However, in view of the ruling of the court concerning the statements made to Nurse Bass and Attendant Williams, the defendant withdrew his objections to evidence of the statements made by him to Dr. Parmelee and to evidence of the results of the examination of such specimens of body fluids.

Following the findings of the court at the conclusion of the voir dire, the jury returned to the courtroom and Nurse Bass testified before the jury that her conversation with the defendant in the emergency room of Wayne Memorial Hospital was initiated by him. No police officer was in the room and no officer had requested her to ask the defendant any question. The defendant asked her to call the police, saying, "Something awful is wrong at my house." She asked what he meant and he replied, "I have destroyed my wife and children." She asked,

"How did you destroy them?" He replied, "I beat them." He told Nurse Bass: "I was walking around like a normal man listening to the radio. Then I started dancing around like a wild man. I destroyed my family. The music gave me sensations which told me my family was people from the moon to kill me. I don't know why I did it. I don't understand. I destroyed my family. Somebody help me. I don't understand it." In the opinion of Nurse Bass, the defendant was in his right mind at the time he made all these statements to her. When he first entered the emergency room, he was shaking and looking from place to place and person to person. After about 15 minutes he began to talk without being led and was not shaking or staring out into space when he made the above statements.

Nurse Johnson testified that she also saw the defendant at the hospital on the night of 2 December. Nurse Johnson was of the opinion that the defendant then knew what he was doing and was able to know the difference between right and wrong. He was shaking but answered questions, knew where he was and knew that Johnson was a nurse.

Attendant Williams testified that when he was in the room with the defendant, he, being also a Vietnam veteran, talked to the defendant about the defendant's service in Vietnam. The defendant said that he needed help and in reply to Williams' inquiry as to why he needed help, the defendant said, "To try and make up for what I've done; maybe to make things right again." He told Williams he had destroyed his family, had killed his wife and child because of "sensations from the music going to his brain." The defendant also told Williams, "They [sic] wanted him to dress like an Indian and fight the Americans." Williams did not know the defendant's wife and children had been killed until the defendant so told him. While in the hospital, the defendant did not cause any disturbance or create any problems but cooperated with the hospital staff. In the opinion of Williams, the defendant knew right from wrong at the time they were talking.

Dr. Parmelee, the doctor on duty in the emergency room, testified that he examined and talked with the defendant and took samples of his body fluids. The defendant, at first, was nervous and upset about something to the point that it was difficult to establish communication, but after about 30 minutes he began to express himself and was doing so freely and of his own volition by the end of an hour. In the opinion of Dr. Parmelee,

he knew right from wrong. In the opinion of Dr. Parmelee, the defendant was suffering from paranoid schizophrenia and a paranoid schizophrenic is "not in his right mind when experiencing delusions." The first information Dr. Parmelee had as to people being dead at the defendant's home came to him from the defendant, who told the doctor that people from outer space were trying to kill him, that his children were from outer space and that he had killed his wife and children by means of a chain, knife, and strangulation. He then asked the doctor if he had done the right thing by killing his children.

In the opinion of Dr. Parmelee, assuming the killings occurred while the defendant was under a delusion that his children were from outer space, he nevertheless knew the difference between right and wrong and was able to control his behavior and adhere to the right. In the opinion of Dr. Parmelee, the method of the killings indicated preparation and not an attempt to escape from someone the defendant thought was attacking him and, though the defendant "heard voices" telling him he should kill his family, he was capable of feeling that these were wrong and he acted according to his own free will in killing his wife and children.

Captain Flores of the Goldsboro Police Department testified that he entered the room while the defendant was being treated and talked to by the hospital staff on the evening of 2 December and heard some of the foregoing statements. The defendant was not advised of the presence of Captain Flores or of the fact that he was a police officer. At that time no warrant had been issued.

Pursuant to the order of District Judge Nowell and upon the recommendation of Dr. Parmelee, the defendant was transferred to Cherry Hospital for psychiatric observation and care.

Dr. Eugene Maynard, Director of Forensic Psychiatry at Cherry Hospital, testified for the State, both on the above mentioned voir dire and before the jury. Dr. Ladislaw Peter, Superintendent of Cherry Hospital, testified on the voir dire but was not called as a witness before the jury either by the State or by the defendant. The testimony of Dr. Maynard before the jury was to the following effect:

It is possible for a paranoid schizophrenic to know the nature and quality of his act and to be able to distinguish right from wrong with reference thereto. A person who completely

believes imaginary voices are giving him directions to kill, like the person who receives such directions in reality, can choose an alternative. In Dr. Maynard's experience most paranoid schizophrenics select the correct alternative. In his opinion, "This defendant did have the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation." This opinion is based upon Dr. Maynard's study of the defendant's record, including the report of Dr. Parmelee concerning his examination of the defendant at Wayne Memorial Hospital on 2 December 1971 and the defendant's statements set forth in that report. In the opinion of Dr. Maynard, it would be entirely possible and probable that, due to the stress of what the defendant had done, he suffered "an acute schizophrenic episode" after he killed his wife and children. In the opinion of Dr. Maynard, these killings were planned and a person making such plans could distinguish between right and wrong at that time. Unreasonable fear and unreasonable suspicion are characteristics of schizophrenia. In many instances such unreasonable suspicion concerns the matter of fidelity of the spouse of the schizophrenic. In the opinion of Dr. Maynard, the defendant did not have to experience an "acute exacerbation" of his mental disease in order to commit the alleged crimes.

In Dr. Maynard's opinion, it is likely that, unless the defendant continues to receive the medication which he now receives (and received during the progress of the trial each day), an exacerbation of his disease will express itself in acts of violence to himself or to others, and "because of the mental disease from which this defendant is suffering he should not be free in society." An active schizophrenic process can well result in the commission of acts of violence over which the person who is mentally ill has no control.

Dr. Maynard's opinion as to the danger of the defendant to himself and society is based upon the doctor's being satisfied that the defendant committed the crimes for which he is under indictment. (The record discloses no objection to or motion to strike this testimony which was given under cross-examination by the defendant.) In Dr. Maynard's opinion, if the defendant, in fact, committed the offenses for which he was on trial, he did so "while in a state of active paranoid schizophrenia at which time he was dangerous to himself and to society." It is not his opinion that the defendant was then "having an acute exacerbation."

In reaching his opinion concerning the defendant, Dr. Maynard had access to and considered a discharge summary prepared by Dr. Peter, Dr. Maynard's superior at Cherry Hospital, when the defendant was sent back from that hospital to the court for trial on 2 March 1972. In that report, Dr. Peter stated that, in his opinion, "the defendant knows right from wrong but, at the time of the alleged offenses, was not able to apply his knowledge of right and wrong and the alleged offense was the product of his mental illness." Dr. Maynard does not agree with that opinion insofar as it relates to the defendant's ability to apply his knowledge of right and wrong and to the killings being products of the defendant's mental illness.

Dr. Maynard also had available and took into consideration an order signed by Superior Court Judge Cowper, on 12 April 1972, in which Judge Cowper concluded that the defendant was then suffering from mental illness to such an extent that he could not understand or assist counsel in the preparation of his defense and, therefore, ordered him re-committed to Cherry Hospital indefinitely for further treatment. Dr. Maynard, nevertheless, believes the defendant was then competent to stand trial. He also had available and took into account a report by Dr. Kim of the Veterans Hospital in Kansas City, where the defendant had been a patient until he left without permission, approximately two months before the offenses for which he was indicted. The report of Dr. Kim reflected a diagnosis of the defendant as a paranoid schizophrenic "able to cope with his affairs." The drug dosages administered by Dr. Maynard to the defendant at Cherry Hospital, and during the course of the trial, were not massive but were sufficient, when administered daily, to keep the defendant's illness in a state of "remission" despite the tensions of the trial.

The defendant offered no expert psychiatric witness. He did not testify himself but called as witnesses in his behalf his mother and Chief Renfrow, Captain Flores, and Major Gilstrap of the Goldsboro Police Department. Chief Renfrow and Captain Flores merely corroborated certain parts of his mother's testimony, and Major Gilstrap testified only that, on the night of 2 December, he concluded the condition of the defendant was such that a warrant should not then be served.

The defendant's mother testified to the effect that he had two tours of duty in Vietnam, being wounded on the second. The

defendant visited her at her home in Kansas City in August or September 1971, bringing with him his son, Boney, whom he left with his mother when the defendant, himself, returned to North Carolina some two months prior to the offenses for which he was indicted. Upon the defendant's arrival at his mother's home, he appeared very frightened and disturbed, telling her that someone was after him to kill him and the baby and insisting that she keep the house locked and dark. On several occasions he had her take him to the nearby Army Air Base in an effort to get transportation for him to Thailand, which he was never able to do. His stated purpose in going to Thailand was to keep "those people" from killing him. She did not think there were any people after him and she took him to the Veterans Hospital in Kansas City. On arrival there he thought some of the people in the waiting room were among the "people from outer space" and did not want to stay, so she took him back to her home.

Thereafter, he suggested that he go to the hospital and she took him back. He was admitted as a patient of Dr. Kim. In about 10 days he left the hospital without the doctor's permission and the following day flew to Washington hoping to be admitted to Walter Reed Hospital. He was not admitted to Walter Reed, or soon left, and returned to Goldsboro. After he left Kansas City, his mother telephoned Chief Renfrow in Goldsboro. She told him the defendant was sick and had left the hospital without the doctor's permission and requested the chief to lock him up because he was mentally disturbed. Chief Renfrow replied that he could not lock the defendant up because the defendant "hadn't done anything."

In the opinion of his mother, the defendant did not know right from wrong at the time he was in her home in Kansas City and he was not then "acting in his right mind." The defendant's mother and his wife got along well and never had any problem. His mother talked to his wife by telephone several times after he left Kansas City. None of the defendant's children was lighter in complexion than the defendant or his mother. The defendant, on one occasion, did tell his mother he was not sure that his second child (one of those killed) was his, but his mother refused to listen to any such observation and told him she did not want him to make any such statement as that to her. He did not ever do so again.

On the voir dire, conducted to determine the admissibility of the defendant's statements in Wayne Memorial Hospital on 2

December, Nurse Bass testified that in just three or four minutes after Cooper was undressed and put on the stretcher for examination, he began to talk. Over a period of 30 to 45 minutes he would talk for a few minutes normally and then would just lie on the stretcher shaking and staring out into space. Then again he would start talking. His statements began with his saying, "There's trouble at my house." When Nurse Bass asked what he meant, he said, "There's bad trouble at my house; somebody send the police." When she asked what kind of trouble, he said, "Something awful has happened; I have destroyed my family." When she asked, "What do you mean," he repeated the statement, and when she asked how he had destroyed his family, he said, "I beat them." The defendant seemed to comprehend what she was telling or asking and to know where he was. He cooperated with her. When he talked, he seemed "like a man in his right mind," "to know what was going on around him," and "could comprehend what he was saying." After he would talk for a few minutes, he would lie still and tremble and stare out into space and around the room. No police officer asked her to interrogate the defendant and she knew nothing of what had happened at the Cooper apartment. All of his statements were initiated by him. In her opinion, he was "in his right mind."

The testimony of Attendant Williams, on this voir dire, was essentially the same. In the absence of Nurse Bass from the room, Williams, just to make conversation, asked the defendant how he felt and he replied, "I need help." He was asked, "Why do you need help?" He replied, "For what I had [sic] done; to make up for what I done." When asked by Williams what he had done, he did not respond but began shaking and looking over the room. After a pause of about half a minute, Williams asked, "Albert can you tell me what you did?" The defendant replied, "I have killed my family." Williams asked no further questions and the defendant said nothing further to Williams.

Dr. Parmelee testified, on this voir dire, that he saw the defendant at the hospital about 8:30 p.m. on 2 December. During the first 20 minutes the defendant appeared highly agitated and withdrawn but was not in a "manic hyperactive state." After about 20 minutes, the defendant began to answer questions to the effect, "They're after me; they'll get you" and "trouble at home." For the next hour his thought processes seemed to clear up and he began to express himself clearly without direct questioning and to communicate in a rational manner. There was no

inducement by the police to Dr. Parmelee to initiate a conversation with the defendant.

The defendant told Dr. Parmelee there were "people dead at home," that he had killed them and had hit them repeatedly. Prior to this statement the doctor did not know there were dead people at the Cooper apartment. In the opinion of Dr. Parmelee, the defendant at this time "was oriented and knew and understood the meaning of what he was saying and responded normally to questions," and was capable of relating recent facts stored in his memory." In Dr. Parmelee's opinion, the defendant, at that time, "could distinguish right from wrong because he said he 'wanted to make things right,' " and he questioned the doctor repeatedly as to how the doctor felt about what he had done and if the defendant could make these things right again.

In Dr. Parmelee's opinion, the defendant was in condition freely and voluntarily to give permission for the withdrawal of body fluids from his body. This was done before the doctor had any discussion with the police and was for the purpose of possible medical diagnosis.

Dr. Parmalee's diagnosis was "schizophrenic reaction, paranoid type with homicidal expression." At the end of the interview, the defendant was not having delusions but was reporting to the doctor various delusions that he had had. In the opinion of Dr. Parmelee, when the defendant made the statement that he killed his wife and children, he did so freely, voluntarily and knowingly and was in control of his mental faculties and knew what he was saying. In stating to the doctor that his children were "from outer space," the defendant was reporting as an historical fact the way the defendant felt at a former time. In the opinion of Dr. Parmelee, the defendant "showed he knew right from wrong" at the time of their conversation in the hospital. He showed he had "some guilt feelings about what he had done" and was trying to find out "how he could set things right."

On this voir dire, Dr. Maynard, who did not see the defendant until a substantial time after these occurrences at Wayne Memorial Hospital, testified that he had reviewed the medical record of the defendant relating to his being in Wayne Memorial Hospital on the night of 2 December 1971 and, in his opinion, the defendant did have the ability to distinguish between the nature and quality of his acts and to distinguish between right

and wrong, though he was confused, disturbed, withdrawn, frightened, and at times out of contact with reality and at times in contact with reality. In his opinion, the defendant was in contact with reality when he was "verbalizing" at the Wayne Memorial Hospital on the night of 2 December and could have made the statements, quoted by Nurse Bass, freely, voluntarily and understandingly.

Dr. Peter testified on this voir dire that, in his opinion, the defendant has a mental disease known as paranoid schizophrenia which began in 1965 when he was in military service in Vietnam. In his opinion, if the defendant, while in Wayne Memorial Hospital, stated to Dr. Parmelee that people from outer space were trying to kill him, that his children were from outer space and he had killed his children and if he then asked Dr. Parmelee if he did the right thing by killing them, these statements would be a manifestation of his inability to distinguish right from wrong.

In the opinion of Dr. Peter, the defendant, at the time of the alleged offense, knew right from wrong, but due to the exacerbation of his illness, he was, at the time of the alleged offenses, not able to apply his knowledge of right and wrong; "as regards this particular offense he was not able to distinguish between right and wrong and adhere to the right." However, it was also Dr. Peter's opinion that, on the night of 2 December 1971, the defendant did have the mental ability to recall and relate to another person to the "historical fact" that he had killed his wife and four children, though he may not have known the full implication of his words.

Captain Flores of the Goldsboro Police Department testified on this voir dire that he went into the hosiptal room while the defendant was being examined and was talking with Nurse Bass, Attendant Williams and Dr. Parmelee. The defendant then seemed to be in a state of general confusion. He heard the above quoted statements by the defendant to these members of the hospital staff. He then suspected the defendant of having committed a crime and was present to watch the defendant and to see what the hospital was going to do with him, but he was not there for the purpose of making an arrest and it was never suggested to the defendant that he was under arrest. Captain Flores did not initiate or request any question put to the defendant during this period. (It was stipulated that no warrant was served on the defendant until after he was transported to the

Cherry Hospital for observation pursuant to an order of District Judge Nowell.)

Attorney General Robert Morgan and Assistant Attorney General Raymond W. Dew, Jr., for the State.

Herbert B. Hulse and George F. Taylor for defendant.

LAKE, Justice.

The defendant's contentions on this appeal are that the trial court erred: (1) In requiring the defendant to plead to the indictment and to stand trial thereon; (2) in admitting into evidence, over objection, the testimony of Nurse Bass, Attendant Williams and Dr. Parmelee concerning statements made by the defendant to them at the Wayne Memorial Hospital; (3) in denying the defendant's motion for a directed verdict of not guilty; and (4) in its instructions to the jury concerning insanity as a complete defense to the charges and in its failure to instruct the jury concerning the defendant's mental condition with reference to the matters of premeditation and deliberation. In all of these, the crucial factor is the defendant's mental capacity. The test of sufficient mental capacity in each of these areas is different from the test to be applied in the other three.

If there was no error in the trial court with reference to these matters, the imposition of the several sentences to imprisonment for life was proper, these offenses having been committed prior to our decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. The defendant concedes in his brief that his exceptions and assignments of error directed to the denial of his motion in arrest of judgment, to the denial of his motion to set aside the verdict and to the entering and signing of the judgments are formal and present no additional question for review. We turn, therefore, to a consideration of mental capacity as related to his four contentions.

[1-5] The test of a defendant's mental capacity to stand trial is whether he has, at the time of trial, the mental 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. *State v. Jones,* 278 N.C. 259, 179 S.E. 2d 433; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Sullivan,* 229 N.C. 251, 49 S.E. 2d 458; Strong,

N. C. Index 2d, Criminal Law, § 29; 21 AM. JUR. 2d, Criminal Law, § 65. When, as here, this question is properly raised before the defendant pleads to the indictment, it should be determined prior to the commencement of the trial, as was done in this instance. *State v. Propst, supra,* at page 69. It may be determined by the trial court with or without the aid of a jury. *State v. Propst, supra,* at page 68. When the court, as here, conducts the inquiry without a jury, the court's findings of fact, if supported by evidence, are conclusive on appeal. *State v. Squires,* 265 N.C. 388, 144 S.E. 2d 49. The fact that, at an earlier date, a judge had found the defendant was, at that time, lacking in capacity to stand trial does not prevent the same or a different judge from conducting another hearing and reaching a different conclusion at a later date. See, *State v. Midyette,* 270 N.C. 229, 154 S.E. 2d 66.

[6] In this instance, there was ample expert medical testimony to support the trial court's finding that the defendant was competent to plead to the charges against him and to stand trial. The fact that the defendant had to be given medication periodically during the trial, in order to prevent exacerbation of his mental illness by the tensions of the courtroom, does not require a finding that he was not competent to stand trial when, as here, the undisputed medical testimony is that the medication did not have the effect of dulling his mind and that the specified dosage was adequate to keep his mental illness in remission. Dr. Maynard testified that, in his opinion, the defendant, at the time the case was called for trial, had the capacity to comprehend his position, to understand the nature and object of the proceedings against him and to cooperate with his counsel to the end that any available defense might be interposed. He further testified that, in his opinion, the defendant, at the time the case was called for trial, had the capacity to remember what happened on the night of the alleged offenses and could intelligently discuss those events with his counsel, if he would. Under these circumstances, there was no error in requiring the defendant to plead to the indictments and to stand trial on the charges against him.

[7] The statements by the defendant to Nurse Bass, Dr. Parmelee and Attendant Williams in the emergency room of the Wayne Memorial Hospital were confessions that he had killed his wife and the four small children. "A confession is an acknowledgment in express words by the accused in a criminal case of the truth of the guilty fact charged or of some essential

part of it." Wigmore on Evidence, 3d Ed, § 821; *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193. At the time these confessions of the defendant were made, he was not in custody and was not under police interrogation. *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694, is inapplicable. Nevertheless, to be admissible in evidence against him, the confessions of the defendant to the hospital attendants must have been made voluntarily and understandingly. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1; *State v. Whittemore,* 255 N.C. 583, 122 S.E. 2d 396; *State v. Hamer, supra.*

[8] For a confession to have been made understandingly, the defendant, at the time of making it, must have had the requisite mental capacity. In *State v. Whittemore, supra,* at page 587, Justice Rodman, speaking for the Court, said: "If the accused has sufficient mental capacity to testify, he has sufficient mental capacity to confess." The test of the mental competency of a witness to testify is his capacity to understand and to relate, under the obligation of an oath, a fact which will assist the jury in determining the truth with respect to the ultimate facts at issue. Strong, N. C. Index 2d, Witnesses, § 1. The trial court's finding that a confession was voluntarily and understandingly made is conclusive on appeal if there is evidence in the record to support it. *State v. Fox,* 277 N.C. 1, 24, 175 S.E. 2d 561; *State v. Gray, supra.*

[9] In this instance, the trial judge found that, at the time the defendant made the statements in question, he had a sufficient understanding to apprehend the obligation of an oath, he was capable of giving a correct account of the matters which he had seen or heard with respect to the deaths of his wife and children and he made the statements in question freely, voluntarily and understandingly.

There was evidence that while the defendant was in the emergency examining room at Wayne Memorial Hospital he was, at frequent intervals, nervous and shaking and, from time to time, stared off into space. One who had, but a few hours previously, brutally killed his wife and four tiny children would naturally exhibit signs of nervousness and emotional stress. These manifestations by the defendant in the emergency room of the hospital fall far short of a conclusive demonstration of his lack of memory and understanding sufficient to make his confession inadmissible as a matter of law.

The attending physician, the nurse and the hospital attendant who heard the statements testified that, in his or her opinion, the defendant, when making them, was in his right mind, could comprehend what he was saying, responded normally to questions, knew and understood the meaning of what he was saying and was capable of relating recent facts stored in his memory. Dr. Maynard, the psychiatric expert who had the defendant in his care before and at the trial, testified that, in his opinion, the defendant was "in contact with reality" when he made these statements. All the evidence is that the statements were made spontaneously by the defendant to persons who knew nothing of and were not interrogating him about the subject matter of his statements prior to his making them. There was no error in the admission of the testimony concerning these confessions by the defendant.

G.S. 8-53 specifically authorizes the trial judge to compel disclosure of a statement otherwise within the physician-patient privilege when necessary to the proper administration of justice. The judge so found and ordered with respect to the statements made to Nurse Bass and Attendant Williams and, thereupon, the defendant withdrew his objection as to Dr. Parmalee's testimony.

[10] A motion for a directed verdict of not guilty has the same effect as a motion for judgment of nonsuit. *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817. On such motion the evidence for the State is taken to be true, conflicts and discrepancies therein are resolved in the State's favor and it is entitled to every reasonable inference which may be drawn from the evidence. *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679. The basis for the defendant's motion for a directed verdict of not guilty was that, at the time the alleged offenses were committed, the defendant was insane and, therefore, not criminally responsible. Obviously, the evidence was sufficient otherwise to require the submission to the jury of the charge of murder in the first degree in each case. There was evidence that each victim was bound before he or she was killed. Four of the victims were children six years of age and under. Each death was caused by a brutal assault. Brutality in a slaying is evidence of intent to kill, not, per se, a basis for finding the defendant insane. *State v. Reams,* 277 N.C. 391, 402, 178 S.E. 2d 65; *State v. Stanley,* 227 N.C. 650, 44 S.E. 2d 196; *State v. Bynum,* 175 N.C. 777, 783, 95 S.E. 101.

[11] Over and over again, this Court has said that the test of insanity as a defense to a criminal charge is the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. *State v. Humphrey,* 283 N.C. 570, 196 S.E. 2d 516; *State v. Jones, supra; State v. Benton,* 276 N.C. 641, 174 S.E. 2d 793; *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345, cert den., 396 U.S. 1024; *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, reversed on death penalty only, 403 U.S. 948; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802, reversed on another point, 392 U.S. 649; *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *State v. Swink,* 229 N.C. 123, 47 S.E. 2d 852. As Justice Branch, speaking for the Court, said in *State v. Humphrey, supra,* "North Carolina, as well as many other jurisdictions, has steadfastly refused to recognize the 'irresistible impulse doctrine' as a test of criminal responsibility."

In *State v. Duncan,* 244 N.C. 374, 93 S.E. 2d 421, Justice Parker, later Chief Justice, speaking for the Court, said:

> "To determine the issue as to whether the defendant was insane at the time of the alleged commission of the offense evidence tending to show the mental condition of the accused both before and after the commission of the act, as well as at the time of the act charged, is competent, provided the inquiry bears such relation to the person's condition of mind at the time of the alleged crime as to be worthy of consideration in respect thereto. It would be impracticable to limit the evidence to such condition at the exact time."

In *State v. Atkinson, supra,* at page 313, we said that a witness, who was an expert in the field of psychiatry, was competent to relate to the jury his opinion as to the defendant's knowledge of right and wrong at the time of the alleged offense even though the witness did not observe the defendant on the precise date of the alleged offense.

[12] In the present instance, Nurse Bass, who observed the defendant closely at the Wayne Memorial Hospital approximately 24 hours after his wife and children were killed, testified that, in her opinion, he then seemed to be in his right mind. In the opinion of Attendant Williams, the defendant knew right from wrong at the time they were talking; i.e., approximately 24 hours after the alleged offenses. In the opinion of Dr. Parmelee, who attended him in the emergency room, the defendant then knew right from wrong, although he was suffering then

from paranoid schizophrenia and, assuming that the killings occurred while the defendant was under a delusion that his children were from outer space, the defendant nevertheless knew the difference between right and wrong and was able to control his behavior and adhere to the right and he acted according to his own free will in killing his wife and children. Dr. Maynard, an expert psychiatrist, testified that the defendant did have the capacity to distinguish between right and wrong at the time of and in respect to the matter under investigation. In view of this evidence, it is clear that the question of the defendant's insanity, as a defense to the charges of murder, was for the jury under proper instructions by the court and the motion for a directed verdict of not guilty was properly overruled.

[13] The court's charge to the jury contained the following:

> "Now, in this case as to each of the bills of indictment you will be required to enter one of four verdicts. You can find the defendant guilty of first degree murder; you can find the defendant guilty of second degree murder; you can find the defendant not guilty by reason of insanity and you can find the, or you can find the defendant not guilty. That is you will have to consider five different bills of indictment, five different charges and enter one of those four verdicts as to each charge.
>
> [Here follow correct instructions as to the elements of first degree murder and second degree murder and the burden of proof with reference thereto.]
>
> "Now, the defendant has the burden of proving that he was insane. However, unlike the State which must prove the defendant's guilt beyond a reasonable doubt, the defendant must only prove his insanity to your satisfaction. Therefore, I charge that if you're satisfied from the evidence that the defendant at the time of the alleged crime, and as a result of a mental disease or defect, although intelligent, either did not know the nature and quality of his act or did not know that it was wrong, you must find him not guilty.
>
> * * *
>
> "Now, if on December 1, 1971, you should find and find beyond a reasonable doubt that the defendant did commit the acts which I've described for you: first degree

murder or as to second degree murder, if you are satisfied that on that date the defendant by reason of his mental disease or defect did not know the nature or quality of his act or did not know the difference between right and wrong at the time and in relation to the matters under investigation, then you would find the defendant not guilty by reason of insanity."

In these instructions we perceive no error. Where, as here, there is evidence justifying the submission to the jury of the question of insanity as a defense to the charge, we believe a better procedure would be to submit to the jury as the first issue for their consideration, "Was the defendant (at the time of the alleged offense), by reason of a defect of reason or disease of the mind, incapable of knowing the nature and quality of the act which he is charged with having committed, or if he did know this, was he, by reason of such defect or disease, incapable of distinguishing between right and wrong in relation to such act?" An affirmative answer to that issue would end the case. If the jury answers that issue in the negative, it should then proceed to determine the defendant's guilt or innocence of the offense charged just as if the defendant were a person of normal mental capacity. The failure to submit such an issue to the jury specifically, or to give it the priority here suggested, is not, however, ground for a new trial.

The defendant's final contention is that the court failed to charge the jury on all substantial features of the case arising on the evidence and failed to apply the law to the evidence.

[14] There was no error in the failure of the court to include in its recapitulation of the evidence the statement by Dr. Peter, contained in the discharge summary by which the defendant was returned by Cherry Hospital to the Superior Court for trial on 2 March 1972. Dr. Peter did not testify before the jury but Dr. Maynard, who did testify, said, on cross-examination by the defendant, that he, in arriving at his own expert opinion as to the ability of the defendant to distinguish right from wrong at the time of the alleged offenses, had available, and took into consideration, Dr. Peter's opinion as set forth in the discharge summary. That statement of Dr. Peter, put before the jury by the defendant's cross-examination of Dr. Maynard, was that the defendant knows right from wrong but "at the time of the alleged offense *was not able to apply his knowledge* of right and wrong and the alleged offense was the product of his mental

illness." (Emphasis added.) This was the expression of an opinion that the defendant, by reason of his mental disease, acted under an irresistible impulse, notwithstanding his ability to distinguish between right and wrong with reference to such act. Since an irresistible impulse is not a defense under the law of this State, as above noted, it was not error for the court to fail to refer to this statement by Dr. Peter in his recapitulation of the evidence.

[16] The defendant says the court also erred in its failure to instruct the jury that it should consider the evidence of the defendant's mental disease on the question of premeditation and deliberation.

[15] It is well established that to convict a defendant of murder in the first degree, when the killing was not perpetrated by one of the means specified by G.S. 14-17 and was not committed in the perpetration of or attempt to perpetrate a felony, the State must prove beyond a reasonable doubt that the killing was with premeditation and deliberation. G.S. 14-17; Strong, N. C. Index 2d, Homicide, § 4, and the numerous cases therein cited. It is also well established that a specific intent to kill is a necessary ingredient of premeditation and deliberation. *State v. Baldwin,* 276 N.C. 690, 700, 174 S.E. 2d 526; *State v. Robbins,* 275 N.C. 537, 169 S.E. 2d 858; *State v. Propst, supra,* at page 71. It follows, necessarily, that a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind, intoxication, as in *State v. Alston,* 214 N.C. 93, 197 S.E. 719, or some other cause. It does not follow, however, that there was reversible error of omission in the charge of the trial court in the present case.

[16] The jury, by its verdict, has established that the defendant, at the time of the alleged offenses, had the mental capacity to know right from wrong with reference to these acts. This distinguishes the present case from cases such as *State v. Alston, supra,* dealing with intoxication as a defense. That finding, supported as it is by ample evidence, is conclusive on appeal, irrespective of a contrary opinion by the defendant's mother and irrespective of inferences which might reasonably be drawn from the State's evidence as to the defendant's appearance and manner when first observed by the police officer and when being

examined in the emergency room of the Wayne Memorial Hospital.

We may take judicial notice of the well known fact that a dog, a wild animal or a completely savage, uncivilized man may have the mental capacity to intend to kill and patiently to stalk his prey for that purpose. The law, however, does not impose criminal responsibility upon one who has this level of mental capacity only. For criminal responsibility it requires that the accused have, at the time of the act, the higher mental ability to distinguish between right and wrong with reference to that act. It requires less mental ability to form a purpose to do an act than to determine its moral quality. The jury, by its verdict, has conclusively established that this defendant, at the time he killed his wife and the four little children, had this higher level of mental capacity. It necessarily follows that he had the lesser, included capacity. The jury also determined that he did, in fact, premeditate and deliberate upon the intended killings. It made these determinations in the light of proper instructions as to what constitutes premeditation and deliberation. Premeditation and deliberation do not require a long, sustained period of brooding. *State v. Fountain,* 282 N.C. 58, 70, 191 S.E. 2d 674; *State v. Reams, supra.*

No error.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

Chief Justice SHARP dissenting:

I concur in the majority's conclusion that the trial court correctly ruled: (1) that on 30 October 1972 defendant was competent to stand trial upon the five indictments which respectively charged him with the first degree murder of his wife Catherine and their four children, Pamela, aged six; Albert, Jr., aged five; Dawn, aged three; and Josephine, aged seven months; (2) that the statements which defendant made to hospital personnel in the emergency room on 2 December 1971 were admissible in evidence; and (3) that defendant's motion for a directed verdict of not guilty was properly overruled. I dissent from the holding that the judge correctly charged the jury with reference to insanity and mental disease as it bears upon an accused's guilt of murder in the first degree.

Plenary undisputed evidence established that on 1 December 1971, the date of the homicides for which defendant now stands convicted, he was *and had been* suffering from the diagnosed, serious mental disease of paranoid schizophrenia, which was then in a state of exacerbation. This evidence was for the jury's consideration in determining whether defendant *had proved to the satisfaction of the jury* that he was *insane* as defined by this Court and therefore completely exempt from criminal responsibility for the homicides of which he has been convicted. The trial judge purported to charge the jury to this effect. However, he failed to charge the jury that this evidence was also for consideration in determining whether *the State had* proved beyond a reasonable doubt the elements of specific intent to kill, after premeditation and deliberation, essential to conviction for murder in the *first* degree. In my judgment, defendant is entitled to a new trial for error of both commission and omission in the judge's instructions to the jury.

My views with reference to this case are those stated by former Chief Justice Bobbitt at the Fall Term 1974 in an opinion which was not adopted by the Court. With minor variations the statement of facts and propositions of law contained in this dissent are taken from that opinion, in which I concurred when it was tendered to the Court. In the main, the variations herein are necessary to make the phraseology of a majority opinion conform to that of a dissent and to set forth the facts, insofar as possible, in chronological order.

That the statement of facts in this dissent and in the majority opinion contain duplications is regrettable. However, consideration of the question whether the court should have instructed the jury to consider evidence of defendant's mental disease on the issue of premeditation and deliberation requires detailed consideration of the evidence relating to defendant's mental disease and his abnormal behavior which was characteristic of the disease. To indicate as clearly as possible the basis of the legal opinions herein expressed, in the facts set out below, I have endeavored to narrate defendant's story chronologically as it emerged from all the evidence.

Defendant was born on 14 August 1944. In September 1965, while in military service, he married his wife Catherine, who was 15 or 16 years old and a resident of Goldsboro. At that time she was expecting a child, which, defendant told his mother, was his.

In 1965, while defendant was on active duty in Vietnam, he experienced his first acute schizophrenic reaction and fired an M-16 rifle into a headquarters tent occupied by troops. He was sent by plane to Walter Reed Hospital in Washington, D. C. On 1 June 1966 he was returned to his unit in Vietnam. In 1968 he was in Womack Hospital at Fort Bragg for six months. There he "was diagnosed schizophrenia, and received a medical discharge from the service." In 1969 he returned to Goldsboro where he worked intermittently at various jobs. Frequently he "was out sick." In 1970 he was treated as an outpatient at Seymour Johnson Air Force Base Clinic.

In 1971 defendant, his wife, and their five children were living in Lincoln Homes, a low-rent housing project in Goldsboro. In July 1971 defendant's mother-in-law heard him tell Catherine that four of the five children were not his. (As noted in the majority opinion, nothing in the evidence substantiates defendant's belief that his wife was unfaithful.)

On or about 1 September 1971 defendant arrived at the home of his mother, Mrs. Suevonia Stewart, in Kansas City. With him was his four-year-old son, Suevonia (Boney), his mother's namesake. Two weeks before he had telephoned Mrs. Stewart four times in one day to tell her that he was coming. Upon his arrival defendant was "very frightened and disturbed." He "put the baby down," closed the door and a venetian blind, and said "that someone was after him to kill him and the baby; that he just did make it." He asked her to take him to Richard Gebur Air Base, saying: "There's a plane there that is going to take me directly to Thailand." He said he was going to Thailand "to keep those people from killing me. . . . I've got to get away fast before they get here." All of this conversation occurred within an hour or so after he arrived at Mrs. Stewart's house.

Defendant was so determined that she took him in her automobile to Richard Gebur Air Base. There they learned that no planes were "fixing to leave," and defendant said: "They must be gone; they are not coming back; we'll have to go back to the house and I'll make other arrangements." He was still very frightened when they got back home. He asked her not to turn on any lights, to make sure the doors were locked, and for all the family to stay in the same room. No one went to bed that night. She slept in a chair, holding the baby in her lap. Her younger daughter sat by her. Defendant sat across from them

and said, "[d]on't make a sound because those people are all around the house." She knew he was sick and tried in every way to comfort and reassure him. She told him her dog would bark if anyone came around the house; that no one was going to bother him. She "kept talking to him this way all night and finally got him kind of calmed down."

There were other nights when he could not sleep. He would not stay in a room by himself but stayed with his mother. He was afraid "something or some people from outer space were coming." One night he reported to his mother that [they] came after [him] and they wanted to talk to [him]" but that he refused to talk to them at night. Another night when Mrs. Stewart woke up, defendant was sitting over her, staring down on her "wildly and frightened looking." At that time she had the feeling he was about to harm her. When she asked what was wrong, he replied: "You've suffered so much in raising us up; now you still have to go to work." His mother explained that she was happy; that she still had her health and strength and was self-supporting; that she thanked God for letting her raise her children, and that she hoped he would raise his in the manner she had raised him.

She took him to the airport at least three more times because he kept insisting that a plane was supposed to take him to Vietnam. He was "in such a state of mind and such a rage" that she "saw no other way but to put him in the car and carry him out there."

Defendant did not leave the home alone. Although employed, Mrs. Stewart did not go to work regularly because defendant would cry like a small child and beg her not to leave because he was afraid to stay at home. On the days she worked, she would leave Boney with a neighbor in the same apartment.

About a week after his arrival, Mrs. Stewart first took defendant to the Veterans Hospital in Kansas City, but he became frightened and would not stay. He said the people in the waiting room were some of the "people from outer space." He returned to his mother's apartment where he stayed until, at his request, he was admitted to this hospital on September 17. His medical history at that time shows he was under the delusion he was being controlled by a cat. There he was rediagnosed "schizophrenia, paranoid type."

His mother saw him frequently while he was a patient in the hospital. After he had been in the hospital about fourteen days, he called her to come for him. She did not go because a nurse also called and asked her not to come. However, upon her return from a trip to a grocery store, she found defendant at her home. He had taken "unauthorized leave" from the hospital because (he said) he wanted "to go to Walter Reed where [he could] be near Catherine and the children." The next morning, 30 September 1971, she took him to the airport where he obtained passage to Washington on a military flight. Defendant left the child Boney with his mother. He had previously told her he had brought that child with him because Boney was the only one who could help him; that Boney took care of him.

In Washington, Walter Reed Hospital refused to admit him but referred him to a VA Hospital there. However, nothing in the record suggests that he attempted to secure admission to this hospital.

When Mrs. Stewart learned by a telephone call to Walter Reed Hospital that defendant was not there, she made two calls to Goldsboro, one to Goldsboro's Chief of Police, Roy Renfro, and the other to Mary Jane Harper, the occupant of the apartment adjoining defendant's. She told Chief Renfro to watch out for defendant; that he was mentally disturbed; that he had left the hospital without the doctor's permission and to lock him up "if there was anything wrong." Renfro promised to call Catherine and let her know defendant was on his way home, but told her "he couldn't lock Albert up because Albert hadn't done anything."

Mrs. Harper testified that Mrs. Stewart told her she thought defendant was "on his way back home and if he comes there and you hear anything over there you call the police. I've already called the police there, and I'm telling you and I have wrote Catherine a letter because I told him all of those children could not be light." According to Mrs. Harper, all the children were light like defendant and his mother except the little boy, Albert, Jr., who was darker like Catherine.

Two days later when Mrs. Stewart reached defendant by telephone, he told her that because Walter Reed did not have a bed for him he "had come home"; that "he and Catherine had made everything all right and he wanted to come back to Kansas City and buy a home." Thereafter Mrs. Stewart talked with

Catherine, with whom she "had a wonderful relationship," more often than with Albert. Her last conversation with Catherine "was about a week before December 1, 1971."

Mrs. Stewart testified that none of the children had a lighter complexion than either defendant or herself; that defendant "never told [her] that none of the children were his except the one he brought out to Kansas City"; that he did say "he wasn't sure about Albert, Jr., his second child." She reprimanded him and refused to "listen to that conversation." She told him she "didn't want him being like so many other young men. They wait, they love their wife to death until they get pregnant and then they want to deny their children." Thereafter, defendant made no other statement to her "about not being the father of any of the other children."

Mrs. Stewart's testimony on direct examination concludes as follows: Based upon her observations of defendant during the entire time he was visiting her in Kansas City—before he went to the VA Hospital there, while he was in the VA Hospital, and after he left the VA Hospital—it is her opinion that he "didn't know right from wrong at that time . . . that he was not acting in his right mind . . . that he was insane."

In October 1971 and thereafter defendant went to Seymour Johnson Air Force Base Clinic at Goldsboro several times. Being on "temporary retirement," he was entitled to and did receive medications at this clinic. However, because of his continued failure to keep appointments, the clinic refused to give him any more time. In the opinion of Dr. Ladislaw Peter, the psychiatrist who is the Superintendent of Cherry Hospital, defendant's condition "was getting gradually worse and worse" after his return to Goldsboro in October 1971.

On Wednesday, 1 December 1971, between 11 and 11:30 a.m., George Uzell, a neighbor, saw Catherine run from the Cooper apartment. Defendant caught her, threw her to the ground, beat her with his fists, and pulled her back into the apartment. Shortly thereafter, Uzell heard "some screams" and noises "like somebody knocking over furniture or something." He figured it was "a family problem" and did nothing to help Mrs. Cooper. Nor did he call the police. About 5 p.m. Catherine ran from her apartment to the front door of Mrs. Harper's apartment. When Mrs. Harper went to the door defendant pulled Catherine back, threw her down on the ground, and was "mashing her in the

bosom." Catherine called out, "Miss Mary, call the police," and defendant said, "Yes, Miss Mary, call the police and call the rescue squad." Mrs. Harper requested the operator to send the police to her address, and the operator said, "all right." When she went back to the door, neither Catherine nor defendant was in sight. The police never came to Mrs. Harper's house. About 7 p.m. Mrs. Harper knocked on the door of the Cooper apartment. When she identified herself, defendant said, "Miss Mary, I can't see you now." At that time she heard no sound in the apartment. The radio in the Cooper apartment, "one of those stereos," played all during the night of December 1.

The radio was still playing on Thursday, December 2, about 5 p.m. when defendant came over to the Harper apartment, and called a cab. At that time he "was nervous and trembling and real wet with perspiration." As he turned to go, he said, "Cat is sick." When Mrs. Harper asked for details, defendant did not answer. The cab arrived, defendant went back into *his* apartment, got his coat, and left in the cab. About 7 p.m. Mrs. Harper went to the Cooper apartment. No one answered her knock and the door was locked. She then called Mrs. Jackson, Catherine's mother, to come over and check on Catherine, that defendant had said she was sick. When Mrs. Jackson and her sons arrived at the Cooper apartment, they were met by a policeman. (A description of the situation they found in the Cooper apartment is deferred.)

Nothing in the evidence discloses the whereabouts or activity of defendant on December 2 from 5 p.m. until about 8 p.m. when Sergeant Whaley of the Goldsboro police force found him in the locker room of a bowling alley after having been advised of the presence of a sick person there. Defendant appeared to be "in a nervous condition." He had "a slipper on one foot and a shoe on the other." Although defendant insisted that "nothing was wrong," Whaley thought he needed to see a doctor and asked if he could take him to the hospital. Defendant said, "No, I want to go home, that's what I want to do." Asked if he "had a knife or anything on him," defendant replied, "No," and gave Whaley permission to "pat him down." Whaley found no knife but felt something on defendant's stomach which defendant referred to as "a package." He told Whaley he could not see the "package," that he was going to deliver it on Lincoln Drive. Whaley, apprehensive that the package contained sticks of dynamite, telephoned Lieutenant Harvell to

meet him at Jefferson and Ash Streets. Defendant got into the car "of his own free will and accord" after Whaley told him he "was going to take him home." Whaley drove to the intersection and was met by Harvell, who had known defendant. At Harvell's request, defendant opened his shirt. Three table legs were taped to his stomach. Defendant ripped off the tape and the table legs were removed. Each was about an inch in diameter and about eleven or twelve inches long.

Leaving Harvell, Whaley took defendant to the Wayne County Memorial Hospital between 8 and 8:30 p.m. Upon arrival, defendant "was nervous and shaking." Every once in a while he "would just shake all over." During the time defendant was in the hospital, he was not under arrest. Whaley took him there to find out what was wrong with him. He thought defendant "might be on drugs or something like that." Whaley observed defendant during six or eight periods of shaking; Harvell, during two. According to Harvell, "Overall, taking his overall behavior, he acted like a man not in his right mind." When he was shaking and staring into space, he did not appear to be in his right mind. At other times he did. After defendant was received in the emergency room, Whaley had no further conversation or contact with defendant, but he observed him occasionally through the open door to the room in which he had been placed.

In the emergency room defendant told Mrs. Bass, the nurse in charge, that he needed help. He told her to "call the police"; that "something awful is wrong at my house"; that "he had destroyed his wife and children"; that he "beat them." When Mrs. Bass talked to defendant, "he acted relaxed at times; at times he was shaking almost over his entire body and was staring about in the room." In the treatment room, he looked "place to place and from person to person" for ten to fifteen minutes. On more than one occasion, defendant said, "I don't understand; I don't know why I did it." When questioned, he "started shaking and looking from place to place again."

Defendant also made these statements to Mrs. Bass: "I was walking around like a normal man listening to the radio. Then I started dancing around like a wild man. I destroyed my family. . . . The music gave me sensations which told me my family was people from the moon to kill me." All during the time defendant was in the emergency room (almost three hours) he "was in certain intervals shaking, and glancing from place to place."

Defendant's statements to Mrs. Bass were "in sketches sort of" over a period of 30 to 45 minutes.

About 9 p.m. when Isaiah Williams, Jr., a medical attendant, asked him how he was feeling, defendant said he did not know and "started trembling and shaking and looking all around the room." Later, defendant told him he needed help to try to make up for what he had done, "maybe to make things right again"; that he had killed his wife and children; that the reason he did it "was sensations from the music going to his brain."

During Williams's first conversation with defendant on December 2, defendant "talked only as if he was in a total state of confusion and he knew nothing that had happened." He was in a nervous state, shaking, trembling, and looking all about the room, and reeling off, "I need help; I need help; I need help." After an hour or two Williams thought defendant seemed a little calmer, but he was still trembling as from fright. In answer to Williams's questions as to why he did it, defendant said, "It was sensations going to my brain, music from the radio giving these sensations." At one point defendant said that "they wanted him to dress like an Indian and fight the Americans." After making this statement, defendant dropped back into his confused state and did not respond to Williams again.

Dr. Warren Parmelee, the physician on duty in the emergency ward, is a medical doctor who had had "some studies in psychiatry." He attended defendant for about an hour and a half on the night of December 2. He testified that at first defendant was so nervous and upset it was difficult to communicate with him, but after 20 or 30 minutes he began to make such statements as, "They're after me . . . they will get you . . . trouble at home." Later he expressed himself in more complex phrases. He said, "There is someone dead at home and the police should check." At the end of an hour he was reporting that he had killed his wife and children because they were from outer space. At one time when the hospital radio ceased to play music and began a news broadcast, defendant told Dr. Parmalee that "those voices" were telling him to kill Dr. Parmelee. He was very disturbed by those voices. It was Dr. Parmelee's opinion, and he so advised the police officers, that defendant "should not be sent to jail and confined"; that he should be put in Cherry Hospital with maximum security. Dr. Parmelee diagnosed defendant's condition as schizophrenic reaction, paranoid type, with homicidal expression.

During the late hours of 2 December 1971, Chief District Court Judge Nowell signed an order "that Albert Cooper be confined to Cherry Hospital for a period of sixty days for the purpose of undergoing psychiatric examination." After having remained in the Wayne County Memorial Hospital "some four hours," defendant was taken on a stretcher in a rescue squad truck to Cherry Hospital. Whaley and Captain Flores followed the truck in a police car. Harvell went to defendant's apartment.

When Lieutenant Harvell arrived at defendant's apartment at approximately 8:30 p.m., he found Officer Isler, Mrs. Jackson, and her sons outside. The doors were locked, and no one had entered. Harvell helped Mrs. Jackson's young son through a window, and he opened the front door. Upon entering the apartment, the group came upon a scene of death and destruction, described in part as follows:

The apartment "was in a total and complete disarray." The tables were turned over; legs were off of chairs and couches; and contents of drawers and closets were scattered around the house. Three legs missing from one of the tables were those defendant had on his person when Whaley found him in the bowling alley at 8 p.m. Bedclothes covered some of the victims. Albert, the five-year-old, had been put in a pillowcase, "head and all," and was completely covered. In the living room, music was playing very loud; the television was not turned on. The front of the television was covered with masking tape. The light sockets and light switches were also taped. The bodies of Catherine and Pamela were in the living room. Albert's body was near a closet. The body of Dawn, the three-year-old, was in the kitchen. The body of Josephine, the baby, was in the bathroom. All were dead, their hands tied behind them, principally with electric cords.

Dr. Jack Newton Drummond, Medical Examiner for Wayne County, joined the police at the Cooper apartment at 8:40 p.m. on December 2. In Dr. Drummond's opinion, Catherine bled to death from severed arteries and veins in her neck; Pamela died of a skull fracture, probably inflicted by a baseball bat; and Albert, Dawn, and Josephine died of skull fractures, probably inflicted by a hammer. It was his further opinion that all the victims had been dead "one and a half to three hours" when he examined the bodies; that all of them "were within the same state of rigor mortis."

Dr. Drummond testified that he found in the bathroom of the apartment "a bloody butcher knife on the floor, a hammer and a baseball bat bloody"; that "[t]here was a large puddle of blood on the carpet extending from under [Catherine's] neck and head," and that he observed there "were socks on [Catherine's] hands"; that he found a radio in the refrigerator and records in the washing machine. Dr. Drummond "couldn't say either way as to whether a person who would create the condition or situation as existed in the Cooper apartment on the night in question [was] a person who did not know right from wrong at the time that this took place." All he could say was that the mental condition of the person who did this was "severely disturbed."

Defendant was admitted to Cherry Hospital on the morning of 3 December 1971 in such a state of agitation that he was put under heavy sedation. He was disoriented except as to place and person, suffering severe thought disorders, and admitting to both auditory and visual hallucinations. Dr. Ladislaw Peter, who was then assistant superintendent of the hospital and regional director for forensic psychiatry and attendant for the forensic unit, examined him on December 4 and thereafter.

On 9 March 1972 Dr. Peter reported to the court that "due to treatment with psychiatric drugs in adequate doses" defendant's disease, paranoid schizophrenia, was presently in partial remission, and that he was able to stand trial.

At April 1972 Session Judge Cowper conducted a hearing to determine whether defendant had sufficient mental capacity to plead to the bill of indictment and conduct a rational defense. After hearing the testimony of Dr. Peter and statements by defendant's court-appointed counsel, Judge Cowper found as a fact that at time defendant was suffering from mental disease to such an extent that he could not stand trial or assist counsel in the preparation of his defense. Judge Cowper ordered that defendant "be recommitted [to Cherry Hospital] to remain indefinitely and to receive treatment."

In an order dated 9 August 1972, signed by Judge Fountain, provided for the return of defendant from Wayne County jail to Cherry Hospital. The record does not show the circumstances leading up to the entry of this order.

Pursuant to a report and discharge summary from Cherry Hospital, signed by Dr. Eugene V. Maynard, Director of the

Forensic Psychiatric Unit at Cherry Hospital, dated 12 September 1972, defendant was taken from Cherry Hospital to the Wayne County jail. Later he was returned to the Cherry Hospital for "substantial" medication, having regressed while in jail awaiting trial.

Pursuant to a discharge dated 5 October 1972, defendant was sent from Cherry Hospital to the Wayne County jail. However, the record shows that he was recommitted to Cherry Hospital on 9 October 1972 by order of Judge Fountain. The record does not disclose the circumstances leading up to the entry of this order.

There was no further discharge of defendant from Cherry Hospital. He was classified there "as a boarder only." During the trial at 30 October 1972 Session, defendant was transported daily between the courthouse and Cherry Hospital and received medication at the hospital given under Dr. Maynard's supervision.

At 30 October 1972 Session, before pleading, defendant's counsel again raised the question and asked for a determination of whether defendant was then capable of pleading to the indictment and of conducting a rational defense. To determine this question, Judge Webb conducted a *voir dire* hearing. The evidence consisted of the testimony of Dr. Peter, who was then the Superintendent of Cherry Hospital, and of Dr. Maynard. Reports previously submitted by each of these psychiatrists were also in evidence. Both agreed that defendant was then able to stand trial, and Judge Webb so found.

In addition to the *voir dire* to determine defendant's competency to stand trial, Judge Webb also heard evidence to determine whether defendant's statements to personnel at the Wayne County Hospital on the night of 2 December 1971 were admissible in evidence. Dr. Peter, Dr. Maynard, and Dr. Parmelee testified on this second *voir dire*. Dr. Maynard and Dr. Parmalee also testified before the jury. Dr. Peter, however, did not. The record offers no explanation why the defense failed to call him as a witness.

The doctors all agreed that defendant had been and was then suffering from paranoid schizophrenia. In brief summary their descriptions of the characteristics and symptoms of this serious mental disease are narrated below.

According to Dr. Maynard: "Paranoid schizophrenia is a mental disease of psychotic depth, that is, of insanity depth. . . . Psychosis simply that the mental functioning of an individual is so impaired as to prevent his meeting the everyday problems of life in an external environment." Paranoid schizophrenia "is characterized by disorders of thinking, behavior and emotional feeling, often manifested by hallucinations and delusional thinking." It is characterized by periods of exacerbation and of remission. Exacerbation is an acute schizophrenic episode in which there may be "a complete disorganization of a personality." Although "[t]here is no heal to schizophrenia," the disease may be kept in remission by tranquilizing drugs.

According to Dr. Peter: Schizophrenia is characterized by an estrangement of the individual from reality which is sometimes complete. Paranoid means that a person has false ideas, delusions, such as delusions of grandeur and of morbid fears of persecution. There is usually no factual basis for the suspicions of a person who is paranoid, but he cannot be shaken from his delusions by any argument or reason. A paranoid schizophrenic has symptoms of two separate mental disorders simultaneously. A worsening of the condition creates a relapse or exacerbation of the disease. Paranoid schizophrenia is in remission when under control by drugs.

According to Dr. Parmelee: Hallucination is a sensory perception; it is something a person hears, smells, feels, or sees which does not really exist. A delusion is the interpretation of a situation contrary to what is actually happening. A paranoid schizophrenic who is experiencing either delusions or hallucinations is at that time out of contact with reality and is not in his right mind.

The testimony summarized below reveals the divergent views of Dr. Peter and Dr. Maynard, the two psychiatrists, and the views of Dr. Parmelee, a medical doctor, with reference to defendant's mental condition at the time of the homicides and during the time he was in the Wayne County Hospital on December 2.

Dr. Peter, who first saw defendant three days after the homicides, testified that he had "examined him, his background, his medical records, and everything pertinent to his psychiatric evaluation"; that in his opinion "at the time of the alleged offense he [defendant] was not able to exercise his capacity to

distinguish between right and wrong"; that when a person suffering from paranoid schizophrenia is experiencing either auditory or visual hallucinations he is in a state of relapse, and is less able to distinguish between right and wrong and to understand the nature and consequences of his actions. "It is possible that he knows the nature and character of his act but is not able to distinguish between right and wrong with reference to it. Based on the testimony of the Wayne County Hospital personnel who saw defendant on the night of December 2, Dr. Peter formed the opinion "that at that time he [defendant] was out of contact with reality."

On *voir dire* Dr. Peter said: "I am familiar with the M'Naghten rules under the legal concept of insanity. In my opinion on the date that this offense was committed the defendant, because of his mental disease, was unable to decide at that point, apply the rule of right and wrong in this particular case. In my opinion as regards this particular offense he was not able to distinguish between right and wrong and adhere to the right."

Dr. Maynard, basing his evaluation of defendant upon Dr. Parmelee's report, hospital records, information from members of the staff, his personal examination and observation of him since 1 June 1972, and other testimony in the case with reference to defendant's conduct before and after the killings, made the following statements upon *voir dire* and before the jury:

"I could not give an answer as to whether he was suffering from the disease [paranoid schizophrenia] on the date of the alleged offense. The disease is one of remission and exacerbation. In my opinion on the date of the alleged offenses he did understand the nature and quality and wrongness of his actions.

"I have examined Dr. Peter's report in which he stated that it was [his] opinion that due to exacerbation of his longstanding mental illness, the defendant at the time of the alleged offense was not able to apply his knowledge of right and wrong and that the alleged offense was the product of his mental illness. I do not agree with that conclusion. Dr. Peter is my superior at Cherry Hospital."

"It is a frequent thing for psychiatrists to disagree on diagnosis on the same facts and in this case there actually was a disagreement between myself who first saw the defendant in

June 1972 at which time I had been a psychiatrist for a month and the opinion of Dr. Peter who at the time was acting superintendent of Cherry Hospital and had been a psychiatrist for 32 years."

"If a person completely believes what imaginary voices are telling him [kill or be killed], he can choose the alternative of being killed." Dr. Maynard added that, in deciding upon a course of behavior, every person "is presented with alternatives whether he is hallucinating or whether he is not hallucinating"; that it has been his "experience with paranoid schizophrenics that most of them select the correct alternatives."

Dr. Maynard also testified that in his "psychiatric opinion," defendant should not go free in society; that most persons suffering with paranoid schizophrenia resist medications; that defendant's disease was in remission because of drugs, the continued use of which is essential to keep the disease in remission; that if defendant should be returned to uncontrolled living in his community where he is not properly supervised and medicated it is likely he could commit acts just as violent as those charged in this case; that, in the event of his acquittal, he should be recommitted to Cherry Hospital to protect himself and society "from a possible regression to an active schizophrenic process"; that "an active schizophrenic process can well result in the commission of acts of violence over which the person who is mentally ill has no control."

In the opinion of Dr. Parmelee a person can be out of touch with reality and simultaneously know right from wrong. He testified: "[I]t is true that as far as he [defendant] was concerned there were voices telling him that his family were from outer space and that he was going to be attacked by them . . . yet he was capable of feeling that these were wrong, and I feel that in my opinion he acted according to his own free will in committing these crimes . . . . I would say that if you and I are told to do something we know better than to do it. I am not suffering from any severe mental disorders to my knowledge. I feel that my response to a command that was completely unreasonable could be judged under the same context as Albert Cooper's response even though he was suffering from an exacerbation of his disease. I feel that he is still just as capable of refusing to commit an immoral act as a person not suffering from the disease."

The foregoing resumes make it quite clear that, despite their conflicting opinions as to whether defendant had mental capacity to understand what he was doing at the time of the homicides and, if he did, to know what he was doing was wrong, the doctors all agreed that defendant was the victim of a serious mental disease.

In this case, upon each of the five bills of indictment, the State asked for a verdict of guilty of murder in the first degree as a "willful, deliberate and premeditated killing" within the meaning of G.S. 14-17.

In his charge to the jury, after defining each of the elements of first degree murder and of second degree murder, the judge gave instuctions that the burden of proof was on the State to satisfy the jury from the evidence beyond a reasonable doubt of every element of the crime before they could find defendant guilty of such crime.

With reference to insanity as a complete defense, the court instructed that the burden of proof was on the defendant to prove to the satisfaction of the jury that he was insane when the alleged crime was committed.

In accord with the indicated prior instructions, near the conclusion of the charge, the court instructed the jury as follows:

" . . . [I]f you find from the evidence and beyond a reasonable doubt that on or about December 1, 1971, Albert Cooper intentionally and without justification or excuse used either a knife, baseball bat or hammer or any other thing as a deadly weapon thereby proximately . . . causing the victim's death, and that Albert Cooper intended to kill the victim, and that he acted with malice and premeditation and deliberation, it would be your duty to return a verdict of guilty of first degree murder; however, if you do not so find or have a reasonable doubt as to one or more of these things you will not return a verdict of guilty of first degree murder.

"Now, if you do not find the defendant guilty of first degree murder in any of the bills of indictment you must determine whether he is guilty of second degree murder . . . . If you find from the evidence and beyond a reasonable doubt that on or about December 1, 1971, Albert Cooper intentionally and with malice and without justification or excuse and using either

a knife, baseball bat or hammer or any other object as a deadly weapon and attacked the victims, thereby causing the victim's death, nothing else appearing, it would be your duty to return a verdict of second degree murder; however, if you do not so find or have a reasonable doubt as to one or more of these things you will not return a verdict of second degree murder.

"Now, if on December 1, 1971, you should find and find beyond a reasonable doubt that the defendant did commit the acts which I've described for you: first degree murder or as [sic] to second degree murder, if you are satisfied that on that date the defendant by reason of his mental disease or defect did not know the nature or quality of his act or did not know the difference between right and wrong at the time and in relation to the matters under investigation, then you would find the defendant not guilty by reason of insanity.

"On the other hand if you should not be satisfied beyond a reasonable doubt as to any of the things necessary to find the defendant guilty of either first degree murder or second degree murder, then you should find the defendant not guilty."

In order to form a specific intent to kill, after premeditation and deliberation, one must have the required mental capacity. A person who is *legally* insane is devoid of such mental capacity. The instructions place upon the State the burden of establishing beyond a reasonable doubt defendant's specific intent, after premeditation and deliberation, to kill the deceased. They place upon defendant the burden of establishing to the satisfaction of the jury that defendant was *legally* insane. These instructions are in conflict. To instruct the jurors to return a verdict of guilty of murder in the first degree if the State has satisfied them beyond a reasonable doubt that defendant intentionally killed the deceased after premeditation and deliberation but *not* if defendant has satisfied them that he was legally insane, is illogical and can only lead to confusion.

When insanity is pleaded as a complete defense to the charge of murder in the first degree, in which proof of a "willful, deliberate and premeditated killing" is essential, and the commission of the homicide by defendant is judicially admitted, the first issue is whether, *by reason of his insanity,* defendant is not guilty of the crime charged or of any lesser included criminal offense. If the jury finds that defendant was insane,

the prosecution fails completely and further consideration becomes unnecessary.

In the absence of a judicial admission that defendant committed the homicide, it would be appropriate to submit as the first issue an issue worded substantially as follows: "Did the defendant kill the deceased?" The burden of proof rests upon the State to establish beyond a reasonable doubt the affirmative of such issue. A negative answer would end the case. If answered in the affirmative, the jury would consider a second issue worded substantially as follows: "If so, was defendant insane when the killing occurred?" Upon this issue, the defendant would have the burden of proving to the satisfaction of the jury that this issue should be answered "Yes". An affirmative answer to this issue would end the case. If answered in the negative, instructions appropriate to a prosecution in which insanity is not pleaded as a complete defense would be applicable.

In this jurisdiction, there has been no requirement that a defendant specially plead insanity as an affirmative defense. In *State v. Potts,* 100 N.C. 457, 460, 6 S.E. 657, 658 (1888), the defendant, when arraigned, answered: "I admit the killing, but was insane at the time of the commission thereof; therefore, not guilty." The trial judged rejected as irrelevant and surplusage all portions of tendered plea execpt the words "not guilty." Holding this ruling "was entirely proper," this Court stated that, under the plea of not guilty, "every defense to the charge, in repelling, or mitigating and reducing the offense to a lower grade, was admissible." *Accord, State v. Nall,* 211 N.C. 61, 188 S.E. 637 (1936), which quotes with approval the above statement in *Potts.*

In *Nall,* the defendant, when arraigned, entered a general plea of not guilty. After testifying that the fatal shot was fired by another person, the defendant, through counsel, announced to the court that he pleaded insanity, his plea of not guilty being based "first, upon the ground that he did not commit the act, and, second, upon the ground that if the jury should find he committed the act, that he was not responsible for the reason that he was insane." *Cf. State v. Sandlin,* 156 N.C. 624, 626, 72 S.E. 203, 204 (1911).

Nall is cited in *State v. Johnson,* 256 N.C. 449, 452, 124 S.E. 2d 126, 128 (1962), but solely with reference to rulings on evidence.

There is no reason why a defendant may not enter simultaneously a general plea of not guilty and a plea of not guilty by reason of insanity. A plea of not guilty by reason of insanity does not *per se* constitute an admission of any of the elements necessary to be established by the State beyond a reasonable doubt as a prerequisite to a verdict of guilty. But *cf. State v. Bowser,* 214 N.C. 249, 254, 199 S.E. 31, 34 (1938), in which the decisions cited do not seem to support certain of the statements in the opinion.

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." (Our italics.) Subsequent decisions of this Court are in strict accord: *See State v. Potter,* 285 N.C. 238, 249, 204 S.E. 2d 649, 656-57 (1974), and cases cited.

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 conditions 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.

Prior to the enactment of Chapter 85, Public Laws of 1893, our statute relating to murder and its punishment provided: "Every person who is convicted, in due process of law, of any wilful murder of malice pretense, shall suffer death." Chapter 25, Section 1057, Code of 1883. Under the Act of 1893, now codified as G.S. 14-17, "[a] murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, tor-

tue, or by any *other* kind of willful, deliberate and premeditated killing . . . shall be deemed to be murder in the first degree. . . . " (Our italics.) The intent and effect of the 1893 Act are discussed in *State v. Benton,* 276 N.C. 641, 657, 174 S.E. 2d 793, 803-04 (1970).

This dissent herein relates solely (1) to homicide cases in which proof beyond a reasonable doubt of a specific intent to kill, formed after premeditation and deliberation, is prerequisite to a conviction for murder in the *first* degree, and (2) to those homicide cases in which there is substantial evidence that at the time of the homicide defendant had been and was suffering from a recognized serious mental disease and engaged in abnormal behavior characteristic of such disease. If such evidence fails to satisfy the jury that defendant was *insane* under the rule approved by this Court and therefore completely exempt from criminal responsibility, is such evidence competent for consideration by the jury in determining whether at the time of the alleged homicides he was capable of forming a premeditated and deliberate intent to kill, and whether he did so? If so, was defendant entitled to an instruction to that effect?

Defendant assigns error in the court's charge "for that nowhere in the charge did the court instruct the jury that it should consider the evidence of the defendant's mental disease on the matter of premeditation and deliberation." This assignment presents a serious question, apparently one of first impression in this jurisdiction. A similar question has been considered in homicide cases in which proof of a specific intent to kill, formed after premeditation and deliberation, is prerequisite to conviction for murder in the first degree, and there is substantial evidence the defendant was intoxicated when the crime was committed.

Although voluntary drunkenness is not a legal excuse for crime, when a specific intent to kill, formed after premeditation and deliberation, is an essential element of the first degree murder for which defendant is prosecuted, the fact of intoxication may negate the existence of that intent. *State v. Propst,* 274 N.C. 62, 71-72, 161 S.E. 2d 560, 567 (1968), and cases cited; *State v. Bunn,* 283 N.C. 444, 458, 196 S.E. 2d 777, 787 (1973), and cases cited. In *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075 (1911), Hoke, J. (later C.J.), states: "[S]ince the statute dividing the crime of murder into two degrees [G.S. 14-17] and in cases where it becomes necessary, in order to convict an offender

of murder in the first degree, to establish that the 'killing was deliberate and premeditated,' these terms contain, as an essential element of the crime of murder, 'a purpose to kill previously formed after weighing the matter' *(S. v. Banks,* 143 N.C. 658; *S. v. Dowden,* 118 N.C. 1148), a mental process, embodying a specific, definite intent, and if it is shown that an offender, charged with such crime, is so drunk that he is utterly unable to form or entertain this essential purpose he should not be convicted of the higher offense."

Although a number of jurisdictions adhere strictly to the view that insanity is either a complete defense or no defense at all, the weight of authority now supports the proposition that mental disease short of legal insanity may be considered in determining whether the accused at the time of the alleged homicide was capable of forming a premeditated and deliberate intent to kill, *and whether he did so.* Pertinent *earlier* decisions are cited and classified in a footnote to the opinion of Justice Reed in *Fisher v. United States,* 328 U.S. 463, 473-74, 90 L.Ed. 1382, 1389, 66 S.Ct. 1318, 1323-24 (1946).

In at least three jurisdictions, earlier decisions holding a person is either legally sane and therefore wholly responsible for all his acts, or insane and wholly irresponsible, have been overruled: *United States v. Lee, 4 Mackey* (DC) 489, 54 Am. Rep. 293 (1885), and District of Columbia cases in accord, were overruled in *United States v. Brawner,* 471 F. 2d 969 (1972); *People v. Troche,* 206 Cal. 35, 273 P. 767 (1928), *app. dismd.* 280 U.S. 524, 74 L.Ed. 592, 50 S.Ct. 87 (1929), and California cases in accord, were overruled in subsequent California decisions including *People v. Henderson,* 60 Cal. 2d 482, 35 Cal. Rptr. 77, 386 P. 2d 677 (1963); *State v. Maioni,* 78 N.J.L. 339, 74 A. 526, 20 Ann. Cas. 204 (1909), and New Jersey cases in accord, were overruled in subsequent New Jersey decisions including *State v. Vigliano,* 43 N.J. 44, 202 A. 2d 657 (1964).

Later decisions are cited in footnotes 55 through 67 in *United States v. Brawner, supra,* at 1000-1001, and in Comment Note, 22 A.L.R. 3d 1228, § 7, at 1246. The A.L.R. Comment Note follows the report of *People v. Goedecke,* 65 Cal. 2d 850, 56 Cal. Rptr. 625, 423 P. 2d 777, 22 A.L.R. 3d 1213 (1967). As indicated, a substantial majority of these decisions support the proposition that evidence of mental disease short of legal insanity is competent for consideration in determining whether the accused at the time of the alleged homicide was capable of

forming a premeditated and deliberate intent to kill, and whether he did so. The decisions referred to below will suffice to indicate the present majority view.

In *Becksted v. People,* 133 Colo. 72, 292 P. 2d 189 (1956), this question was presented: "[U]pon trial of the issues raised under the 'not guilty' plea is accused entitled to introduce all competent evidence, including that of experts, which is relevant to the question of whether he lacked the mentality to form the specific malicious intent which is an essential ingredient in the crime of first degree murder, namely, the specific intent deliberately and premeditatedly to unlawfully take the life of another?" This question was answered in the affirmative.

In *State v. Green,* 78 Utah 580, 6 P. 2d 177 (1931), the opinion states: "If the appellant was so afflicted with insanity that he was 'mentally incapable of deliberating or premeditating, and to entertain malice aforethought, and to form a specific intent to take the life of the deceased, in such event the jury should not find him guilty of murder in the first degree.' The language just quoted is the law announced by this court in the case of *State v. Anselmo,* 46 Utah 137, 148 P. 1071. While the defense urged in the Anselmo Case was intoxication, the law there announced is equally applicable where, as here, the defense of insanity is made an issue."

In *State v. Padilla,* 66 N.M. 289, 347 P. 2d 312, 78 A.L.R. 2d 908 (1959), a new trial was awarded because the court failed to instruct the jury that evidence of the defendant's mental condition and defects was competent for consideration in determining whether defendant had the mental capacity to deliberate the killing. The court noted that its holding was not based on a doctrine of "diminished" or "partial" responsibility. In explanation of the basis therefor, the opinion states: "[I]t means the allowing of proof of mental derangement short of insanity as evidence of lack of deliberate or premeditated design. In other words is contemplates full responsibility, not partial, but only for the crime actually committed." Too, the opinion, after referring to New Mexico decisions similar to our *State v. Propst, supra,* continues: "[T]he question immediately arises as to why there should be a different rule and perhaps a more lenient one with respect to a user of alcohol or drugs than in the case of one who may be afflicted with a mental disease not of his own making. If alcohol or drugs can legally prevent a person from truly

deliberating, then certainly disease of the mind, which has the same effect, should be given like consideration."

In *State v. Gramenz,* 256 Iowa 134, 126 N.W. 2d 285 (1964), the defendant was convicted of murder in the second degree. The Supreme Court of Iowa approved the trial court's instruction which, under the facts of the case, permitted the jury to consider evidence of defendant's mental condition on the issues of willfulness, deliberation and premeditation, but rejected defendant's contention that the jury should have been allowed to consider the evidence of defendant's mental condition on the elements of malice aforethought and general criminal intent.

Under the present California rule, a person who is suffering from a mental disease that prevents his acting with premeditation and deliberation is not guilty of murder in the first degree. Moreover, when the court is sufficiently advised that the defendant is relying upon evidence of such mental disease to negate the elements of premeditation and deliberation in first degree murder, the court is required without request therefor to instruct the jury as to the legal significance of such evidence. *People v. Henderson, supra.* It was so held in New Jersey in *State v. Vigliano, supra.*

In addition to the abnormal behavior of defendant herein, all of the medical testimony tends to show defendant had been and was suffering from paranoid schizophrenia which, at the time of the homicides, was in a state of exacerbation. Under these circumstances, not withstanding the absence of a specific request therefor by defendant's counsel, it is my view that defendant was entitled to instructions that this evidence was for consideration by the jury in determining whether the State had proven that the homicides were committed pursuant to a specific intent to kill, formed after premeditation and deliberation. *See State v. Propst, supra.*

Certain of the cases cited as adhering strictly to the view that "a person is either 'sane' and wholly responsible for all his acts, or 'insane' and wholly irresponsible," Weihofen, Mental Disorder as a Criminal Defense, at 177-78 (1954), involved factual situations in which this Court would reach a like *result.* For example, in *State v. Flint,* 142 W. Va. 509, 96 S.E. 2d 677 (1957), it was held that the trial court properly excluded the proffered testimony of a psychiatrist to the effect that his examination of defendant disclosed that defendant's "mental

age" was not greater than that of an average person of the age of "ten years and eleven months." Under our decisions such evidence of low mentality would not be competent to establish legal insanity, *State v. Shackleford*, 232 N.C. 299, 59 S.E. 2d 825 (1950), or to negate the elements of premeditation and deliberation in first degree murder, *State v. Scales*, 242 N.C. 400, 87 S.E. 2d 916 (1955). The evidence herein with reference to defendant's mental disease and abnormal behavior characteristic thereof is quite different from testimony tending to show "low mentality."

As stated above, the rule urged herein relates solely (1) to homicide cases in which proof beyond a reasonable doubt of a specific intent to kill, formed after premeditation and deliberation, is prerequisite to a conviction for murder in the *first* degree, and (2) to those homicides in which there is substantial evidence that defendant was suffering from a recognized serious mental disease and engaged in abnormal behavior characteristic of such disease. The record here discloses that defendant had been and was a chronic sufferer from paranoid schizophrenia, described by all experts as a serious mental disease of psychotic depth and when in exacerbation characterized by abnormal conduct resulting from hallucinations and delusions.

In my view, there was ample medical and circumstantial evidence from which the jury could have found that, at the time of the homicides, defendant's disease was in relapse; that he was experiencing an active schizophrenic process, characterized by both visual and auditory hallucinations; and that he was out of touch with reality. It was Dr. Maynard who testified upon cross-examination, "I do know and it is my opinion as an expert that an active schizophrenic process can well result in the commissions of acts of violence over which the person who is mentally ill has no control. I thought this was possible in the case of Albert Cooper."

For the reasons stated, I vote for a new trial.

STATE OF NORTH CAROLINA v. ALEXANDER McLAUGHLIN

No. 28

(Filed 14 April 1975)

1. **Homicide § 12— indictment — premeditated murder or murder in perpetration of felony**

A bill of indictment drawn under G.S. 15-144 is sufficient to sustain verdict of guilty of murder in the first degree if the jury finds from the evidence and beyond a reasonable doubt that the defendant killed the deceased with malice, after premeditation and deliberation, or that he killed the deceased in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony.

2. **Homicide § 12; Indictment and Warrant § 13— murder indictment — purpose of bill of particulars**

If a defendant is charged with murder in the first degree by a bill of indictment drawn under G.S. 15-144 and desires to know whether the State relies on proof the killing was done with premeditation or deliberation, or in the perpetration or attempt to perpetrate a felony, he should apply for a bill of particulars as provided in G.S. 15-143; the function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry.

3. **Indictment and Warrant § 13— bill of particulars — denial proper**

In a prosecution for arson and first degree murder, the trial court did not abuse its discretion in denying defendant's motion for a bill of particulars where the arson indictment set out the county in which the alleged offense occurred, the date of the occurrence, the street address of the house alleged to have been burned, and the name of the occupants therein, the murder indictments gave the date, the county where the offense was alleged to have occurred, and the names of the alleged victims, defendant was familiar with the house involved and its occupants, all information surrounding the commission of the crimes was well known to defendant, and the solicitor announced that he would make out a case of premeditation and deliberation and would also make out a case of homicide in the perpetration of a felony.

4. **Arson § 4; Homicide § 21— premeditated murder — murder in perpetration of arson — sufficiency of evidence of both**

Where the evidence tended to show that prior to the fire witnesses heard defendant say he was going to burn the house in question, defendant told the homeowner that he was going to burn her house and her baby, and after the fire was set defendant made the statement that he had "burned [the house] down," such evidence was sufficient to permit the jury to find that defendant committed premeditated murder or murder in the perpetration or attempt to perpetrate arson, and the trial court did not err in submitting both to the jury.

5. **Criminal Law § 6— intoxication as defense — specific intent as element of crime**

Except where a crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge.

6. **Homicide § 8— defense of intoxication — specific intent as element of crime**

Specific intent is not an element of the crime of arson, but it is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and a showing of legal intoxication to the jury's satisfaction will mitigate the offense to murder in the second degree.

7. **Homicide § 8— first degree murder — intoxication as defense — insufficiency of evidence**

Testimony by witnesses that defendant had been drinking but that he was not drunk did not constitute evidence that defendant's mind was so intoxicated and his reason so overthrown that he could not form a specific intent to kill, nor did defendant at any time say he was so drunk that he did not know what he was doing but instead recited in detail his actions on this occasion; therefore, the trial court was not required to instruct the jury as to defendant's intoxication.

8. **Criminal Law § 26; Homicide § 31— felony-murder — separate punishment for felony — error**

Since arson was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of arson, it afforded no basis for additional punishment, and the trial court erred in failing to arrest the judgment.

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

Defendant's constitutional and statutory rights were not violated by the imposition of the death penalty in this first degree murder case.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to the death sentence.

APPEAL by defendant under G.S. 7A-27(a) from *Hall, J.*, at the February 1974 Criminal Session of ROBESON Superior Court.

Defendant was convicted of arson and of five counts of murder in the first degree. A sentence of death was imposed on the arson charge and on each of the five murder charges.

These charges arose from a fire that destroyed a house at 641 East Wilmington Street in Maxton, North Carolina, during the early morning of 16 December 1973, and killed five small children who were sleeping in the house at the time.

Tilisa Jones testified that she was seventeen years of age, and on Sunday, 16 December 1973, was living in the house on East Wilmington Street with her mother Lewbertha Jones and ten other children, ranging from two to fourteen years of age. Her mother left the house on Saturday night, 15 December 1973, leaving her in charge. After her mother left, Tilisa also left for a while, leaving her fourteen-year-old cousin Rosie in charge. When she returned at approximately 11:00 p.m., some of the younger children had fallen asleep. She put Tywana Yulette Jones, Carla Daneise Malloy, Checo Spectus Jones, Jamar Leonco Jones and Mark Teral Malloy to bed and at that time these children were all in good health. She and some of the older children watched television until after the late show and then went to bed. At that time the room was cold because the fire in the pot-bellied stove had gone out. Demeatrice, her nine-year-old sister, woke her later in the night telling her the house was on fire. Tilisa could see nothing but fire and smoke as she left the house through a window. She heard Demeatrice calling, and returned to the house and pulled her out of a window. She did not go back into the house as she had been burned. She did go next door and call the fire department. By that time this house was also on fire. Later she fainted. She did not see the five younger children again after she put them to bed.

Lewbertha Jones testified that on the date in question she lived in the house on East Wilmington Street with her children, grandchildren and niece, and that Carla Malloy, her daughter (six years of age), Mark Malloy, her son (four years of age), Jamar Jones, her grandson (three years of age), Checo Jones, her grandson (two years of age), and Tywana Jones, her daughter (two years of age), all died in the fire.

Lewbertha further testified that on 15 December 1973 she left home about 9:30 or 10:00 p.m. She stopped by Ziegler's Cafe for a pack of cigarettes. The defendant came in and she left and went to McRae's Place across the street. She was sitting at a table with Ada Pearl Monroe when defendant came in, walked up to the counter, and then came over to the table where she was sitting. Defendant began cursing her and pulling at her clothes. She told him to leave and went to the counter. Defendant followed so she returned to the table. The defendant continued pulling on her and cursing her. Finally, she hit him on the head with a coke bottle. Defendant then said, "Bitch, I am going to burn your damn house and your mother fucking baby," and

walked out. After that she stayed and talked for a while. As she left to go home, she could see a fire in the direction of her house. When she got there the home was on fire. She then fainted.

On the night before the fire, defendant had drawn a pistol on her and she had knocked the pistol from his hand and hit him with a bottle.

Tony Wright, a friend of Lewbertha's, testified that he was present at McRae's Place on the night of 15 December 1973 and heard defendant curse Lewbertha and threaten to burn her home.

Ada Pearl Monroe testified that she was sitting with Lewbertha at McRae's Place on the night of 15 December 1973 and that defendant was pulling on Lewbertha's clothes, cursing her, and threatening to burn her home.

Daisy Blue testified that she was at McRae's Place and saw Lewbertha and defendant arguing but left before Lewbertha hit him with a bottle. She went to a house behind the store and talked and sang with friends. As she was getting in a car to leave around 3:30 a.m., defendant came up "walking sort of speedy like" and said, "I set the damn house, Lewbertha's damn house on fire." She hurried to Lewbertha's house and found it on fire.

Kenneth Bullard of the Maxton Police Department testified that he investigated the fire at Lewbertha's house on the morning of 16 December. When he arrived only Lewbertha's house was burning. He helped a neighbor move objects from her house, but soon it and another adjacent house caught fire. Later, as all three houses were burning, he noticed a scramble up the street and "a lot of cussing going on." Defendant came running by and Bullard could smell alcohol. He did not know what might happen to defendant if he let him go, so he arrested him for public drunkenness. While defendant was in the police car, a woman came to the window and said defendant had "burned down the house." The defendant replied, "Damn right I burned it down."

Defendant was taken to the police station and locked up between 5:30 and 6:00 a.m.

Lawrence Jackson, Jr., testified that he is in the funeral business. He arrived at the site of the burned house around

9:00 a.m. on 16 December. Lewbertha's house was completely burned as were the houses on each side. He found the remains of five small human bodies in the ruins of Lewbertha's house.

Franklin D. Johnson, an agent for the State Bureau of Investigation, testified that after viewing the scene of the fire he went to the Maxton Police Department to talk to defendant. Defendant was taken by Deputy Sheriff Hubert Stone to the sheriff's office in Lumberton for questioning. There defendant was read his rights as required by *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966), and defendant stated he understood them. He then signed a waiver of these rights and answered questions from 12:20 p.m. until 1:30 p.m. Defendant admitted going to Lewbertha's house but denied setting it on fire. Defendant was questioned again around 6:30 p.m. He was again read his rights and another waiver was signed. Defendant then admitted that he had burned the house because he was mad at Lewbertha. Defendant said Lewbertha had once been his girl friend, that she had a child by him, and that he occasionally gave her money to help support the children. He also said he used rags and papers found on the back porch to set the house on fire.

Other testimony by Johnson served to corroborate the testimony of Lewbertha Jones, Tony Wright and Daisy Blue.

Deputy Sheriff Hubert Stone of the Robeson County Sheriff's Department testified in corroboration of Agent Johnson. He further testified that, after the first interrogation had ended about 1:30 p.m. on 16 December, defendant told him that he burned the house and asked him to come back later and he would tell the truth. Around 6:30 p.m. defendant confessed and signed a full statement.

Defendant did not testify or offer evidence.

Other facts pertinent to decision are set out in the opinion.

Attorney General Robert Morgan, Deputy Attorney General James F. Bullock, and Associate Attorneys Austin B. Campbell and Ralf F. Haskell for the State.

Fred L. Musselwhite for defendant appellant.

MOORE, Justice.

The murder indictments in these cases were drawn under G.S. 15-144. Defendant, before trial, filed a motion for a bill

of particulars requiring the State to make an election as to whether the murders were done with premeditation and deliberation, or in the perpetration or attempt to perpetrate arson. Defendant contends it was error for the court to overrule this motion and to charge the jury that they could return a verdict of guilty of murder in the first degree if they found from the evidence beyond a reasonable doubt that the killings were done with malice and after premeditation or deliberation, or that the killings were done in the perpetration or attempt to perpetrate arson.

G.S. 14-17 in part provides:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . . "

G.S. 15-144 provides:

> "In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment 'with force and arms,' and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law; and it is sufficient in describing manslaughter to allege that the accused feloniously and willfully did kill and slay (naming the person killed), and concluding as aforesaid; and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter, as the case may be."

[1] A bill of indictment drawn under G.S. 15-144 is sufficient to sustain verdicts of guilty of murder in the first degree if the jury finds from the evidence and beyond a reasonable doubt that defendant killed the deceased with malice, after premeditation and deliberation, or that he killed the deceased in the per-

petration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony. *State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169 (1974) ; *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972) ; *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970).

[2] If a defendant is charged with murder in the first degree by a bill of indictment drawn under G.S. 15-144 and desires to know whether the State relies on proof the killing was done with premeditation or deliberation, or in the perpetration or attempt to perpetrate a felony, he should apply for a bill of particulars as provided in G.S. 15-143 (repealed by Session Laws of 1973, c. 1286, s. 26, effective July 1, 1975). *State v. Haynes, supra.*

The function of such a bill of particulars is (1) to inform the defense of the specific occurrences intended to be investigated on the trial and (2) to limit the course of the evidence to the particular scope of inquiry. *State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973) ; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802 (1967) ; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967).

The granting or denial of motions for a bill of particulars is within the discretion of the court and is not subject to review except for palpable and gross abuse thereof. *State v. Cameron, supra; State v. Spence, supra; State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967).

[3] The arson indictment in this case sets out the county in which the alleged offense occurred, the date of the occurrence, the street address of the house alleged to have been burned and the names of the occupants therein at the time.

The murder indictments each give the date and the county where the offense was alleged to have occurred and the name of the alleged victim. The names of those alleged to have been murdered are the same as those alleged to have been occupants of the house when the fire was set. Defendant was familiar with the house involved and its occupants, having visited and slept there on occasions. All the information surrounding the commission of the crimes was contained in the bills of indictment and was well known to defendant. Furthermore, the solicitor announced that he would make out a case of premeditation and deliberation and would also make out a case of homicide in the

perpetration of a felony, so defendant was on notice as to all elements of the charges against him and as to how the State planned to proceed. Under these circumstances, defendant has failed to show any abuse of discretion by the trial court in denying his motion for a bill of particulars.

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. Robbins,* 275 N.C. 537, 169 S.E. 2d 858 (1969). Premeditation and deliberation are not usually susceptible of direct proof and are therefore susceptible of proof by circumstances from which the facts sought to be proven may be inferred. As stated in *State v. Walters,* 275 N.C. 615, 624, 170 S.E. 2d 484, 490 (1969):

> " 'Among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: Want of provocation on the part of deceased. *State v. Matheson,* 225 N.C. 109, 111, 33 S.E. 2d 590; *State v. Hammonds,* 216 N.C. 67, 75, 3 S.E. 2d 439; *State v. Buffkin,* 209 N.C. 117, 126, 183 S.E. 543. The conduct of defendant before and after the killing. *State v. Lamm,* 232 N.C. 402, 406, 61 S.E. 2d 188; *State v. Chavis,* 231 N.C. 307, 311, 56 S.E. 2d 678; *State v. Harris,* 223 N.C. 697, 701, 28 S.E. 2d 232. Threats and declarations of defendant before and during the course of the occurrence giving rise to the death of deceased. *State v. Dockery,* 238 N.C. 222, 224, 77 S.E. 2d 664; *State v. Hudson,* 218 N.C. 219, 230, 10 S.E. 2d 730; *State v. Hawkins,* 214 N.C. 326, 331, 199 S.E. 284; *State v. Bowser, supra* (214 N.C. 249, 199 S.E. 31) . . . . ' "

In the present case, several witnesses for the State testified that prior to the fire defendant said he was going to burn Lewbertha's house and, in additon, Lewbertha testified that defendant said he was going to burn her house and her baby. After the fire was set defendant made the statement that he had "burned [the house] down." From this evidence, the jury could find that the defendant acted with premeditation and deliberation.

Under G.S. 14-17, a murder committed in the perpetration or attempt to perpetrate arson is murder in the first degree irrespective of premeditation or deliberation, or malice afore-

thought. *State v. Hairston,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Thompson, supra.*

[4] We hold that the evidence in these cases was sufficient to permit the jury to find that defendant committed premeditated murder or murder in the perpetration or attempt to perpetrate arson. Therefore, the trial court did not err in submitting both to the jury.

By his next assignment of error defendant contends that the trial court erred in overruling the defendant's motion for nonsuit at the close of the State's evidence and at the close of all the evidence.

The evidence in the present case shows that defendant announced to several witnesses his intention to burn the house and that shortly after the fire he told Daisy Blue that he had "burned Lewbertha's damn house." He freely and fully confessed to police officers that he had burned the house. His statement closely paralleled the other evidence against him.

As we said in *State v. McNeil,* 280 N.C. 159, 161-62, 185 S.E. 2d 156, 157 (1971):

> " . . . Motion to nonsuit requires the trial judge to consider the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn therefrom. *State v. Vincent,* 278 N.C. 63, 178 S.E. 2d 608 (1971). 'Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which a jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled.' *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968)."

Accord, State v. Tillman, 269 N.C. 276, 152 S.E. 2d 159 (1967); *State v. Bogan,* 266 N.C. 99, 145 S.E. 2d 374 (1965).

The evidence in this case clearly meets that standard and was properly submitted to the jury. This assignment is overruled.

Defendant next contends that the trial court erred in failing to instruct the jury on the law of intoxication as a defense, asserting that there was evidence from which the jury could have concluded that defendant was so intoxicated that he

was incapable of forming criminal intent to commit the crimes of arson and murder in the first degree.

[5] Except where a crime requires a showing of specific intent, voluntary intoxication is not a defense to a criminal charge. *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); *State v. Cureton,* 218 N.C. 491, 11 S.E. 2d 469 (1940); *State v. Murphy,* 157 N.C. 614, 72 S.E. 1075 (1911). *See, Annot.,* 8 A.L.R. 3d 1236 (1966).

[6] Specific intent is not an element of the crime of arson. 5 Am. Jur. 2d, Arson and Related Offenses § 10 (1962); 6 C.J.S., Arson § 3; *State v. Thomas,* 241 N.C. 337, 85 S.E. 2d 300 (1955); *State v. Cash,* 234 N.C. 292, 67 S.E. 2d 50 (1951); *State v. Anderson,* 228 N.C. 720, 47 S.E. 2d 1 (1948). *See also,* Perkins on Criminal Law 217 (2d ed. 1969). Therefore, intoxication may not be shown to negative any elements of arson.

However, specific intent to kill is a necessary constituent of the elements of premeditation and deliberation in first degree murder, and a showing of legal intoxication to the jury's satisfaction will mitigate the offense to murder in the second degree. *State v. Bunn, supra; State v. Wilson,* 280 N.C. 674, 187 S.E. 2d 22 (1972); *State v. Propst, supra; State v. Cureton, supra.*

As stated by Justice Barnhill, later Chief Justice, in *State v. Cureton, supra:*

> ". . . No inference of the absence of deliberation and premeditation arises as a matter of law from intoxication; and mere intoxication cannot serve as an excuse for the offender. The influence of intoxication upon the question of existence of premeditation depends upon its degree and its effect upon the mind and passion. For it to constitute a defense it must appear that the defendant was not able, by reason of drukenness, to think out beforehand what he intended to do and to weigh it and understand the nature and consequence of his act."

And, as we said in *State v. Shelton,* 164 N.C. 513, 79 S.E. 883 (1913):

> "All the authorities agree that to make such defense available the evidence must show that *at the time of the*

killing the prisoner's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming a deliberate and premeditated purpose to kill."

[7] In the absence of evidence of intoxication to a degree precluding the ability to form a specific intent to kill, the court is not required to charge the jury thereupon. *State v. Cureton, supra.* The question in this case is whether there was evidence that defendant was intoxicated to the extent that his ability to form such specific intent was overthrown, thus necessitating an instruction on intoxication by the trial judge. We think not.

There was ample evidence that defendant had been drinking on the night in question.

Lewbertha Jones testified:

"I have known Alexander McLaughlin for about three years. I have had occasion to see him when he was both drunk and sober. I did not see him drinking that night. In my opinion, having known him for some period of time I would say that he was not drunk, but acted like he had been drinking some. He acted like it. I don't know whether he had or not. . . . I did not see Alexander McLaughlin take a drop of liquor that night. He was acting like he was drinking. I did not get close enough to him to smell it on his breath."

Tony Wright testified:

"I observed McLaughlin closely at the McRae place. I could not tell whether or not he had been drinking. He was not drunk."

Daisy Blue testified:

"I have had occasions to see him when he has been both drunk and sober. In my opinion, Alexander McLaughlin was not drunk that night. 'He wasn't what you say drunk.' He had had a few drinks.

* * *

"At approximately 3:30 o'clock, he was not acting any different in any way except walking fast. He did not seem to stagger. In my opinion I do not think he was drunk. He didn't act to be drunk, what you say drunk. . . ."

Kenneth Bullard testified:

". . . I noticed some kind of scramble back up the street, maybe as far as from her to the door. There was a lot of cussing going on and I saw Mr. McLaughlin running by me. When he got in front of me he stopped. He had been drinking some and there were some boys following him. McLaughlin stopped in front of my car. I could tell that he had been drinking by the way he stood. He was pretty close and I could smell it. I placed him under arrest for public drunkenness. He was not as drunk as some I have arrested for being drunk.

* * *

"Q. (By Mr. Britt) : Well, was he really drunk on this occasion?

* * *

"THE WITNESS: *No, he wasn't really drunk.* (Emphasis added.)

* * *

"I issued a warrant for the defendant's arrest for public drunkenness. I arrested the defendant for public drunkenness. I did not know what might happen to him if I let him go. . . ."

Franklin Johnson testified that defendant stated:

". . . [H]e had been drinking since he had gotten into Maxton and was drinking beer and whiskey. . . ."

Hubert Stone testified that defendant stated to him:

"I had been drinking beer and some whiskey. Later on we began to argue at each other. We separated and later we both got together at William McRae's Place, just off Highway 74, near the hotel. We started arguing again there. It was about 2:00 or 3:00 o'clock. During the argument Lewbertha Jones hit me in the head with a bottle. When she hit me, there was a crowd of people in there. It made me mad. I then told her that I would burn her house. I then got out, went outside of the building and went to Lewbertha's house across the railroad walking. When I got to the house I saw the front porch light burning, a light in her bedroom burning. I believe the light on the back porch was burning. I went around the house to the back

porch. I took my matches out of my pocket and light [sic] some rags and paper that was there on the back porch. I then saw it was burning and left and went back to Willie's Place where I had left Lewbertha."

None of the foregoing is evidence that defendant's mind was so intoxicated and his reason so overthrown that defendant could not form a specific intent to kill. At no time did defendant say he was so drunk he didn't know what he was doing. To the contrary, he recited in detail his actions on this occasion.

Defendant contends, however, that *State v. Propst, supra,* is authority for his position that the trial judge was required to instruct on intoxication in this case. In *Propst,* however, defendant had been medically diagnosed as paranoid, had previously been medically determined to be unable to understand the charges against him, and had been committed to Dorothea Dix Hospital for treatment. Further, defendant in that case had drunk an entire fifth of whiskey shortly before the murder, "had really been tore up with a bad case of the nerves the past several days," "had been complaining with his head," had delusions about being persecuted, and, according to expert testimony, had lost contact with reality.

We find no such evidence of defendant's inability to form a specific intent to kill in this case. This assignment is overruled.

[8] Defendant next assigns as error the court's failure to arrest judgment in the arson charge in that the arson charge was embraced and made a part of the five charges of murder in the first degree. We believe there is merit to this contention.

In *State v. Moore, supra,* the indictment, drawn under G.S. 15-144, charged defendant with killing with malice, premeditation and deliberation. Defendant was also charged with armed robbery. The evidence against him on the murder charge disclosed a killing in the perpetration of robbery. The trial court had charged that a verdict of first degree murder could be rendered upon a finding beyond a reasonable doubt that the killing was done in the perpetration or attempt to perpetrate a robbery. The jury found the defendant guilty of both murder and armed robbery. On appeal, this Court vacated the armed robbery conviction on the basis that it had been merged into the murder conviction.

In *State v. Thompson, supra,* at 215-16, 185 S.E. 2d at 675, involving convictions for felonious breaking and first degree murder, Chief Justice Bobbitt formulated the following succinct statement of the merger rule:

> ". . . [T]he separate judgment imposing punishment for felonious breaking and entering in addition to that imposed for the murder conviction cannot stand. When a person is convicted of murder in the first degree no separate punishment may be imposed for any lesser included offense. Technically, feloniously breaking and entering a dwelling is never a lesser included offense of the crime of murder. *However, in the present and similar factual situations, a cognate principle applies.* Here, proof that defendant feloniously broke into and entered the dwelling . . . was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of feloniously breaking into and entering that particular dwelling. The conviction of defendant for felony-murder, that is, murder in the first degree without proof of malice, premeditation or deliberation, was based on a finding by the jury that the murder was committed in the perpetration of the felonious breaking and entering. *In this sense, the felonious breaking and entering was a lesser included offense of the felony-murder.* Hence, the separate verdict of guilty of felonious breaking and entering affords no basis for additional punishment. If defendant had been acquitted in a prior trial of the separate charge of feloniously breaking and entering, a plea of former jeopardy would have precluded subsequent prosecution on the theory of felony-murder. *State v. Bell,* 205 N.C. 225, 171 S.E. 50 (1933)." (Emphasis added.)

See also, State v. Carroll, 282 N.C. 326, 193 S.E. 2d 85 (1972); *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972).

The trial judge in the present case charged the jury to return a verdict of guilty of murder in the first degree if the State satisfied them beyond a reasonable doubt that the killings were done with premeditation and deliberation or in the perpetration or attempted perpetration of the felony of arson. We do not know, of course, which of the two theories the jury chose in finding defendant guilty of murder in the first degree. Undoubtedly, however, the jury considered the overwhelming evidence that the murders were committed in the perpetration of

arson. Accordingly, since the arson was an essential and indispensable element in the State's proof of murder committed in the perpetration of the felony of arson, it affords no basis for additional punishment. This assignment is sustained, and the judgment in the arson case is arrested.

Since we arrest judgment in the arson case, it is not necessary to determine whether the 1973 amendment to G.S. 14-58, changing the punishment for arson from death to life imprisonment, applies to this case.

[9] Defendant finally contends that his constitutional and statutory rights were violated by the imposition of the death penalty. The defendant's contentions with respect to the validity of the death sentence have been carefully considered and found to be without merit by this Court in a number of recent decisions. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). No useful purpose would be served by further discussion here. This assignment is overruled.

In view of the seriousness of the charge and gravity of the punishment imposed, we have carefully examined each of defendant's assignments of error. In the trial, verdicts and judgments, we find no errors except in the judgment in the arson case which we vacate.

As to the murder charges: No error.

As to the arson charge: Judgment arrested.

Chief Justice SHARP dissenting as to the death penalty.

The murders for which defendant was convicted occurred on 16 December 1973, a date between 18 January 1973, the day of the decision in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, and 8 April 1974, the day on which the General Assembly rewrote G.S. 14-17 by the enactment of Chapter 1201 of the Session Laws of 1973. For the reasons stated by Chief Justice Bobbitt in his dissenting opinion in *State v. Jarrette,* 284 N.C. 625, 666, 202 S.E. 2d 721, 747 (1974)—an opinion in which Justice Higgins and I joined—I dissent as to the death sentence imposed upon defendant by the court below and vote to remand for the imposition of a sentence of life imprisonment. *See also*

the dissenting opinion of Chief Justice Bobbitt, and my concurrence therein, in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. VERNON JUNIOR WOODS

No. 13

(Filed 14 April 1975)

1. **Jury § 7—peremptory challenges — number allowed in capital case**

In a prosecution of defendant for kidnapping, rape and murder, the trial court erred in allowing the State twenty-two peremptory challenges and defendant thirty-four since G.S. 9-21 allowed the State only nine jurors and defendant fourteen jurors "and no more" in a capital case; however, such error was harmless and not so prejudicial as to require a new trial.

2. **Criminal Law § 84; Searches and Seizures § 2— engagement ring and wedding band given to officers — no search by officers**

In a prosecution for rape, murder and kidnapping, the trial court did not err in allowing into evidence an engagement ring and a wedding band allegedly belonging to defendant's victim where the evidence tended to show that two officers talked to defendant's wife at the police station in the presence of her mother, the wife was asked about the rings and was persuaded by her mother to give the rings to the officers, and thereafter took her mother and the officers to her trailer home where she unlocked the door and led the two officers and her mother to her bedroom where she picked up a pair of her blue jeans and took from the pocket the two rings in question and gave them to the officers, no search or further inquiry was made at the trailer, the officers were inside the trailer less than two minutes, the rings given to the officers by defendant's wife had been given to her by defendant on the day the offenses were committed, and the rings were the wife's and were in her possession.

3. Searches and Seizures § 1— warrantless seizure and impoundment of vehicle — no abridgment of rights

Defendant's rights were not abridged by the warrantless seizure, impoundment, and subsequent search pursuant to a warrant of his automobile where officers observed defendant driving an automobile which they had probable cause to believe had been involved in the kidnapping, rape and murder of deceased, and officers believed that, if the automobile was not seized and impounded, the wife of the defendant would likely attempt to destroy or make unusable any evidence therein or any evidence in the car could be tainted and considered unreliable in the minds of the jury and perhaps even made inadmissible because of intervening uncontrolled access to the car by persons other than defendant.

4. Criminal Law § 43— staged photographs — admissibility for illustration only

In a kidnapping, rape and murder prosecution, the trial court did not err in allowing into evidence photographs staged with witnesses and with the automobiles of the alleged victim and of the defendant where the photographs were admitted for illustrative purposes only, the jury was instructed as to their limited purpose, and the jury was thoroughly informed that the photographs were posed or staged.

5. Criminal Law § 66— in-court identification of defendant — observation at crime scene as basis

Findings of fact by the trial court that a witness had an opportunity to observe defendant and his victim on the day of the crime and that the in-court identification of the defendant by the witness was based on that observation and not on photographs shown him by police officers were supported by the evidence and are conclusive on appeal.

6. Criminal Law § 33— inability of witness to identify driver of vehicle — relevancy of testimony

In a prosecution for kidnapping, rape and murder where the State relied on circumstantial evidence, the trial court did not err in allowing into evidence testimony of a witness who was unable to identify with certainty an automobile or its occupants, since the testimony was relevant in that it placed a male driver in a light green Chevrolet operating the vehicle on the wrong side of the road on the morning that the offenses were committed, and other evidence tended to show that defendant owned a light green 1967 Chevrolet and that the victim's body was found in that vicinity the next day.

7. Criminal Law § 113— alibi instruction — failure to request

Defendant was not entitled to an instruction on alibi where he failed to make a request therefor.

8. Homicide § 30— felony-murder — no submission of lesser included offense of second degree murder

In a first degree murder prosecution where there was no evidence that suggested deceased was killed other than in the perpetration or attempted perpetration of the felonies of kidnapping and rape, the

trial court did not err in failing to instruct the jury on the question of defendant's guilt of the lesser included offense of second degree murder.

9. **Kidnapping § 1; Homicide § 21; Rape § 5— first degree murder following kidnapping and rape — sufficiency of evidence**

In a kidnapping, rape and first degree murder prosecution, evidence was sufficient to survive defendant's motion for directed verdict and the case was properly submitted to the jury where the State's evidence tended to show that numerous witnesses saw defendant in downtown Lenoir around 9:00 a.m. on 11 August 1973 driving a light green Chevrolet with a dark top, several women testified that they were approached by defendant on this morning, there was testimony that a man and a woman were seen scuffling in the parking lot where deceased's car was parked and that deceased was shoved into defendant's car, a car like defendant's carrying two occupants and with a male driver was seen about an hour and twenty minutes later on the wrong side of the road in the vicinity of a stream where the victim's body was found the next day, the victim had live spermatozoa in her vagina, her vagina and rectal area had been injured and there was a tear in the peritoneum, rings identified as belonging to the victim were given by the defendant to his wife on the afternoon of 11 August, a torn portion of an insurance identification card was found in the 1967 Chevrolet operated by defendant, this torn portion matched the other portion of the card found with the personal effects of the deceased, and fibers found in the 1967 Chevrolet matched fibers from the dress worn by the deceased on 11 August.

10. **Criminal Law § 26; Homicide § 31— felony-murder — separate punishment for felony — error**

In a prosecution for kidnapping, rape and first degree murder, the trial court erred in overruling defendant's motion to arrest the judgments entered in the kidnapping and rape cases since proof of rape or kidnapping was an indispensable element in the State's proof of murder in the first degree, and therefore neither rape nor kidnapping afforded basis for additional punishment under the merger rule.

11. **Criminal Law § 55— bloodstain in kidnapping vehicle — failure to show type — probative value**

When considered with other circumstances shown by the evidence in a kidnapping, rape and murder prosecution, the fact that there was a human bloodstain on the seat cover of the automobile alleged to have been utilized in the kidnapping of deceased and driven by defendant on the morning of 11 August 1973 was highly probative of a material fact, and the fact that the State could not show the blood type went to the weight of the evidence and not to its admissibility.

12. **Criminal Law § 50— expert testimony as to cloth fibers — statement not within field of expertise — no error**

The trial court did not err in allowing an expert witness to testify concerning his examination of fibers from a kidnapping, rape and

murder victim's dress, his examination of fibers seized in a search of defendant's vehicle, his expert opinion as to the similarity of the fibers, and his opinion that the red fibers were reasonably rare and that it was unlikely that the fibers came from a source other than the dress of the victim; the further statement by the witness on cross-examination that it was also unlikely that two women might own the same dress was inconsequential and not prejudicial to defendant.

13. Homicide §§ 4, 12— felony-murder — kidnapping not listed in statute — kidnapping within purview of statute

The trial court properly denied defendant's motions to quash the bills of indictment made on the ground that the felony-murder doctrine under which the State elected to proceed was unconstitutionally vague in that kidnapping was not listed in G.S. 14-17 at the time of the offense as one of the felonies that would support a conviction under the felony-murder rule, since, prior to the amending of G.S. 14-17 to add kidnapping to the list of specified felonies, it was well established that any felony inherently dangerous to life was within the purview of G.S. 14-17 though not specified therein; furthermore, rape was listed in G.S. 14-17 at the time of the alleged murder as one of the felonies that would support a conviction under the felony-murder rule, and either kidnapping or rape would support a conviction under this rule.

14. Constitutional Law § 36; Homicide § 31— first degree murder — mandatory death sentence proper

Imposition of the mandatory death sentence in this first degree murder case did not violate defendant's rights under the Eighth and Fourteenth Amendments to the U. S. Constitution.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

ON *certiorari* to review the trial before *Thornburg, J.*, at the 21 January 1974 Session of Catawba Superior Court. Defendant initially appealed, but the transcript was not available to perfect the appeal within the time allowed. Defendant petitioned for a writ of *certiorari*, which we allowed on 8 May 1974.

On indictments proper in form, defendant was convicted of kidnapping, rape and first degree murder, and received life imprisonment for kidnapping and the death penalty for both rape and first degree murder.

The evidence for the State tends to show: On Saturday, 11 August 1973, shortly after 8:30 a.m., Mrs. Paula Gail Bowman Hollar left the home of her parents where she and her husband Steven Hollar were living. Although due at work at a photography studio in Lenoir at 9:00 a.m., she did not arrive there. However, her 1973 yellow Pontiac was found later that

day in the parking lot where she usually parked it during working hours.

On the afternoon of 12 August, Charles B. Taylor of Lenoir was viewing some of his property on Old Mill Creek Road about three quarters of a mile from Lenoir when he found Mrs. Hollar's nude, lifeless body partially submerged in a small creek nearby.

Dr. John Daly, the State Medical Examiner, performed an autopsy the next day. Paula had been dead at that point between 24 and 72 hours, in his opinion. She had abrasions and bruises on her mouth, neck, arm, back, anus, and vaginal area. There was a three millimeter perforation of the peritoneum which, in the opinion of Dr. Daly, was a manifestation of blunt trauma in the anus. Fresh intact spermatozoa were found in deceased's vagina. The cause of death was blunt trauma to the head.

Onis Miller, who operated a service station in Lenoir, talked to defendant for about five or ten minutes between 6:30 a.m. and 8:00 a.m. on 11 August regarding repairs to defendant's automobile. It appeared to Miller that defendant had been drinking and Miller saw a fifth-size bottle of liquor in the floorboard of defendant's automobile.

Mrs. Violet Price was parking at her place of employment in Lenoir at about 7:45 a.m. on 11 August when defendant pulled in beside her, got out, opened her door, and asked, "What's your name?" She answered, "Get away from my car." Defendant then said, "I'm sorry, I thought you were my wife," and drove away. Mrs. Price was eight and one-half months pregnant at the time.

Mrs. Agnes Ruppert was walking to the post office about 8:40 a.m. on 11 August when defendant, in a light-green Chevrolet with a dark vinyl top, pulled into the curb and began yelling to her and motioning to her to come to him. She recognized him since he had accompanied his wife on several occasions while his wife was being fitted for contact lenses at Mrs. Ruppert's place of employment. Mrs. Ruppert continued to the post office and defendant drove away.

Mrs. Shirley Watson was parking her automobile for a visit to the beauty shop around 7:30 a.m. to 7:45 a.m. on 11 August when defendant drove into the parking lot and began staring at her. He stared at her until she went into the beauty shop.

Mrs. A. F. Lupes was parked outside her house in Lenoir waiting for a girl who works for her mother at about 8:05 a.m. on 11 August when defendant stopped beside her and honked his horn. Mrs. Lupes thought defendant wanted to enter a driveway that she was blocking so she backed up. Defendant then pulled into a parking lot across the street and motioned for her to come to his automobile. Mrs. Lupes drove away and came to a stop at a red stoplight down the street. Defendant, who had followed her, stopped his car, got out, and walked to the driver's side of Mrs. Lupes's vehicle. He told her to stop at a parking lot and to wait for him because he wanted to talk to her. When the light changed, she drove directly home and told her husband.

James L. Cline was walking in Lenoir on 11 August shortly before 9:00 a.m. As he emerged from an alley which served as a short cut to his destination, he saw the victim's Pontiac and defendant's 1967 light-green Chevrolet with a black vinyl top parked across the street in the lot where deceased's car was found. The automobiles were about twenty feet apart. He saw defendant with his arm around the neck of deceased. They were about three feet from the victim's Pontiac. Defendant took her to the Chevrolet, opened the door, and shoved her into the front seat. Cline did not see her head above the seat after that.

Judge A. R. Crisp was walking to the post office about 8:50 a.m. on 11 August when he heard a short blast from the horn of an automobile parked in the lot where deceased's Pontiac was found. He saw the back of a young woman apparently being held down by someone. At the time he was about ten feet away. He did not see any faces. He remembered seeing only one car. He assumed they were two youngsters "carrying on," and did nothing to aid the girl at that time.

Paul Seagle was waiting at a red light in Lenoir shortly before 9:00 a.m. on 11 August and saw a man and woman sitting in a light-colored Pontiac at the parking lot in question. The man's arms were around the woman. It was the same Pontiac he had often seen parked there.

Mr. Jessie C. Watson was also waiting for the light near the parking lot to change "somewhere before 9:00 a.m." on 11 August. He saw a man standing beside a light-colored automobile with his right arm around a girl's neck and his left hand over her face around her mouth.

Mrs. Louise H. Wilcox was driving on Hibriten Drive about 10:20 a.m. on 11 August. As she approached the intersection of Hibriten Drive and Old Mill Creek Road, a 1967 light-green Chevrolet approached her from the other direction in her lane of traffic. The car was occupied by two people. Mrs. Wilcox stopped completely and the Chevrolet turned down Old Mill Creek Road.

There was also testimony that defendant gave three rings to his wife sometime during the afternoon of 11 August. One was an engagement ring, another was a wedding band, and another was a 1972-1973 high school ring. Two of the rings were identified by the deceased's husband and the jeweler who sold them to him as belonging to deceased. Defendant told his wife that he had won the rings in a poker game the night before. The wedding and engagement rings were introduced into evidence at the trial. The high school ring was never recovered.

The State further offered expert testimony that tended to show that certain fibers found in defendant's 1967 Chevrolet automobile matched fibers from the dress worn by the victim on 11 August, and that a portion of an identification card found in the Chevrolet matched a larger portion of the identification card found in the victim's wallet in the creek where her clothing was found.

Defendant's evidence tended to show that defendant was at his sister's house south of Lenoir from 7:00 a.m. to 7:40 a.m. and again about 10:00 a.m. on 11 August 1973. That he stayed there for about fifteen minutes and seemed to be normal. His mother saw him that afternoon and he appeared normal.

Defendant did not testify.

Other facts pertinent to decision are set out in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Sidney S. Eagles, Jr. for the State.

John H. McMurray and Bruce W. Vanderbloemen for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the action of the trial court in allowing the State to challenge peremptorily without cause more than nine jurors. It was stipulated that the State

peremptorily excused eleven jurors and the record shows that the defendant peremptorily excused thirteen. The trial court ruled that the State had twenty-two peremptory challenges and that the defendant had thirty-four.

Defendant was charged with two capital crimes and one non-capital.

G.S. 9-21 in part provides:

"(a) In all capital cases each defendant may challenge peremptorily without cause 14 jurors and no more. In all other criminal cases each defendant may challenge peremptorily six jurors without cause and no more. . . .

"(b) In all capital cases the State may challenge peremptorily without cause nine jurors for each defendant and no more. In all other criminal cases the State may challenge peremptorily without cause four jurors for each defendant and no more. . . . "

The trial judge allowed the State nine peremptory challenges in each capital case and four in the kidnapping case, for a total of twenty-two. Defendant was allowed fourteen in each capital case and six in the kidnapping case, for a total of thirty-four. This was error. Under the express provisions of the statute in all capital cases the defendant may challenge fourteen jurors and the State may challenge nine jurors *"and no more."* (Emphasis added.) *See State v. Alridge,* 206 N.C. 850, 175 S.E. 191 (1934). In the present case, however, we think this error is harmless.

It is well established that the system by which juries are selected does not include the right of any party to select certain jurors but to permit parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. Defendant has no vested right to a particular juror. *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969). The right of peremptory challenge is not a right to select but to exclude. *State v. Allred,* 275 N.C. 554, 169 S.E. 2d 833 (1969); *State v. Banner,* 149 N.C. 519, 63 S.E. 84 (1908). Defendant did not exhaust the fourteen peremptory challenges given him by the statute and was not in any respect denied his right to exclude prospective jurors unacceptable to him.

As was said by Chief Justice Stacy in *State v. Koritz,* 227 N.C. 552, 555, 43 S.E. 2d 77, 80 (1947) :

> " . . . To present an exception on rulings to challenges to the polls, the appellant is required to exhaust his peremptory challenges and then undertake to challenge another juror. *Oliphant v. R. R.,* 171 N.C., 303, 88 S.E., 425. The court's action in the matter must be hurtful and its effect unavoidable before it will be held to vitiate the trial. *S. v. Cockman,* 60 N.C., 484; *S. v. Benton,* 19 N.C., 196.
>
> "The trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury. The defendants would be entitled to no more on a new trial, and this they have already had. *S. v. Levy,* 187 N.C., 581, 122 S.E., 386; *S. v. Sultan,* 142 N.C., 569, 54 S.E., 841; *S. v. English,* 164 N.C., 497, 80 S.E., 72; *S. v. Bohanon,* 142 N.C., 695, 55 S.E., 797. Their right is not to select but to reject jurors. Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury. *S. v. Pritchett,* 106 N.C., 667, 11 S.E., 357; *S. v. Hensley,* 94 N.C., 1021."

Although it was error for the trial court to allow the State more than nine peremptory challenges and to allow the defendant more than fourteen, we hold that this error was harmless and not so prejudicial as to require a new trial. *See* 3 Strong, N. C. Index 2d, Criminal Law § 167, p. 126, and cases cited therein. This assignment is overruled.

[2] Defendant next assigns as error the denial of his motion to suppress the evidence and receiving into evidence State's Exhibits Nos. 6 and 7, an engagement ring and a wedding band. He contends that his constitutional rights under the Fourth and Fourteenth Amendments to the Constitution of the United States were violated in that this evidence obtained by the officers was without the authorization of a valid search warrant and that evidence obtained in such a manner is incompetent under G.S. 15-27, the federal exclusionary rule, and federal and state decisions dealing with non-consensual searches conducted without search warrants.

To support this position, defendant cites *State v. Hall,* 264 N.C. 559, 142 S.E. 2d 177 (1965). The facts in *Hall* were briefly as follows: Defendant was in jail and officers both from North Carolina and Virginia knew this. They did not request defendant's permission to search his home but went to the home, confronted defendant's wife, identified themselves as police officers, and asked for the privilege of searching the house. There was some question as to the extent the officers left the wife free to consent to the search, or whether the number of officers had a coercive effect sufficient to make her consent involuntary. A search of the house by the officers turned up a clock and a radio which were later identified as belonging to the store in Edenton, North Carolina, which had been robbed. The officers then confronted the defendant with those items, at which time he confessed to the breaking and entering and larceny. This Court held that the possession of the radio and clock was unlawfully obtained by the officers and the items were improperly admitted in evidence. The facts in the present case clearly distinguish it from *Hall.*

Here, there were but two officers who talked to Mrs. Woods at the police station in the presence of her mother. Mrs. Woods was asked about the rings and was persuaded by her mother to give the rings to the officers. She thereafter took her mother and the officers to her trailer home where she unlocked the door and led the two officers and her mother to her bedroom where she picked up a pair of her blue jean pants and took from the right side pocket of these pants the two rings in question and gave them to the officers. No search or further inquiry was made at the trailer. The officers were inside the trailer less than two minutes. The rings given to the officers by Mrs. Woods had been given to her by her husband on 11 August 1973. The rings were hers and were in her possession.

It is well settled that evidence obtained by unreasonable searches and seizures is inadmissible. Fourth, Fifth and Fourteenth Amendments to the United States Constitution; Article I, Section 20, of the North Carolina Constitution; G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws); *Mapp v. Ohio,* 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968). It is also well settled that the constitutional guaranty against unreasonable searches and seizures does not pro-

hibit a seizure of evidence without a warrant where no search is required. *U. S. v. Pate,* 324 F. 2d 934 (7th Cir. 1963), *cert. den.* 377 U.S. 937, 12 L.Ed. 2d 299, 84 S.Ct. 1341 (1964); *State v. Reams, supra; State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970).

Quoting with approval from *State v. Coolidge,* 106 N.H. 186, 208 A. 2d 322, this Court in *Reams, supra,* at 398, 178 S.E. 2d at 69, stated:

> " 'A search ordinarily implies a quest by an officer of the law, a prying into hidden places for that which is concealed. A seizure contemplates forcible dispossession of the owner. *Weeks v. United States,* 232 U.S. 383, 397, 34 S.Ct. 341, 58 L.Ed. 652; *United States ex rel Stacey v. Pate,* 324 F. 2d 934, 935 (7th Cir. 1963); [other citations omitted.]' "

The evidence in the instant case amply supports the trial judge's findings of fact:

> "That Mrs. Woods had a legal right to enter the trailer premises on the occasion when she did so with her mother and the officers. That the officers performed no search on the premises.
>
> "That the interrogation was not extensive in duration. That Mrs. Woods was not coerced by the officers into producing the rings and in fact made no effort to do so until requested by her mother to cooperate with the officers. That she was under no duress, restraint or coercion at the time she agreed to go to the trailer."

These facts sustained the trial judge's conclusions of law that "there was no unreasonable search of the premises occupied by the defendant and his wife at the time the rings were obtained, and second, that the rings were legally obtained from Mrs. Woods who voluntarily, knowingly, understandingly and intentionally turned over their possession to the officers."

We hold, therefore, that no search was involved, and that Mrs. Woods voluntarily turned the rings over to the officers. They were properly admitted into evidence. This assignment of error is overruled.

[3] Defendant next contends that his rights under the Fourth Amendment to the Constitution of the United States, as applied

to the states by the Fourteenth Amendment, were violated by the unreasonable search and seizure of the automobile in question.

In the instant case, as defendant and his wife were driving their car they were stopped by police officers who took defendant to police headquarters for questioning. The officers had no arrest warrant and no search warrant.

While defendant was being taken to police headquarters, the 1967 Chevrolet and his wife were driven by an officer to headquarters also. Once there, the car was impounded and thereafter a search warrant for the car was issued and served on the defendant and on his wife before any search of it was made.

Defendant contends that the officers had no reasonable grounds for a warrantless arrest and, since he was not arrested when he was taken in for questioning, the seizure of the automobile at that time without a search warrant was unconstitutional and that all evidence seized from the car and all testimony which referred to the evidence found in the car should have been suppressed.

It is not necessary to decide whether defendant was arrested at the time he was requested by the officers to accompany them to the police station to answer questions. The officers then had probable cause to believe that defendant had committed three serious felonies—kidnapping, rape, and murder—and was likely to evade arrest if not immediately taken into custody. An arrest then would have been proper. G.S. 15-41 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

While he was at the police station, defendant was formally arrested and proper warrants charging the three felonies were served on him. The car was impounded and was not searched until a search warrant was procured and served. Defendant contends, however, that the original seizure of the automobile was unreasonable and without a warrant and that any evidence obtained therefrom was inadmissible. Unreasonable searches and seizures are prohibited by both the Constitution of the United States and the Constitution of North Carolina, and all evidence obtained by searches and seizures in violation of the Constitution is inadmissible in both state and federal courts. *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Ratliff,* 281 N.C. 397, 189 S.E. 2d 179 (1972); *State v. Hill,* 278 N.C. 365, 180

S.E. 2d 21 (1971); G.S. 15-27 (repealed effective July 1, 1975, by Chapter 1286, Section 26, 1973 Session Laws).

A warrantless search of a vehicle capable of movement may be made by officers when they have probable cause to search and if exigent circumstances make it impracticable to secure a search warrant. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed. 2d 419 (1970); *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d 685 (1969); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *State v. Allen, supra; State v. Ratliff, supra; State v. Jordan*, 277 N.C. 341, 177 S.E. 2d 289 (1970).

In the instant case there was sufficient evidence to constitute probable cause that the 1967 Chevrolet driven by defendant and taken to the police station had been involved in the kidnapping, rape, and murder of the deceased. Later in the day, this evidence was sufficient to cause a magistrate to issue a search warrant for the car. The officers who seized the automobile were faced with two dilemmas. First, if the automobile was not seized and impounded, the wife of the defendant would likely attempt to destroy or make unusable any evidence therein. This assumption was based on evidence that she had already disposed of the victim's class ring. The second was that unless the automobile was impounded and safeguarded any evidence in the car could be tainted and considered unreliable in the minds of the jury and perhaps even made inadmissible because of intervening uncontrolled access to the car by persons other than defendant. In *Chambers v. Maroney, supra*, at 51-52, 90 S.Ct. at 1981, 26 L.Ed. 2d at 428, Justice White, in upholding the search of a car, speaking for the United States Supreme Court, stated:

> "Arguably, because of the preference for a magistrate's judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the 'lesser' intrusion is permissible until the magistrate authorizes the 'greater'. But which is the 'greater' and which the 'lesser' intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment."

We hold that the officers in this case had probable cause to seize and hold the car before presenting the probable cause issue to a magistrate and obtaining a valid search warrant. This assignment is overruled.

[4] By his Assignment of Error No. 13, defendant asserts that the trial court erred when it allowed the introduction of staged photographs into evidence even though the testimony revealed that the photographs were staged with witnesses and with the automobiles of the alleged victim and of the defendant.

Defendant correctly concedes that a photograph of a person, place or object may be introduced into evidence to illustrate the testimony of a witness. *State v. Johnson,* 280 N.C. 281, 185 S.E. 2d 698 (1972); 1 Stansbury's N. C. Evidence, § 34, p. 93 (Brandis Rev. 1973). The photographs of the parking lot on which the alleged abduction took place were made on 22 August 1973, some eleven days after the incident allegedly occurred. They were made by witness Henry M. Dula, employer of the deceased, at the direction and under the supervision of the Lenoir Police Department. Photographs of this area included photographs of the parking lot, of the automobile driven by the deceased, of the alley leading to the parking lot, of the witness Cline in the alley, and in other places. The photographs also showed the defendant's car on the parking lot with the deceased's car. The defendant contends that one of the errors in posing the 1967 Chevrolet is that the photograph clearly shows its license number (BMW-522).

For a photograph to be used to illustrate the testimony of a witness it must be identified as portraying the scene with sufficient accuracy but need not have been made by the witness himself provided he can testify as to its adequacy as a representation. 1 Stansbury's, *supra,* § 34, pp. 93-95. Stansbury also points out that "[p]osed photographs of the reconstructed scene of an accident are admissible when properly identified by a witness as being accurate representations of the conditions as he saw them at the time in issue." 1 Stanbury's, *supra,* § 34, p. 97; *Hunt v. Wooten,* 238 N.C. 42, 76 S.E. 2d 326 (1953); *State v. Matthews,* 191 N.C. 378, 131 S.E. 743 (1926).

At the time the photographs were introduced into evidence and again in his charge, the trial court instructed the jury that the photographs were introduced "for the sole purpose of illustrating or explaining the testimony of the witnesses. These photo-

graphs . . . may not be considered by you for any other purpose." In addition, the photographs where staged were described to the jury as posed or staged photographs, designed to illustrate the testimony of the witnesses as to the type, style, color characteristics of the vehicles observed and their relative positions and the relative positions of the various witnesses in the parking lot. There could be no misunderstanding that the photographs were posed or staged.

Captain Triplett of the Lenoir Police Department testified as to the license number (BMW-522) of the 1967 Chevrolet which defendant had been driving prior to the alleged crimes and which had been legally impounded by the officers. The jury was informed that the photographs were made by a professional photographer after the alleged kidnapping and that they were offered for the limited purpose of illustrating the testimony of the witness. "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. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). *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). *See generally,* 1 Stansbury's, *supra,* § 34.

We hold that for the limited purpose of illustrating the testimony of witnesses, the posed or staged photographs were properly admitted into evidence. This assignment is overruled.

[5] By his Assignment of Error No. 12, defendant alleges that the trial court erred in allowing witnesses to make in-court identifications of the defendant when those identifications were tainted by the police having shown these witnesses police photographs of the defendant which impermissibly suggested to the witnesses that the defendant was in fact guilty of the crimes for which he was charged.

Defendant contends that each of the witnesses who identified the defendant in open court had previously been shown a group of police photographs or mug shots and that these photographs showed a frontal view, right profile and left profile of each of the persons photographed. Defendant particularly contends that the witness Cline had less than one minute to observe the side of the defendant's face, that he had never seen the defendant prior to 11 August 1973, and that his in-court identification was inadmissible.

In *Simmons v. United States,* 390 U.S. 377, 384, 19 L.Ed. 2d 1247, 1253, 88 S.Ct. 967, 971 (1968), the court held that "each case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside . . . only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . . . "

In each instance when the identification of defendant by a witness was questioned, the trial court held an extensive *voir dire* hearing. After two of these hearings, the court held that the testimony of the witness in question regarding the identification of defendant was not admissible. In the others, he held the identification testimony admissible. In each instance he found facts and made conclusions of law. Defendant strenuously objected to the identification of defendant and the deceased by the witness Cline. We quote some of the findings of fact made by the trial court and his conclusions of law as to this witness.

"FINDINGS OF FACT

* * *

"That it was daylight. That there was nothing obscuring the vision of the witness, Cline, of either of these parties and that he observed the right and a portion of the front of the faces of the individuals whom he described.

* * *

"That he was within twenty to thirty feet of the couple that he observed and never at any time attended a lineup in which the defendant was placed or observed the defendant in a lineup.

* * *

"That the witness had ample opportunity to observe the side and a portion of the front of the faces of both parties present on the parking lot on the morning of August 11, 1973, and observed them from the time he emerged from the alley, crossed the street and turned to the jewelry store.

"That the identity [sic] by the witness, Cline, of the defendant and Paula Gail Hollar was based upon his observation of these two persons at the time he saw them in the parking lot near the jewelry store and the independent

recollection of what he saw on that occasion and not the photographs of the defendant which were displayed to him by the officers at the police station or upon the photograph of Paula Gail Hollar which he saw lying on the desk at the time or at some later time.

"That the witness's identification of the defendant and Paula Gail Hollar was of independent origin and did not originate in the police station of the town of Lenoir.

"CONCLUSIONS OF LAW

"Based upon the foregoing Findings of Fact, the court concludes as a matter of law that the pre-trial identification procedure of displaying the photograph was not unnecessarily suggestive and conducive to irreparable mistaken identification and the court finds the evidence totally void of anything to suggest that the procedures as followed would manifestly offend fundamental standards of decency, fairness and justice and amount to denial of due process of law. Next, that there is no substantial likelihood of irreparable misidentification.

"Based upon the foregoing Findings of Fact and Conclusions of Law it is the order of the court that this witness be permitted, in open court, to identify this defendant."

In *State v. Tuggle,* 284 N.C. 515, 520, 201 S.E. 2d 884, 887 (1974), Chief Justice Bobbitt stated the rules governing *voir dire* hearings when identification testimony is challenged:

"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)."

Accord, State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Shore,* 285 N.C. 328, 204 S.E. 2d 682 (1974). *See,* 1 Stansbury's, *supra,* § 57, pp. 176-77.

In the present case the facts found by the trial court after *voir dire* hearings concerning each witness allowed to identify defendant were substantially as set out above for the witness Cline, were supported by competent evidence and are conclusive on this Court. This assignment is overruled.

[6] Defendant next assigns as error the admission of testimony of a witness who was unable to identify with certainty an automobile or its occupants.

The witness Wilcox testified that she saw a light-green Chevrolet with two passengers turn onto Old Mill Creek Road at approximately 10:20 a.m. on Saturday, 11 August 1973. She testified that she thought the car was a light-green 1967 Chevrolet although she was uncertain of the color of the top. She thought the driver was a male but was unsure about the passenger. She noticed nothing unusual about the way the passengers were seated.

Defendant contends that this testimony was highly prejudicial to defendant for it seeks to put the light-green car that defendant had been driving near the location where the body of deceased was found without any evidence as to who was driving the car at the time.

Chief Justice Denny, in *State v. Hamilton,* 264 N.C. 277, 286-87, 141 S.E. 2d 506, 513 (1965), a case in which as here the State relied on circumstantial evidence, stated: " . . . However, in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible. The weight of such evidence is for the jury." *Accord, State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Shaw,* 284 N.C. 366, 200 S.E. 2d 585 (1973); *State v. Sneeden,* 274 N.C. 498, 164 S.E. 2d 190 (1968).

The testimony of the witness Wilcox was relevant in that it placed a male driver in a light-green Chevrolet operating the vehicle on the wrong side of the road on Hibriten Drive turning onto the Old Mill Creek Road at approximately 10:20 a.m. on the morning of 11 August 1973. This was near where the body of deceased was found the next day.

This is a circumstance to be considered by the jury. The weight is for the jury. This assignment is overruled.

[7] Defendant next assigns as error the failure of the trial court to charge on defendant's evidence relating to alibi.

Defendant's sister, Barbara Minton, testified that defendant was at her house on 11 August 1973 from 7:00 a.m. to 7:40 a.m. and later that same morning stayed from 10:00 a.m. until 10:15 a.m.

Louise Wilcox testified for the State that she saw two people drive onto Old Mill Creek Road at about 10:20 a.m. that same morning.

This is the only evidence cited by defendant of an alibi.

Although it is doubtful if this evidence is sufficient to require the court to charge on alibi even if requested to do so, no such request was made in this case.

In *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973), we established the rule in this jurisdiction that the court is not required to give an instruction on alibi unless requested to do so by the defendant.

In *State v. Shore,* 285 N.C. 328, 341, 204 S.E. 2d 682, 690 (1974), Justice Huskins, speaking for the Court, said:

> "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 the present case began on 21 January 1974. In the absence of a request for instruction on the evidence of an alibi, no such instruction was required. This assignment is overruled.

[8] By his Assignment of Error No. 20, defendant contends the trial court erred in failing to submit to the jury the question of defendant's guilt of second degree murder as a lesser included offense under the first degree murder indictment.

On 11 August 1973, G.S. 14-17 in part provided:

> "A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . . "

The trial judge, after defining "kidnapping" and "rape," charged the jury:

> "So, I instruct you, members of the jury, that if you find from the evidence and beyond a reasonable doubt that on or about the 11th day of August, 1973, Vernon Junior Woods struck Paula Gail Hollar on the head with a blunt instrument . . . while committing, or attempting to commit the crime of kidnapping or rape, and that these blows . . . proximately caused Paula Gail Hollar's death, it would be your duty to return a verdict of Guilty of Murder in the First 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."

The judge did not instruct regarding proof of murder in the first degree by killing with premeditation and deliberation or regarding second degree murder.

When all the evidence tends to show that the accused killed the deceased in the perpetration or attempted perpetration of a felony and there is no evidence of guilt of a lesser offense, the court correctly refrains from submitting the question of defendant's guilt of murder in the second degree. *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E.

2d 671 (1971); *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232 (1963); *State v. Scales,* 242 N.C. 400, 87 S.E. 2d 916 (1955); *State v. Mays,* 225 N.C. 486, 35 S.E. 2d 494 (1945). In the present case, the State's evidence (consisting of over 300 pages in the record) tended to show that Paula Gail Hollar was kidnapped by defendant on the streets of Lenoir, forced into his automobile, driven to a secluded area off Hibriten Drive, raped, and murdered. Defendant's evidence sought to show that Mrs. Hollar had not been raped, that she had not been kidnapped, and that in any event defendant was not the perpetrator of the crimes. The jury was instructed that if they believed deceased was killed but did not believe that this occurred during the perpetration of rape or kidnapping by defendant, they were to return a verdict of "not guilty." We find no evidenec in the 516-page record of this case that suggests deceased was killed other than in the perpetration or attempted perpetration of the felonies of kidnapping and rape. We hold therefore that the trial judge did not err in failing to instruct the jury on the question of defendant's guilt of the lesser included offense of second degree murder.

By Assignments of Error Nos. 18 and 19, defendant contends the trial court erred in overruling his motions for directed verdicts of not guilty and motion to set aside the verdicts.

The motion for a directed verdict of not guilty challenges the sufficiency of the evidence to go to the jury. *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913 (1955); *State v. Brackville,* 106 N.C. 701, 11 S.E. 284 (1890). "When the evidence is sufficient to overrule defendant's motions for nonsuit, the evidence is also sufficient to overrule defendant's motion for a directed verdict of not guilty, since the motions have the same legal effect." 2 Strong, N. C. Index 2d, Criminal Law § 109 (1974 Supp.); *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305 (1967). On motion to nonsuit, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *See,* 2 Strong, N. C. Index 2d, Criminal Law § 104 (1967), and numerous cases therein cited. Contradictions and discrepancies are for the jury to resolve, and do not warrant nonsuit. *Id.* Only the evidence favorable to the State will be considered, and defendant's evidence relating to matters of defense will not be considered. *Id.*

[9] The State's case is based upon circumstantial evidence. The State offered numerous witnesses whose testimony tended

to show that the defendant was in downtown Lenoir around 9:00 a.m. on 11 August 1973 driving a 1967 light-green Chevrolet with a dark top. Several women testified that they were approached by defendant on this morning. There was testimony that a man and woman were seen scuffling in the parking lot where deceased's car was parked and that deceased was shoved into defendant's car. A car like defendant's carrying two occupants and with a male driver was seen about an hour and twenty minutes later on the wrong side of Hibriten Drive and the car turned into Old Mill Creek Road. The victim's body was found in a stream nearby late the next day. The victim had live spermatozoa in her vagina, her vagina and rectal area had been injured and there was a tear in the peritoneum. Rings identified as belonging to the victim were given by the defendant to his wife on the afternoon of 11 August. A torn portion of an insurance identification card was found in the 1967 Chevrolet operated by defendant, and this torn portion matched the other portion of the card found with the personal effects of the deceased. Fibers found in the 1967 Chevrolet matched fibers from the dress worn by the deceased on August 11.

The State's evidence in this case was clearly adequate to survive defendant's motion for directed verdict and the case was properly submitted to the jury. This assignment is overruled.

[10] Defendant next contends that the trial court erred in overruling his motion to arrest the judgments entered in the kidnapping and rape cases. We agree.

The trial judge instructed the jury that in order to find defendant guilty, they must find that defendant caused the death of deceased while committing or attempting to commit the crimes of rape or kidnapping. It is clear from this instruction that proof of rape or kidnapping was an indispensable element in the State's proof of murder in the first degree. This being true, neither rape nor kidnapping affords basis for additional punishment under the merger rule, most recently discussed in *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975). *See also, State v. Moore,* 284 N.C. 485, 202 S.E. 2d 169 (1974); *State v. Carroll,* 282 N.C. 326, 193 S.E. 2d 85 (1972); *State v. Peele,* 281 N.C. 253, 188 S.E. 2d 326 (1972); *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972). This assignment is sustained and the judgments in the kidnapping and rape cases are arrested.

By Assignment of Error No. 9, defendant contends it was prejudicial error to allow Laura Ward, an expert in forensic serology employed by the State Bureau of Investigation Chemical Laboratory, to testify as to the presence of human blood on the seat cover of the 1967 Chevrolet automobile allegedly driven by defendant on 11 August 1973.

At trial, Laura Ward testified that her examination of the seat cover revealed a bloodstain approximately two inches in diameter. The quantity was sufficient to allow her to determine the blood to be of human origin, but insufficient to allow her to determine the blood type. She further testified that the blood was diluted by some substance, but could not determine what that substance was. She could not tell how long the blood had been on the seat cover—whether one or two weeks. Defendant moved to strike this testimony as being of no probative value, which motion was denied by the trial court.

In 1 Stansbury's, *supra*, § 78, we find:

> "The standard of admissibility based on relevancy and materiality is of necessity so elastic, and the variety of possible fact situations so nearly infinite, that an exact rule cannot be formulated. In attempting to express the standard more precisely, the Court has emphasized the necessity of a *reasonable,* or *open and visible* connection, rather than one which is remote, latent, or conjectural, between the evidence presented and the fact to be proved by it . . . . "

And this Court has said that " . . . in criminal cases, every circumstance that is calculated to throw any light upon the supposed crime is admissible." *State v. Hamilton, supra. Accord, State v. Arnold, supra; State v. Shaw, supra.*

Prior to the testimony of Laura Ward, the State offered evidence tending to show that deceased had been forced into an automobile like that driven by defendant on 11 August, and that the deceased suffered abrasions and traumas to various parts of her anatomy before her death. The State also introduced evidence tending to show that a portion of deceased's insurance identification card was found in the 1967 Chevrolet belonging to defendant. Subsequent to the testimony of Laura Ward, the State offered evidence tending to show that fibers from the seat cover of the 1967 Chevrolet matched fibers from the clothing worn by deceased on the day of her death.

To be admissible, an item of evidence need only have a logical tendency to prove a fact in issue, and need not *prove* a material fact *of itself*. As is said in McCormick on Evidence 436 (2d ed. 1972):

> " . . . Items are normally offered and admitted or rejected as units, though of course the judge will consider any proof already made by the proponent as indicating the bearing of the item offered, and may in his discretion ask the proponent what additional circumstances he expects to prove. But when it is offered and judged singly and in isolation, as it frequently is, it cannot be expected by itself to furnish conclusive proof of the ultimate fact to be inferred. . . . This is the distinction between relevancy and sufficiency. The test of relevancy, which is to be applied by the trial judge in determining whether a *particular item or group of items of evidence* is to be admitted is a different and less stringent one than the standard used at a later stage in deciding whether *all the evidence* of the party on an issue is sufficient to permit the issue to go to the jury. A brick is not a wall." (Emphasis added.)

See also, 1 Stansbury's, *supra*, § 78, p. 238.

[11] When considered with other circumstances shown by the evidence, we think the fact that there was a human bloodstain on the seat cover of the automobile alleged to have been utilized in the kidnapping of deceased and driven by defendant on the morning of 11 August 1973 is highly probative of a material fact in this case and was properly admitted in evidence. The fact that the State could not show the blood type went to the weight of the evidence and not to its admissibility. This assignment is overruled.

[12] Defendant next contends that the court erred when it allowed witness W. E. Pearce to testify regarding matters within his common experience and not based on expert tests conducted by him.

Mr. Pearce, a forensic chemist for the State Bureau of Investigation Chemical Laboratory, testified at length concerning his examination of fibers from the victim's dress, his examination of fibers seized in the search of the 1967 Chevrolet, and his expert opinion as to similarity of the fibers. Mr. Pearce used microscopic examination, solvent tests and thin-layer chroma-

tography in reaching the conclusion that the fibers found in the automobile could have come from the victim's dress. He testified that it was "unlikely" that these fibers came from a different article dyed in the same manner as the dress.

On cross-examination, Pearce testified that he had some distinct impressions as to how common the various fibers were. He said the cotton fiber was fairly common but that the red polyester fiber was "quite unique unto itself" and "reasonably rare" due to the fact that it was dyed by a mixture of several different dyes rather than by one of the approximately thirty dyes most commonly used. He stated that it was therefore "unlikely" that these fibers came from a source other than the victim's dress. He concluded that he did not know exactly what quantity polyester fiber was colored with the same mixture of dyes or how much of this fiber was distributed in the Lenoir area, and that he therefore could not determine to exact probability whether the fibers found in the automobile were from a source other than the victim's dress, but that it was "unlikely" since he knew that " . . . just going through life . . .you don't routinely see two women with the same dress on. It does happen, but it is not extremely common. You . . . go to a clothing store and . . . see duplications, but they are not the rule."

It is the rule in North Carolina that "[a] finding by the trial judge that the witness possesses the requisite skill will not be reversed on appeal unless there is no evidence to support it or the judge abuses his discretion." 1 Stansbury's, *supra*, § 133. *State v. Johnson*, 280 N.C. 281, 185 S.E. 2d 698 (1972); *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971); *Hunt v. Wooten*, 238 N.C. 42, 76 S.E. 2d 326 (1953). In this case, the trial judge found Mr. Pearce to be an expert and there is ample evidence to support this finding. It is clear that the witness's statements to the effect that the red polyester fibers were "reasonably rare" and that it was "unlikely" that the fibers came from a source other than the dress of the victim were based on his expertise. He evidenced a professional familiarity with dyes and dyeing techniques, and knew which dyes were more common than others. We think the further statement by the witness on cross-examination that it was also unlikely that two women might own the same dress was inconsequential in this setting. Clothing merchandising was not this expert's area of expertise, as the witness pointed out when he said his answer was based on "just going through life." Defendant, having asked the

questions, cannot now be heard to say the court erred in allowing seemingly innocuous answers. This assignment is overruled.

[13] Defendant next assigns as error the trial court's denial of his motions to quash the bills of indictment for the reason that the felony-murder doctrine under which the State elected to proceed is unconstitutionally vague in that kidnapping was not listed in G.S. 14-17 at the time of the offense as one of the felonies that would support a conviction under the felony-murder rule.

Suffice to say that, prior to the amending of G.S. 14-17 to add kidnapping to the list of specified felonies (1973 Session Laws, Chapter 1201, Section 1, effective 8 April 1974), it was well established that any felony inherently dangerous to life is within the purview of G.S. 14-17 though not specified therein. *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666 (1972); *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970); *State v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649 (1949). We held in *State v. Streeton, supra,* that a homicide in the perpetration of kidnapping is first degree murder, Justice Ervin stating that "[w]hen a person undertakes by force or violence to kidnap another . . . contrary to G.S. 14-39, he commits or attempts to commit a felony which has a natural tendency to cause death."

Rape was listed in G.S. 14-17 at the time of the alleged murder as one of the felonies that would support a conviction under the felony-murder rule. Either kidnapping or rape would support a conviction under this rule. There is no merit to this assignment.

[14] Defendant finally contends that his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated in this case by the imposition of the mandatory death sentence. Defendant contends specifically that due to the large amount of discretion present in the administration of criminal justice, particularly the discretion vested in the district attorney in determining which cases will be prosecuted for the capital crime, or which should be prosecuted for a lesser offense, the imposition of the death penalty is cruel and unusual punishment and operated to deprive him of his rights of equal protection of the law. Defendant's contentions were extensively argued, carefully considered and rejected in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to our deci-

sion in that case. *See also, 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. 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 and each assignment of error brought forward by defendant. Our examination discloses that defendant received a fair trial free from prejudicial error.

As to the murder charges: No error.

As to the kidnapping and rape charges: Judgments arrested.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of life imprisonment for the reasons stated in her dissenting opinion in *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 3 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. JOHN RICHARD STEGMANN

No. 38

(Filed 14 April 1975)

1. **Criminal Law § 89— qualification of character witness — testimony as to general reputation permissible**

It is the general rule in this State that a sustaining or impeaching character witness must first qualify himself by indicating whether he knows the general reputation or character of the person, and when thus qualified, the character witness may then indicate, of his own accord or by prompting from counsel, what that general reputation is.

2. Criminal Law § 89; Rape § 4— character witness — basis of opinions questioned

The district attorney's question put to witnesses who had testified as to the prosecuting witness's general reputation and character, "On what do you base your opinion?" though unnecessary and ineptly phrased, together with the answers thereto tended to show the foundation for the character evidence given by the witnesses, aided the jury in determining the weight to be given the testimony, and was not prejudicial to defendant.

3. Criminal Law § 89; Rape § 4— prosecuting witness in rape case — veracity questioned — character evidence proper

Where defense counsel in a rape case attempted to elicit testimony from the prosecuting witness tending to show that she consented to the intercourse and fabricated the alleged rape because she was afraid her husband would learn the truth concerning her rendezvous with defendant, the district attorney was entitled, while making out the State's case in chief, to offer evidence of her good character and reputation to sustain and strengthen her veracity and virtue.

4. Criminal Law § 89; Rape § 4— prosecuting witness in rape case — character witnesses — evidence admissible

Testimony of witnesses in a rape case which indicated that the witnesses were in positions to observe the prosecuting witness and to gain knowledge of her general reputation in the community from those knowledgeable of that reputation was admissible, together with the length of time each witness had known the prosecuting witness, to show the foundation for their estimate of her character; the fact that several of the witnesses attended the same church as the prosecuting witness and based their testimony on what had been heard in the church community did not render the testimony inadmissible.

5. Criminal Law § 34— defendant's guilt of prior rape — admissibility for identification and corroboration

In a rape prosecution the trial court did not err in allowing the prosecuting witness to testify that defendant told her he had previously been charged with rape but had "beaten the rap," in allowing officers to testify that they had reviewed their files as a result of the prosecuting witness's statements to them concerning the earlier rape, in allowing defendant to be cross-examined concerning the rape, and in allowing the district attorney to argue the matter before the jury, since such evidence was admissible to identify defendant as the perpetrator of the offense in question and to corroborate the testimony of the prosecuting witness.

6. Criminal Law § 102— district attorney's jury argument — reason for failure to introduce evidence

In a prosecution for rape where defense counsel repeatedly argued to the jury that there was no evidence that defendant was arrested for rape on an earlier occasion, just accusations, the trial court did not err in allowing the district attorney's response indicating why he had not introduced such evidence.

7. **Criminal Law § 102— argument of prosecutor — latitude**

The prosecutor is entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom, but he may not place before the jury incompetent, irrelevant and prejudicial matters, and may not travel outside the record by injecting into his argument facts of his own knowledge or other facts not included in the evidence; moreover, the fact that the sympathy or prejudice of the jury may be aroused by the argument of counsel does not render the argument improper when it is legitimate and based on competent evidence.

8. **Criminal Law § 89; Rape § 4— character witness — information about employment properly excluded**

In a rape case where a witness testified as to the character and reputation of the prosecuting witness and further testified on cross-examination that he was a special investigator with an intelligence unit, the trial court did not err in refusing to require the witness to divulge details concerning the type of work involved or the identity of his employer.

9. **Constitutional Law § 36; Rape § 7— death sentence — constitutionality**

Death sentence imposed in this rape case was constitutional.

Chief Justice SHARP and Justice COPELAND dissenting as to death sentence.

Justice EXUM dissenting.

APPEAL by defendant from judgments of *Canaday, J.*, 13 May 1974 Criminal Session, CUMBERLAND Superior Court.

Defendant was tried upon bills of indictment proper in form charging him with (1) kidnapping and (2) raping Ruth O'Leta Kendall on 4 September 1973 in Cumberland County.

Ruth O'Leta Kendall, a twenty-six-year-old married woman, testified that on 4 September 1973 she worked her normal hours of 8:30 a.m. to 5:00 p.m. at the Aetna Finance Company office located in the K-Mart Shopping Center on Bragg Boulevard in Fayetteville. Upon leaving work about 5:15 p.m., she made a few purchases in the grocery store, returned to her car, unlocked and opened the door on the driver's side, and sat down on the seat with her right leg in the car and her left foot and leg outside. The right door to the car was locked and could only be unlocked from the outside because the plastic button on the inside was broken off. While in that position and in the act of placing her groceries on the seat, a man shoved a knife in her ribs and told her to move over. "He told me to keep quiet

and move over or he would use the knife. That if I did keep quiet he wouldn't hurt me."

Mrs. Kendall further testified that she moved over and the man got under the wheel. He required her to keep her hands on her lap while he kept his right arm around her with the knife to her side. It was a straight shift car which he steered with his left hand while she, at his command, changed gears as necessary. The man took her out Bragg Boulevard and into a remote section of Clark's Park where he stopped the car. He then forced Mrs. Kendall to accompany him on foot into the woods. There, after forcing her to disrobe, he raped her.

After putting on their clothes, Mrs. Kendall inquired if she would be taken back to the K-Mart and the man said, "I can't let you live because you can recognize me," adding that rape was a capital offense and that he couldn't afford to go through that. He told Mrs. Kendall he had been tried for rape in 1971 and "beat the rap" and couldn't go through that again. He told her he had spent time in jail and in a mental hospital; that he had children he had to support; that she could identify him by his tattoos. Mrs. Kendall observed that the man's front teeth were missing and that a tattoo on his left forearm said "God Bless My Family" and had four names, including the name Sharon. On his right upper arm was an Airborne-type tattoo. He was wearing a T-shirt, fatigue pants, and combat boots. The man pushed Mrs. Kendall through the underbrush until they came to the Cape Fear River. He asked her if she could swim and told her to choose between the knife and the river. She started for the river and he pulled her back and eventually took her back to the car.

On the way back to K-Mart he wanted to know her name and she told him. He said he wanted her telephone number, and Mrs. Kendall wrote it on a piece of paper and gave it to him. He told her that he wanted to have an affair with her—"he wanted to call me up and meet me later. I told him that I would do anything he wanted; he still had the knife and I was still petrified."

Upon arrival at the K-Mart parking lot the man talked to Mrs. Kendall for an additional ten or fifteen minutes, then got out of the car and told her to go straight home and not look back. Mrs. Kendall drove away and noticed a white car following her until she turned into the street where she lived.

Mrs. Kendall immediately told her husband what had occurred. Her clothes were dirty and wet and had mud, debris and pine straw on them. The family doctor was called and the police were notified.

When the police arrived at her home she told them the whole story and gave a description of the man including information about the tattoos, the two missing front teeth, and the color of his hair. She also told the officers that her assailant said "he had beat a case like this in '71 where he had assaulted another lady and that he had spent time in jail and that he had spent time in a mental hospital."

The officers consulted their files and ascertained that the defendant John Richard Stegmann fit, *in minute detail,* the description given by Mrs. Kendall. The police records further showed that defendant had been charged with rape in 1971 and acquitted.

Defendant was arrested and on the following day Mrs. Kendall identified him in a lineup.

Defendant offered evidence and testified as a witness in his own behalf. He said he was twenty-four years old, married, and had three children named Johnny, Donny and Sharon. He testified he first met Mrs. Kendall in the K-Mart Snack Bar approximately two weeks before he was arrested. The place was crowded and he asked Mrs. Kendall if he might sit at her table where she was eating lunch and she consented. He introduced himself and she told him her name. He told her he was in the Army, married and had children. He asked her for her telephone number and she gave it to him there in the K-Mart Snack Bar. The number was 867-1700 and he put it in his wallet. On 3 September 1973 he called Mrs. Kendall and in a one-minute conversation they agreed to meet the following day when she got off work. Accordingly, he met her on 4 September 1973 as she came out of the grocery store at the K-Mart Shopping Center. "I walked over to her and took the bags she was carrying and carried them to her car. She then got into her car and I got in, too, and I drove away."

The defendant further testified that they drove to Clark's Park, went down the path that leads to the river to an area in the woods where they undressed and had sexual relations. It was drizzling at the time. While undressing "everything fell out of one of the pockets in my pants," including the knife offered

in evidence, and Mrs. Kendall helped pick the items up. Defendant said he and Mrs. Kendall then dressed and drove back to the K-Mart Shopping Center where they sat and talked for fifteen or twenty minutes. "I then got out of the car and left. She drove off."

Defendant emphatically denied that his small pocket knife was ever open, or that he ever threatened Mrs. Kendall, or that he ever told her he had been previously charged with rape in 1971 and beat the rap. He admitted that his front teeth are missing and that he has tattoos on both arms, one an Airborne-type tattoo and the other with "God Bless My Family" and four names on it—Sandra, Sharon, Johnny and Donny.

Dr. Albert Stewart, Jr., testified that he saw Mrs. Kendall on 4 September 1973 at which time she told him she had been raped. She appeared to be frightened but there was no evidence of any bodily injury. Examination disclosed twigs, bits of debris, leaves and dirt adhering to her back and in the vaginal area. There were no scratches, cuts or bruises on her body and examination of her privates revealed no cuts or bruises or lacerations of any kind.

The arguments were transcribed and constitute part of the record on appeal. Pertinent portions of the district attorney's argument which are assigned as error will be narrated in the opinion.

Defendant was convicted of both charges and appeals from a life sentence for the kidnapping and a death sentence for the rape.

Kenneth Glusman, attorney for defendant appellant.

James H. Carson, Jr., Attorney General, and James E. Magner, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

The trial court admitted over objection the testimony of fourteen character witnesses offered by the State to show the good character and reputation of the prosecuting witness. Defendant's second and third assignments of error are based upon admission of this testimony. Following is a brief narration of the evidence in question.

Roger Frazee, manager of Aetna Finance Company where Mrs. Ruth Kendall had been working for fourteen months, testified that he knew her character and reputation in the community in which she lived and that it was outstanding.

Gilda Smith testified she had known Ruth Kendall for over four years, knew her character and reputation in the community in which she lived and that it was "very good, excellent."

Reverend Clarence L. Hopkins testified he had known Ruth Kendall for about ten years, knew her character and reputation in the community in which she lived, and that it was outstanding. When asked to state on what he based his opinion, he replied: "As a pastor and counseling with other members of the church and their counseling with me and statements made about her and also in and out of the church I knew her."

Major Darryl C. Judson testified he had known Ruth Kendall for about eight years, knew her character and reputation in the community in which she lived, and that it was outstanding. When requested to state the basis for his answer, he replied: "I base this upon personal observation, talking with friends and conversation with other people and upon my own seeing what she has done on her courage and her integrity."

Will R. Godwin testified he had known Ruth Kendall for ten or twelve years, knew her character and reputation in the community in which she lived, and that it was very good. When asked to state the basis for his testimony, he replied: "I am her Sunday School teacher and I am the director of the choir in which she sings. She is there every Wednesday night and every Sunday and I can find nothing wrong with her whatsoever. She is a very fine girl."

Eugene Arthur Ledbetter, a soldier in the United States Army, testified he had known Ruth Kendall between ten and twelve years, knew her character and reputation in the community in which she lived, and that it was excellent. When asked to state the basis for that opinion, he replied: "I base this on my own personal observation and discussions with other church leaders regarding positions of leadership that have been filled with the church and I know her reputation as being the finest a woman can have."

Pansy Cain Porter testified she had known Ruth Kendell approximately twelve years, knew her character and reputation

in the community in which she lived, and that it was outstanding. When asked what she based that opinion on, she replied: "I have been knowing her approximately twelve years and personal contact. And working with her in the church and choir."

Roy A. Parker testified that he knew Ruth Kendall; that her character and reputation in the community in which she lived was very good and that he based his opinion upon talking with his friends and neighbors in the church and in the community and as a personal observation.

Mitchell Reinburger testified that he knew the character and reputation of the prosecuting witness in the community in which she lived and that it was outstanding; that his opinion was based on his personal knowledge of her and the opinions of his friends.

Catherine Reinburger testified that she knew the character and reputation of Ruth Kendall in the community in which she lived and that it was excellent; that her opinion was based on the fact that she had known Mrs. Kendall for three and one-half years, had been involved in activities with her and her husband, and from talking with friends and acquaintances.

Ann Riggin testified that she knew the character and reputation of Ruth Kendall in the community in which she lived and that it was excellent; that her opinion was based on living in the community with her when she was growing up, going to church with her, and having Mrs. Kendall in her home at Christmas time.

Tony Cimaglia testified that he knew the general character and reputation of the prosecuting witness in the community in which she lived and that it was very good; that his opinion was based on being with Mrs. Kendall and her husband on numerous occasions and through friends in the community and from knowing her personally.

Aldan Ernest Pease testified that he knew the character and reputation of Mrs. Kendall in the community in which she lived and that it was outstanding; that his opinion was based on his personal acquaintance with Ruth Kendall and her husband "and through personal acquaintances with neighbors and church members."

Mrs. Roland Harris, Jr., testified that she knew the general character and reputation of the prosecuting witness in the com-

munity in which she lived and that it was good; that her opinion was based on her own personal observation. "The witness testified that the prosecuting witness and her husband had been in the witness' home several times during the time they were dating and since then and the witness further testified that in her opinion the prosecuting witness is a fine Christian girl."

[1] It is the general rule in this State that a sustaining or impeaching character witness must first qualify himself by indicating whether he knows the general reputation or character of the person. *Johnson v. Massengill,* 280 N.C. 376, 186 S.E. 2d 168 (1972); *State v. Ellis,* 243 N.C. 142, 90 S.E. 2d 225 (1955); *State v. Bowen,* 226 N.C. 601, 39 S.E. 2d 740 (1946); *State v. Colson,* 193 N.C. 236, 136 S.E. 730 (1927); *State v. Steen,* 185 N.C. 768, 117 S.E. 793 (1923); 1 Stansbury's North Carolina Evidence, § 114 (Brandis Rev. 1973).

When thus qualified, the character witness may then indicate, of his own accord or by prompting from counsel, what that general reputation is. *State v. Smoak,* 213 N.C. 79, 195 S.E. 72 (1938); *State v. Sentelle,* 212 N.C. 386, 193 S.E. 405 (1937); *State v. Nance,* 195 N.C. 47, 141 S.E. 468 (1928); *Edwards v. Price,* 162 N.C. 243, 78 S.E. 145 (1913); *State v. Ussery,* 118 N.C. 1177, 24 S.E. 414 (1896).

Chief Justice Stacy in *State v. Hicks,* 200 N.C. 539, 157 S.E. 851 (1931), states the rule for qualifying a character witness and eliciting character testimony from him in these words:

> "The rule is, that when an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer it in the negative, he should be stood aside without further examination. If he reply in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is. This he may do categorically, *i.e.* simply saying that is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices."

[2] This procedure was followed in the examination of witnesses Roger Frazee and Gilda Smith. In the examination of the remaining twelve witnesses, however, the district attorney added the question: "On what do you base your opinion?" Defendant contends this question spawned expressions of personal opinions and narrations of specific acts relating to Ruth Kendall's good character in violation of the rule that character may not be shown by the opinion of the character witness or by specific acts of the person whose character is in question. *See Johnson v. Massengill,* 280 N.C. 376, 186 S.E. 2d 168 (1972).

Although unnecessary and ineptly phrased, the additional question and the answers thereto tended to show the foundation for the character evidence given by the witnesses. A strong or weak foundation for the testimony of a witness aids the jury in determining the weight it will give that testimony. *State v. Young,* 210 N.C. 452, 187 S.E. 561 (1936); *Moss v. Knitting Mills,* 190 N.C. 644, 130 S.E. 635 (1925); 2 Wigmore, Evidence § 655 (3rd Ed. 1940). Thus the question was properly permitted, and we perceive no prejudice from either the question or the responses. *State v. Kiziah,* 217 N.C. 399, 8 S.E. 2d 474 (1940).

[3] In the cross-examination of Ruth Kendall, defense counsel attempted to elicit testimony tending to show that she consented to the intercourse with defendant and fabricated the alleged rape because she was afraid her husband would learn the truth concerning her rendezvous with defendant. The questions implied that Mrs. Kendall had willingly engaged in an adulterous act and then sought to conceal it by false testimony on direct examination. In that setting, the district attorney was entitled, while making out the State's case in chief, to offer evidence of her good character and reputation to sustain and strengthen her veracity and virtue. *Ingle v. Transfer Co.,* 271 N.C. 276, 156 S.E. 2d 265 (1967); *Lorbacher v. Talley,* 256 N.C. 258, 123 S.E. 2d 477 (1962); *State v. Hooks,* 228 N.C. 689, 47 S.E. 2d 234 (1948); *State v. Litteral,* 227 N.C. 527, 43 S.E. 2d 84, *cert. denied* 332 U.S. 764, 92 L.Ed. 349, 68 S.Ct. 69 (1947); *State v. Bethea,* 186 N.C. 22, 118 S.E. 800 (1923); 1 Jones on Evidence § 4:37 (6th Ed. 1972); 1 Stansbury's North Carolina Evidence § 50 (Brandis Rev. 1973); 4 Wigmore, Evidence § 1104 (Chadbourn Rev. 1972); 29 Am. Jur. 2d, Evidence § 342 (1967). Moreover, "the character of the complainant in rape may, it seems, be shown as bearing on the question of consent." 1 Stansbury's North Carolina Evidence § 105 (Brandis Rev. 1973); *State v. Grundler*

and Jelly, 251 N.C. 177, 111 S.E. 2d 1 (1959), *cert. denied* 362 U.S. 917, 4 L.Ed. 2d 738, 80 S.Ct. 670 (1960); *State v. Hairston*, 121 N.C. 579, 28 S.E. 492 (1897); *State v. Daniel*, 87 N.C. 507 (1882); *State v. Jefferson*, 28 N.C. 305 (1846). In every criminal prosecution a defendant may offer evidence of his good character and have it considered as substantive evidence in his favor. On the same theory, in a prosecution for rape, where the credibility of the prosecutrix is attacked either by evidence or by questions on cross-examination insinuating that she consented to sexual relations with the defendant, the State is entitled to offer evidence of the good character of the prosecutrix. The defense of consent is a charge that the prosecutrix has, under oath, falsely accused a man in a matter involving his life or death. The State, therefore, may put in evidence any circumstance tending to lessen the likelihood that she is guilty of such criminal and iniquitous conduct. *See* 1 Stanbury's North Carolina Evidence §§ 104 and 105 (Brandis Rev. 1973). In situations where the defendant does not question the fact of rape but denies that he is the guilty party, the character of the prosecutrix is not directly involved in the issue.

[4] We note that each character witness categorically stated that Ruth Kendall's character and reputation was "outstanding," "very good," or "excellent." Then in response to the additional question the witnesses indicated that their testimony was based on association, observation and discussion with Ruth Kendall and her associates. Eight of the witnesses (Hopkins, Judson, Ledbetter, Parker, Mitchell, Reinburger, Cimaglia and Pease) testified they had gained knowledge of Ruth Kendall's reputation through personal observation, and *by talking with church members, friends, neighbors, personal acquaintances, and other members of the community.* The testimony of each witness, when taken as a whole, indicates that the witness was in a position to observe Ruth Kendall and to gain knowledge of her general reputation in the community from those knowledgeable of that reputation. Such testimony, as well as the length of time each witness had known Ruth Kendall, was admissible to show the foundation for their estimate of her character. *State v. Carden*, 209 N.C. 404, 183 S.E. 898, *cert. denied* 298 U.S. 682, 80 L.Ed. 1402, 56 S.Ct. 960 (1936).

The fact that several of the witnesses attended the same church as Ruth Kendall and based their testimony on what had been heard in the church community did not render the testi-

mony inadmissible. Evidence of Ruth Kendall's general reputation among the members of the church community was competent. *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973). And the number of character witnesses who were permitted to testify rested in the sound discretion of the trial court. *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968); *Wells v. Bissette,* 266 N.C. 774, 147 S.E. 2d 210 (1966); *see* Annot., Propriety and Prejudicial Effect of Trial Court's Limiting Number of Character or Reputation Witnesses, 17 A.L.R. 3d 327 (1968). The number permitted in this case by the trial judge is understandable since Mrs. Kendall's character was under attack.

Only the testimony of Mrs. Roland Harris, Jr., appears to be grounded solely on personal opinion and thus inadmissible. Error in admitting her testimony is harmless since Ruth Kendall's good reputation was well established by other admissible evidence. *State v. Killian,* 173 N.C. 792, 92 S.E. 499 (1917); *accord, United States v. Neff,* 343 F. Supp. 978 (E.D. Pa. 1972), *aff'd* 475 F. 2d 861 (3rd Cir. 1973). We conclude, for the reasons stated, that defendant's second and third assignments of error are without merit.

Assignments of error five, six and eleven assert error in the admission of evidence tending to show defendant had been arrested for rape in 1971. One question of law is presented under the three assignments, so we consider them together.

Ruth Kendall testified on direct examination that defendant told her "that he had had a lady in 1971 and that he had done the same thing to her that he had done to me and he had beat the rap, and that he had spent time in jail for it." When the police came to her home, she told them what defendant had said "concerning 1971." She said she did not know defendant's name at that time and the name Stegmann was not mentioned by anyone. Defendant made no objection and took no exception to the introduction of her testimony.

Defendant Stegmann took the stand and testified he did not tell Ruth Kendall that he had previously been charged with rape. On cross-examination he stated that Mrs. Kendall had lied about the statement.

On the direct examination of Deputy Sheriffs Conerly and Martin, the district attorney inquired whether the officers had reviewed their files as a result of Ruth Kendall's description of the suspect and the statement concerning his arrest for rape

in 1971. The witnesses in substance testified that such a review was made and, as a result, the defendant's name was turned over to Detective Merritt of the Fayetteville City Police Department. Detective Merritt testified that he received defendant's name from the sheriff's department and that defendant was arrested. Objections and exceptions to the questioning and testimony of these witnesses constitutes defendant's fifth assignment of error.

In a series of questions propounded on cross-examination, the district attorney asked defendant, *inter alia,* whether he knew Diane Hoffman, whether he raped her in September 1971 and used a knife in the process, whether he had sexual intercourse with her, and whether he knew Officer House who was sitting in the courtroom. Defendant responded that he had known Diane Hoffman for approximately five or six hours and admitted having sexual intercourse with her. However, he denied using his knife and raping her. He stated that he knew Officer House. Objections and exceptions to these questions and testimony constitute defendant's sixth assignment of error.

During argument to the jury the district attorney recapitulated the above testimony, stating at one point that it showed the steps leading to the identification and apprehension of defendant. At another point in his argument he invited the jury to "draw the reasonable inferences" from it. Objections and exceptions to such argument constitutes defendant's eleventh assignment of error.

Defendant argues that one of the major thrusts of the State's case was directed towards proving and arguing that defendant had a prior arrest for rape. He contends such testimony and argument should have been excluded under authority of *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971).

In *Williams* the defendant was tried for robbery. On cross-examination he was asked whether he was *under indictment* for other unrelated robberies. Overruling a line of cases to the contrary, this Court held that *"for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *indicted* or is *under indictment* for a criminal offense other than that for which he is then on trial." The Court also held, *a fortiori,* that *"for purposes of impeachment,* a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he

has been *accused,* either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense." In conclusion, Chief Justice Bobbitt, writing for the Court, defined the limits of that decision:

> "We are not at present concerned with *the general rule* that, in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has been convicted of another distinct, independent, or separate offense, nor with any of the *well recognized exceptions* to that rule. See *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954), and cases cited. Evidence which is admissible under any of the *well recognized exceptions* is admissible as substantive evidence. At present, we are concerned only with questions which are permissible on cross-examination solely *for purposes of impeachment.*
>
> "It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal and degrading conduct. *State v. Patterson,* 24 N.C. 346 (1824); *State v. Davidson,* 67 N.C. 119 (1872); *State v. Ross,* 275 N.C. 550, 553, 169 S.E. 2d 875, 878 (1969). Such questions related to matters *within the knowledge of the witness,* not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith."

The *Williams* decision does not affect the general rule that in a prosecution for a particular crime the State cannot offer evidence tending to show the accused committed another distinct, independent or separate offense. *See State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820 (1971); *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954). Nor does *Williams* displace the many recognized exceptions to that general rule. *See State v. McClain, supra; State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232 (1943); *State v. Hight,* 150 N.C. 817, 63 S.E. 1043 (1909).

When the general rule excluding evidence of other offenses is stated in terms of relevancy of evidence, the rule becomes absolute. Professor Stansbury correctly states the rule as follows:

> "This is commonly supposed to be a somewhat difficult and complex field, marked out by a general rule of exclusion and a series of exceptions. It is submitted, however, that the rule is in fact a simple one which, when accurately stated, is subject to no exceptions: Evidence of other offenses is inadmissible on the issue of guilt if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury's North Carolina Evidence § 91 (Brandis Rev. 1973); *accord*, *State v. Shutt*, 279 N.C. 689, 185 S.E. 2d 206 (1971), *cert. denied* 406 U.S. 928, 32 L.Ed. 2d 130, 92 S.Ct. 1805 (1972); *State v. McClain, supra* at 176-77, 81 S.E. 2d at 368 ("The acid test is its logical relevancy to the particular excepted purpose or purposes for which it is sought to be introduced," quoting *State v. Gregory*, 191 S.C. 212, 4 S.E. 2d 1).

[5] Under this rule evidence tending to show that defendant had been arrested for rape in 1971 is admissible if it is relevant to some legitimate issue in the trial other than defendant's character or disposition for crime. We find it admissible to show identification and to corroborate the testimony of Ruth Kendall.

Ruth Kendall testified defendant told her he had committed a similar act in 1971 for which he spent time in jail, but that he ultimately "beat the rap." The subsequent questioning and testimony of the officers and defendant, which tended to show that he had *in fact* been arrested for a similar incident, was obviously relevant to show that defendant was the person who had raped Ruth Kendall and made the statement concerning a similar offense in 1971. *State v. Perry*, 275 N.C. 565, 169 S.E. 2d 839 (1969); *see also State v. Shutt, supra; State v. Williams*, 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd on other grounds* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971), and cases cited therein.

Even so, defendant contends that the issue of identification was never really in issue since the defense was based on consent rather than misidentification. Nevertheless, his plea of not guilty

put in issue every material element of the State's charge against him. *State v. McWilliams,* 277 N.C. 680, 178 S.E. 2d 476 (1971); *State v. Courtney,* 248 N.C. 447, 103 S.E. 2d 861 (1958). Regardless of the development at the previous trial or defendant's testimony in the trial now under consideration, it was incumbent on the prosecution to prove that *defendant* committed the alleged crime. 65 Am. Jur. 2d, Rape § 53 (1972). The district attorney was not required to speculate as to possible defenses before defendant put on evidence.

Moreover, the evidence tended to confirm the statement that defendant had committed a similar offense in 1971 which would indicate that Ruth Kendall did not fabricate her testimony concerning the statement. The evidence strengthened what Ruth Kendall had said, and therefore was admissible for corroboration purposes. *See State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. denied* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961); *State v. Lippard,* 223 N.C. 167, 25 S.E. 2d 594, *cert. denied* 320 U.S. 749, 88 L.Ed. 445, 64 S.Ct. 52 (1943); *State v. Morton,* 107 N.C. 890, 12 S.E. 112 (1890).

Even assuming *arguendo* that the evidence served no relevant purpose and was inadmissible, there was no prejudicial error. On both direct and cross-examination Ruth Kendall testified that defendant told her he had committed a similar offense and "beat the rap." Since defendant made no objection to her testimony, his subsequent objections to evidence of the same or like import were of no avail. *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4 (1967); *State v. Wright,* 270 N.C. 158, 153 S.E. 2d 883 (1967). Assignments of error five, six and eleven are overruled.

Assignments of error eight and ten are directed to the district attorney's argument to the jury.

Assignment eight alleges error in the following portion of the argument, which reads:

> "In criminal law we have certain rules, laws, statutes and all of these are designed to protect the rights of defendant. They have been brought about by custom from England, statutes that have been designed through history and building up to the present day, laws that we work with. Now under those rules of evidence, there is certain evidence that

can't be presented to you, for the protection of the defendant.

Now, that is just the law, yet, even in view of those rules and those laws, argument can be made to you, why wasn't this or that brought in. Now, that seems inconsistent to you but that is the law. I maybe could not present evidence, but the defense attorney can stand up and say why didn't we, when he knows that it was for the protection of his defendant, that evidence didn't come in, from some law—

ATTORNEY GLUSMAN: Objection. (The Judge is not in the Courtroom).

The law is clear and I can ask a defendant on cross examination about prior misconduct, specific instances, that is the law of the case, law in North Carolina. The law is equally clear that if the defendant denies that, I can't put on independent evidence of it.

ATTORNEY GLUSMAN: Objection."

Defendant's objections to this portion of the argument and a motion for mistrial grounded thereon were denied.

Numerous cases hold that the argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases. *E.g. State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975); *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955); *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466 (1949); *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542 (1947).

It is the duty of the prosecuting attorney in all phases of the trial to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction. *See State v. Monk, supra; State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *vacated on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972); 23A C.J.S., Criminal Law § 1081 (1961).

[6] Such is the case here. Both counsel for defendant and the district attorney presented forceful arguments to the jury. Defense counsel repeatedly argued that there was *no evidence* that defendant was arrested for rape in 1971, *just accusations.* Defense counsel's remarks invited the district attorney's response indicating why he had not introduced such evidence. Although

we do not concede, as the district attorney apparently thought, that the stated rule precluded the actual introduction of such evidence for relevant purposes other than impeachment, we perceive no error in the trial court's ruling upon the district attorney's responsive argument. *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960); *State v. Knotts,* 168 N.C. 173, 83 S.E. 972 (1914); 75 Am. Jur. 2d, Trial § 233 (1974). Defendant's eighth assignment is overruled.

Defendant's tenth assignment of error is also directed to portions of the district attorney's argument. Exceptions 58, 61-64 and 67 are grouped under this assignment and relate to the following excerpts from the argument:

> "Very frankly, I want you to be bothered. I think we all are bothered by this. I think it is shocking. I think it is the most horrible thing that can happen to anybody in this world." Objection. Overruled. Exception No. 58.
>
> * * * *
>
> "She has been accused of taking up with this stranger after a fifteen minute conversation and running off to the woods and having intercourse on a path, on a wet day, as a lark. I am not going to call the name that you would refer to, as to somebody that would do that, but you know what it is and that is what he is saying she did. She has been accused of being a liar. Her character has been assaulted in about the most lowly manner that can be done to anybody." Objection. Overruled. Exception No. 61.
>
> "And I ask you—most of you men can probably not understand it, because you can't be placed in the woman's shoes, completely—but let me ask you, how would you feel if you were called the things in this Court—" Objection. Exception No. 62.
>
> "—that she was called?" Objection. Overruled. Exception No. 63.
>
> "And they said on top of all this, and this really tops it all, that she can just turn on and off the tears when she wants to. By gosh, after what she has gone through and what she was being called. And there is no protection from what is printed or what is published in a trial of a case. Everybody talks about it. But look what happened. She is scarred—not physically, there is no scarring on the outside,

but she is scarred mentally. She has got to live with it. She has got to live with this horrible experience the rest of her life." Objection. Overruled. Exception No. 64.

* * * *

"The defendant Stegmann feels, as has been shown you, that he can force his way on any woman. He is going to do what he pleases, regardless of whose rights he violates. He is above the law and that is the way he sits here right now, 'I am above the law. I am going to thumb my nose at you.' " Objection.

"COURT: Proceed to some other form of argument, Mr. District Attorney." Exception No. 67.

In presenting the State's case, the prosecutor must "show the whole transaction as it was." He has much latitude in the language and manner of presenting his side of the case "consistent with the facts in evidence." *State v. Westbrook, supra;* 23A C.J.S., Criminal Law §§ 1081 and 1090 (1961).

[7] The prosecutor is entitled to argue to the jury the law and the facts in evidence and all reasonable inferences to be drawn therefrom. *State v. Conner,* 244 N.C. 109, 92 S.E. 2d 668 (1956); *State v. Willard,* 241 N.C. 259, 84 S.E. 2d 899 (1954); *State v. Campo,* 233 N.C. 79, 62 S.E. 2d 500 (1950). On the other hand, he may not place before the jury incompetent, irrelevant and prejudicial matters, and may not "travel outside the record" by injecting into his argument facts of his own knowledge or other facts not included in the evidence. *State v. Monk, supra; State v. Crisp,* 244 N.C. 407, 94 S.E. 2d 402, 67 A.L.R. 2d 236 (1956); *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954); *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953); *State v. Buchanan,* 216 N.C. 709, 6 S.E. 2d 521 (1940).

The fact that the sympathy or prejudice of the jury may be aroused by the argument of counsel does not render the argument improper when it is legitimate and based on competent evidence. Only comments calculated to inflame unduly the passions and prejudices of jurors are improper.

"Ordinarily, legitimate arguments based on competent evidence in the case are not rendered improper by the fact that they incidentally stir the sympathies and prejudices of the jury, and, a fortiori, do not constitute error where they are relatively of little importance, and have no ten-

dency to create sympathy or prejudice greater than the facts in evidence create, or where they are within the permissible bounds of fair comment and are not in fact inflammatory to the extent of constituting misconduct by the prosecuting attorney. On the other hand, comments calculated unduly to create, arouse or inflame their sympathies, prejudices, or passions to the detriment of the accused are improper.

* * * *

On the other hand, it has been held not to be an improper appeal to the sympathies and prejudices of the jurors to denounce crime in strong terms, or to characterize the crime charged or point out its gravity, heinousness, and consequences; but comments to the effect that the crime was of such a nature as might well have induced relatives of the injured person or citizens generally to take the law into their own hands are usually held improper." 23A C.J.S., Criminal Law § 1105 (1961).

Applying these principles to this case, the district attorney's argument is within permissible bounds of fair debate, except the portion to which Exception No. 67 is addressed. That portion was improper and the trial judge stopped it before any prejudice, beyond that created by the facts themselves, was done. *See State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424 (1955). Assignment number ten is overruled.

Assignments one, seven and nine are not discussed in defendant's brief and are therefore deemed abandoned. Rule 28, Rules of Practice in the Supreme Court, 254 N.C. 783, 810 (1961).

[8] The witness Alden Ernest Pease testified that Ruth Kendall's character and reputation in the community in which she lived was outstanding. On cross-examination he testified that he was a special investigator with an intelligence unit involving seven states but, by reason of the confidential nature of his work, could not reveal details concerning the type of work involved or the identity of his employer. Defendant's fourth assignment of error is addressed to the refusal of the court to require the witness to reveal that information. It suffices to say that the nature of Mr. Pease's work had nothing to do with the basis of his testimony concerning Mrs. Kendall's character and reputation in her community. This assignment is overruled without further discussion.

[9] Defendant's twelfth assignment of error argues the unconstitutionality of the death penalty. This point has already been the subject of final judicial determination in this State until and unless further review is required by legislative enactment or by the Supreme Court of the United States. *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973) *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974).

Examination of the entire record discloses that defendant received a fair trial free from prejudicial error. The verdict and judgments must therefore be upheld.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in her dissenting opinion in *State v. Williams,* 286 N.C. 422, 434, 212 S.E. 2d 113, 123 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissenting:

In my view there was prejudicial error in the trial in the admission of much of the character evidence and in the prosecutor's closing argument.

The testimony of several of the character witnesses in response to the district attorney's questions regarding the "basis" for earlier and properly expressed opinions constituted an improper effort by the State to prove, over objection of the defendant, the character of the prosecuting witness by specific acts and personal opinion. The witness Judson was allowed to testify that his opinion of the prosecuting witness' character was based upon "personal observation" and "upon my own seeing what she has done on her courage and her integrity." The witness Godwin testified that the prosecuting witness was in his Sunday School Class and the choir which he directed and that she regularly attended meetings every Wednesday night and

every Sunday and that he could "find nothing wrong with her whatsoever." The witness Ledbetter said his opinion was based on his "own personal observation." The witness Reinburger said that her opinion was based on her own "personal observation of the prosecuting witness' reaction to things." The witness Riggin testified that she had had the prosecuting witness in her home on Christmas and her opinion of her character was based on "just personal observation." The witness Harris testified that "in her opinion the prosecuting witness is a fine Christian girl."

While the State was entitled to prove the character of the prosecuting witness both on the issue of her credibility and on the issue of whether she consented to the sexual intercourse, the only method of proof previously sanctioned by this Court and most other jurisdictions is by showing the general reputation of the witness in the community where she lived. *Michelson v. United States,* 335 U.S. 469, 93 L.Ed. 168, 69 S.Ct. 213 (1948); *State v. McEachern,* 283 N.C. 57, 194 S.E. 2d 787 (1973); *State v. Steen,* 185 N.C. 768, 117 S.E. 793 (1923). See 1 Stanbury's North Carolina Evidence, Brandis Revision, § 110 at 336-337, and cases cited, where it is stated:

> "There are three methods by which a person's character might conceivably be proved: (1) by the opinion of those who know him, (2) by reputation, and (3) by specific acts. Where a character is directly in issue, it seems that all three of these processes are available. But when character is offered as evidence of a person's conduct on a particular occasion, the first method is not allowed at all, and the third is available only on cross-examination of the person whose character is in question. Therefore the standard method, and usually the only permissible method, of proving character is by *reputation.*"

It is clear that the character of the prosecuting witness was not directly but only collaterally in issue. Character is directly in issue only when it is one of the ultimate facts to be proved or disproved in the case, for example, in actions for defamation where injury to reputation is one of the principal measures of damage or in prosecutions for the seduction of an "innocent and virtuous woman" under General Statute § 14-180. 1 Stansbury's North Carolina Evidence, Brandis Revision, § 102. Where character evidence "is offered on the question of a witness' credibility, or as evidence that a party or third person did or did not do a particular thing" it is only collaterally in issue. *Id.* § 111,

n. 5. A criminal defendant may offer evidence of his good character both on the question of his credibility if he testifies and on the question of his guilt whether or not he testifies, but his proof must be limited to his general reputation in the community. *Michelson v. United States, supra; State v. McKissick,* 271 N.C. 500, 507, 157 S.E. 2d 112, 118 (1967); *State v. Sentelle,* 212 N.C. 386, 193 S.E. 405 (1937). The Supreme Court of the United States, reviewing the general law on the subject, stated the rule as follows:

> "The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself. The evidence which the law permits is not as to the personality of defendant but only as to the shadow his daily life has cast in his neighborhood." *Michelson v. United States,* 335 U.S. at 477, 93 L.Ed. at 174, 69 S.Ct. at 219.

This is also the North Carolina rule stated in *State v. Steen,* 185 N.C. at 770, 117 S.E. at 794 as follows:

> "In North Carolina the testimony of a character witness is confined to the general reputation of the person whose character is attacked, or supported, in the community in which he lives. *State v. Parks,* 25 N.C., 296; *State v. Perkins,* 66 N.C., 126; *State v. Gee,* 92 N.C., 756; *State v. Wheeler,* 104 N.C., 893; *State v. Coley,* 114 N.C., 879, and numerous other cases since. Reputation is the general opinion, good or bad, held of a person by those of a community in which he resides. This is eminently a matter of hearsay, based upon what the witness has heard or learned, not as to any particular acts, but as to the general opinion or standing in the community."

This same rule has previously been true with regard to the prosecutrix in a rape case. "The State may only prove her general character—it may not offer proof of particular traits of

character." *State v. Grundler*, 251 N.C. 177, 192, 111 S.E. 2d 1, 12 (1959).

The reason for the rule limiting character evidence to general reputation is grounded not in logic but in policy and expediency. *Michelson v. United States, supra; State v. Adams*, 193 N.C. 581, 137 S.E. 657 (1927). Certainly the opinion of a witness who knows the person whose character is in question and prior specific acts of that person are highly relevant on the question of the person's character. We have said, however, that the rule prohibiting this kind of evidence "is both sound and salutary, for the reason that it obviates a mass of collateral questions which would interminably prolong trials and inevitably result in drawing the minds of the jurors far afield from the merit of the case." *State v. Adams*, 193 N.C. at 582, 137 S.E. at 658.

The holding of the majority, I fear, dangerously ignores the policy for limiting character evidence previously recognized by this and other courts. If the good character of the prosecuting witness in a rape case may be shown by the State through the personal opinion of witnesses who know her and by their revelation of her specific acts then the defendant must be allowed to attack her character by the same kind of testimony. The character of a defendant may likewise be proved. The majority opinion takes us back to what Justice Jackson in *Michelson v. United States, supra*, called "the frontier phase of our law's development, [where] calling friends to vouch for defendant's good character, and its counterpart—calling the rivals and enemies of a witness to impeach him by testifying that his reputation for veracity was so bad that he was unworthy of belief on his oath—were favorite and frequent ways of converting an individual litigation into a community contest and a trial into a spectacle." 335 U.S. at 480, 93 L.Ed. at 176, 69 S.Ct. at 220.

At Stegmann's first trial character evidence was not offered. The jury was unable to agree on a verdict. The improper admission of this evidence was clearly prejudicial to the defendant.

The district attorney's argument to the jury, set out verbatim in the majority opinion, to the effect that because of the rules of evidence the State was unable to present certain evidence to the jury and that these rules were for the protection of the defendant was improper. It permitted the jury to speculate on what might have been offered; it allowed the State to

circumvent the rules of evidence and do indirectly what it could not do directly. The majority justifies the permissibility of the argument on the ground that it was invited by defense counsel and seems to say that it related solely to the question of whether the defendant had previously been arrested for rape. Defense counsel did, indeed, argue that there was no evidence that defendant had been arrested for rape—"just accusation." There was, however, evidence that he had been so arrested from the testimony of the prosecuting witness herself regarding statements made to her by the defendant. The majority recognizes that testimony of officers for the State and of the defendant "tended to show that he had *in fact* been arrested for a similar incident." Defense counsel, moreover, argued justifiably the failure of the State to offer into evidence the black underpants of the prosecuting witness. Whatever the district attorney's intent, the jury may well have understood from his argument that the State, somehow, was precluded by law from offering this evidence.

This kind of argument by the prosecution has been consistently condemned and held to be reversible error in cases from this and other jurisdictions. *State v. Roach,* 248 N.C. 63, 102 S.E. 2d 413 (1958) ("I tell you I could get a number of people, at least one hundred, to come in here and testify to his bad character") ; *Ginsberg v. United States,* 257 F. 2d 950 (5th Cir. 1958) ("I could probably have fifty people in here who would show that [defendant] isn't a good character") ; *Snipes v. United States,* 230 F. 2d 165 (6th Cir. 1956) ("We could have made thirty or forty counts in this thing, if you had wanted to be here a couple of weeks trying this lawsuit") ; *People v. Talle,* 111 Cal. App. 2d 650, 676-677, 245 P. 2d 633, 649 (1952) ("[Argument which] broadly implies the prosecution is possessed of much evidence tending to show guilt that has not been introduced, is erroneous and prejudicial"). It has been so held even where the argument was prompted by statements made by defense counsel and curative instructions were given by the trial court. *State v. Eagle,* 233 N.C. 218, 63 S.E. 2d 170 (1951) ; *Kitchell v. United States,* 354 F. 2d 715 (1st Cir. 1965). *But see Commonwealth v. French,* 357 Mass. 356, 259 N.E. 2d 195 (1970) ("[Y]ou have to use your imagination. There are many things in a court of law that can't be introduced." Held, improper but harmless because of adequate curative instructions.)

In *State v. Eagle, supra,* a drunk driving prosecution, defendant had argued the failure of the State to introduce into

evidence a bottle of whiskey referred to in the testimony of State's witnesses. In his argument to the jury the district attorney explained why the whiskey bottle had not been produced, stated that he had sent for the bottle and had it in a paper sack and was willing for it to be shown to the jury. Defendant objected and moved for an instruction that the jury not consider the argument. The motion was denied but in his instructions to the jury the trial judge told them to disregard that portion of the State's argument. We, nevertheless, because of this argument awarded defendant a new trial.

In *Kitchell v. United States, supra,* the government argued:

> "[T]here was a comment made by defense counsel, there is no evidence here that Mr. Kitchell knew of any of the other defendants. I submit to you it is an unfair comment. There are certain rules of evidence, his Honor will instruct you about, what the Government can introduce without prejudice to its case. I submit it is in that light you must consider that comment." 354 F. 2d at 719.

Upon objection the trial judge immediately instructed Government counsel to make no further argument of that nature. But counsel returned to say to the jury, "The issue is not, does he know these other defendants? If that were the issue, we would bring in an entirely different set of witnesses." *Id.* These arguments were held to justify a new trial. The court said:

> "Remarks on the availability of unused 'evidence' are clearly impermissible. *Ginsberg v. United States,* 5 Cir., 1958, 257 F. 2d 950; see *United States v. Lefkowitz,* 2 Cir., 1960, 284 F. 2d 310, 314; cf. *Greenberg v. United States,* 1 Cir., 1960, 280 F. 2d 472, 475. Conceivably a single error in this regard might have been cured by the court's sustaining the objection. The Government cannot go on, however, making such remarks and having the court strike them out, and then claim they had no effect." *Id.*

In *State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975), we held it to be prejudicial error for the State to argue that a person's criminal record cannot be offered in evidence unless the person testifies on the ground, however, that the remark amounted to an impermissible comment upon the failure of the defendant to testify in his behalf.

Stegmann, through counsel, promptly objected to the prosecutor's argument here complained of and moved for a mistrial.

His objection was overruled and motion denied. No curative instructions were attempted. This constituted error, in my opinion, entitling defendant to a new trial.

The evidence in this case is sharply conflicting. The question of guilt hangs largely on the credibility which the jury accords to the prosecuting witness and to the defendant. I am unable to say that the improper character evidence and the improper portions of the State's closing argument constituted error which was harmless beyond a reasonable doubt.

I also dissent from the imposition of the death sentence for the reasons stated in my dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975).

EVELYN B. BROWN, ADMINISTRATRIX OF THE ESTATE OF MICHAEL RAY BROWN, DECEASED v. EDWARD MICHAEL MOORE

No. 92

(Filed 14 April 1975)

1. **Death § 7— wrongful death — damages — award for present monetary value not required**

In awarding damages for wrongful death the jury is not ordinarily required as a matter of law to award damages for all or any of the items specified in G.S. 28-174(a), (b) and (c) for consideration in determining the present monetary value of decedent to the persons entitled to the damages recovered.

2. **Evidence § 11— dead man's statute — transactions and communications with decedent — opening door by offering testimony**

When plaintiff offered testimony in a wrongful death case relating to what happened during the evening of decedent's death from the time the witness, decedent and defendant got together until the wreck causing decedent's death, she thereby rendered competent testimony of defendant concerning the same transactions or communications but did not render competent testimony of defendant concerning what may have occurred between him and decedent on unrelated prior occasions.

3. **Evidence § 11— dead man's statute — testimony by third party — incompetent testimony by defendant**

In an action to recover for the death of a passenger in an automobile driven by defendant which failed to negotiate a curve while traveling at a high rate of speed, G.S. 8-51 did not disqualify a third party from giving testimony otherwise competent concerning transactions and communications between decedent and defendant in the presence of the witness on occasions prior to the accident in question,

and it was permissible for defendant to testify with reference to the transactions and communications referred to in such witness's testimony; however, defendant's testimony that decedent had accompanied him on numerous prior unidentified occasions when he drove his car to determine the maximum speed at which it could take the curves did not relate to transactions and communications involved in such witness's testimony and was incompetent under G.S. 8-51.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

ON *certiorari* to review the decision of the Court of Appeals reported in 22 N.C. App. 445, 206 S.E. 2d 794 (1974), which found "no error" in the trial before *Long, J.*, at the 7 January 1974 Session of the Superior Court of GUILFORD County, High Point Division, docketed and argued as case No. 100 at the Fall Term 1974.

This action was instituted by the administratrix of the estate of Michael Ray Brown (Brown) to recover damages for the alleged wrongful death of her intestate.

Brown, aged 17, died 18 August 1972 from injuries he sustained in a one-car wreck on N. C. Rural Paved Road 1763 in Davidson County, North Carolina, about 11:55 p.m. on that date. The wrecked car was a 1962 Chevrolet four-door sedan, owned and operated by defendant, Edward Michael Moore (Moore), aged 19. Brown and Terry Gray (Gray), aged 17, were guest passengers. Moore, Brown, and Gray were good friends.

The wreck occurred at a curve 1.8 miles south of the intersection of Westchester Drive and Burton Street Extension in High Point, North Carolina. Moore had turned left from Westchester and was driving south towards Thomasville. For the distance of "about .7 of a mile" from the intersection to the Davidson County line, the speed limit was 35 miles per hour. South of the county line Burton became Rural Paved Road 1763. For a distance of "1.1 mile" from the county line to the curve where the wreck occurred, the speed limit was 55 miles per hour. The paved portion of the tar and gravel road was "17 feet wide" and the shoulder was "about 3 feet wide." There were two lanes, one for each direction of travel, but no lines on the road marked these lanes.

Earlier in the evening of Friday, 18 August 1972, Moore, Brown, and Gray, along with Moe (Tommy) Bugg and Dan

Bugg, went to the Midway Drive-In on the Old Thomasville Road. All of them left the Drive-In in Moe Bugg's car. Moe Bugg drove first to Moore's home. There Moore, Brown, and Gray got out of Moe Bugg's car and got into Moore's car. It was then "just about 15 minutes before the accident occurred." Moe Bugg drove ahead to the J & M Curb Market and got some gas. Moore followed him to the Curb Market. As Moe Bugg left the Curb Market, traveling on Westchester Drive, Moore "hollered out the window at him and told him not to go down Burton Street." However, Moe Bugg ignored this instruction, proceeded to the intersection, and made a left turn into Burton Street. Moore stopped at the intersection because the "light caught [his] car." When the light changed, Moore turned left into Burton Street. The occupants of the Moore car could see the tailights of the Moe Bugg car until to crossed the Davidson County line and "speeded up and took off."

Trooper J. Scott Irving of the State Highway Patrol arrived at the scene at 11:59 p.m., shortly after the wreck occurred. The investigation at the scene disclosed the following: The road curved sharply to the left for the southbound motorist. Moore's car was "probably about 50 feet off the road" to the right. It had struck a tree and come to rest beside a power pole and guy wire. It was resting "just a little bit past the center of the curve." Tire marks, which began on the road and continued to where the car struck the tree, measured 214 feet, "the largest portion . . . on the dirt." There was extensive damage to the right front side of the door, "the front end being twisted to the right." The right front door came completely off and was "just crumbled up." Brown was on the right hand side of the car. The lower half of his body was pinned in the car; the upper part was "hanging out of the car." Within a minute or two, Brown, Moore, and Gray were taken by ambulance to a hospital in High Point. Irving had no conversation with Moore or Gray at the scene of the wreck.

The night was clear. The road was dry and practically level both north and south of the curve where the wreck occurred. The point at which Moore went off the road was in the first or north portion of an "S" curve.

Irving testified there were five curves "from the county line to the scene of the wreck"; that a couple of them were "fairly sharp" but not as sharp as the curve where the wreck occurred; and that the road was "a narrow winding road."

Irving saw Moore (defendant) in the emergency room of the hospital about 1:30 a.m. On that occasion, Irving's only inquiry concerned the identity of the driver of the wrecked car. Moore "promptly told" Irving that he was driving. Moore was crying, was "very emotionally upset," and said "his best friend was dead," and that "he didn't care what happened to him." Moore was admitted to the hospital and remained there until the following Monday.

At the hospital, on Sunday afternoon, Irving talked with Moore again. According to Irving, statements then made by Moore included the following: When they started out, all three were in the front seat. Just before the wreck Gray got out of the front, got into the back and lay down on the floorboard in the back seat. They had been talking "about the curves on Burton Street." He did not know exactly how fast he was driving but was going "less than a hundred." He had drunk "a couple of beers."

Irving testified that he had detected a slight odor of alcohol on Moore's breath when he first saw him in the emergency room but he did not think he was under the influence of any intoxicant. He further testified that on 6 October 1972 Moore had "entered a guilty plea to exceeding a safe speed arising from the wreck."

Gray testified that he had had nothing to drink during the entire evening but that both Moore and Brown had drunk beer earlier. He further testified that Moore was not under the influence of any intoxicant. There was evidence that a sample of blood taken from Brown after his death "contained .05% of alcohol by weight." There was no testimony that Brown was under the influence of any intoxicant.

Gray testified that Moore speeded up when he got to the county line, "gradually kept on picking up speed," and began breaking the speed limit when it changed from 35 to 55. Gray further testified: "I had no notice prior to the time he started into the 55-mile zone on Burton Street that he was intending to speed through those curves out there. There had been no discussion between me and Mr. Moore and anybody else in that vehicle prior to the time we got into it about speeding on those curves on Burton Street Extension. Prior to the time he started speeding where the speed limit changed, I had no reason to fear riding with him. At the point where he did start speeding, I asked him

to slow down several times. He didn't say anything. He didn't slow down. As we started into the curve where the wreck happened, I told him, 'Since you are not going to slow down, I am going to get in the back'; so I started to get in the back and he told me he didn't blame me for getting in the back so I went ahead and got in the back seat. I mentioned the curve to him prior to approaching the curve and getting in the back seat. I told him there was a bad curve coming up and we might not make it. While I was climbing over the back seat and going into that curve, Mike Brown told Mike [Moore] to hold the car inside and work his way out in the curve. Mike Brown did not say anything else while we were on Burton Street Extension before that time. From the time we entered the 55 mile per hour zone to the time the car left the road in that bad curve, Mike Moore did not stop the car at any time. No one in the car had any opportunity to leave the car. Neither I, nor Mike Brown, did anything to encourage Mike Moore to speed out there."

Testimony relating to defendant's driving on occasions prior to the evening of 18 August 1972 will be set forth in the opinion.

Testimony pertinent to the issue of damages includes the following:

At the time of Brown's death, his father was 62 and his mother over 48. His father, a 30-year employee of Burlington Industries, received take-home pay of between $170 and $175 each two weeks. His mother had been unable "to go back in the mill" since her operation for a ruptured disc in April of 1972. She sold cosmetics "to help out a little." During the preceding five years, the parents had been buying a home. Their house payment (V.A. Loan) was $69.50 per month.

Brown had always lived in the home of his parents. At the time of his death, a brother, aged 22, and a sister, aged 10, also lived with the parents. A married brother, aged 28, had children of his own and lived elsewhere.

Brown quit school after finishing the seventh grade. "He was two years behind other children of his age." He worked 40 hours a week for the Albert Roofing Company at $2 per hour from 14 December 1970 until 27 July 1972, as a sheet metal helper. His employer described him as "a very good boy, a good worker." He was dependable, a sober boy, as far as he knew. He never came around him drinking.

Brown quit his job with Albert Roofing Company because he "had a little falling-out with the mechanic," and applied for a job with Lane Upholstery Company. On the Monday after his death, this company sought to notify him that his application had been accepted. He had been of out work two or three weeks before his death. The job with Lane Upholstery Company would have paid him $2 to $2.10 per hour for approximately 40 to 45 hours per week during a "training type program." A properly trained upholsterer could expect to earn from $4 to $6.50 per hour.

While employed, Brown bought his own clothes and gave his parents "about $25.00 each two weeks," which was "practically more or less just to feed him." He took out three insurance policies: (1) a $9,000 life policy in which his mother was named beneficiary, (2) a $1,000 life policy in which his father was named beneficiary, and (3) a disability policy. At times his mother paid some of the premiums.

All witnesses described Brown as "a fairly intelligent boy," and "a good boy." He got along well with other children, and nobody in the community had had any trouble with him. Brown's mother, the plaintiff, testified: "He was fairly intelligent. He conducted himself well and had a nice personality. Most everybody liked him and he was just wonderful to me and his father. He was good to do things around the house." He had helped his father "put on the roof of an outbuilding." He had painted the back porch; he mowed the grass and ran errands. He waited on and helped his mother during an illness.

Brown was a "strong and husky boy and had a chest on him like Tarzan." His health was good.

Brown had bought "a straight gear" 1955 Chevrolet, which stayed in the driveway of his parents' home. It had not been driven out "on the open road" because his mother "would not let him." Brown did not have an operator's license. He had not taken a "driver's training" course and therefore could not get a driver's license until his 18th birthday.

Brown did not have any money "to report in the Estate." On the night of his death "his father gave him a couple of dollars."

The issues submitted and the jury's answers are as follows:

"1. Was the plaintiff's intestate, Michael Ray Brown, injured by the negligence of the defendant, Edward Michael Moore?

"Answer: Yes

"2. Did Michael Ray Brown, by his own negligence, contribute to his injury?

"Answer: Yes

"3. Was the plaintiff's intestate, Michael Ray Brown, injured by the wilful and wanton negligence of the defendant, Edward Michael Moore?

"Answer: Yes

"4. What amount, if any, should the plaintiff recover of the defendant for compensatory damages?

"Answer: $2,756.84

"5. What amount, if any, should the plaintiff recover of the defendant for punitive damages?

"Answer: None."

When the jury first submitted its verdict, the answer to the fourth issue was worded as follows: "Expenses for funeral, burial plot and ambulance, as cited by the Court." The judge instructed the jury they would have to answer the issue in monetary terms. Counsel then stipulated the amount of these items and agreed that the jury might take the bills into the jury room for use in arriving at a monetary answer to the fourth issue. In the verdict as later returned, the fourth issue was answered $2,756.84," the exact total of these bills.

Plaintiff moved to set the verdict aside and for a new trial. After denying this motion, the court entered judgment that the plaintiff recover from the defendant the sum of $2,756.84 plus costs. Upon plaintiff's appeal therefrom, the Court of Appeals found "No Error." Plaintiff's petition for *certiorari* was allowed.

Floyd & Baker by Walter W. Baker, Jr., for plaintiff appellant.

Henson & Elrod by Perry C. Henson and Joseph E. Elrod III, for defendant appellee.

SHARP, Chief Justice.

On her appeal to the Court of Appeals, plaintiff assigned as error the court's refusal to set the verdict aside. *Inter alia,* she contended the award of damages was inadequate as a matter of law "because absolutely no value was placed on the life of plaintiff's intestate" and the court's refusal to set the verdict aside was "an abuse of discretion." With reference to this assignment, the Court of Appeals held that whether the verdict should be set aside was in the discretion of the trial judge, and the plaintiff had failed to show "an abuse of discretion." In this Court, plaintiff renews her contentions with reference to the asserted inadequacy of the verdict and brings forward all other assignments of error presented to the Court of Appeals.

The evidence, when considered in the light most favorable to plaintiff, was sufficient to support findings that Brown's death was proximately caused by the actionable negligence of Moore and that such actionable negligence was wilful and wanton. Also, considered in the light most favorable to defendant, the evidence was sufficient to support a finding that negligence on the part of Brown contributed to his death as a proximate cause thereof. Gray's testimony tended to show that he repeatedly protested the speed at which Moore was driving but to no avail; that Gray climbed over the front seat to a safer position in the back; that Brown did not protest Moore's speed or call upon him to slow down but gave directions to Moore with reference to *how* to take the curves at high speed.

The right of action to recover damages for wrongful death was created by and is based on the statute codified as G.S. 28-173. G.S. 28-174, as rewritten by Chapter 215, Session Laws of 1969 (1969 Act), sets forth the items for which damages are recoverable. It does not purport to identify the beneficiaries of such damages as the jury may award. The distribution of whatever recovery is obtained is governed by the provisions of G.S. 28-173. *Bowen v. Rental Co.,* 283 N.C. 395, 196 S.E. 2d 789 (1973). The opinion in *Bowen* sets forth the full text of G.S. 28-173 and sets forth in full all provisions of the 1969 Act, codified as G.S. 28-174.

G.S. 28-174(a) provides: "Damages recoverable for death by wrongful act include:

"(1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;

"(2) Compensation for pain and suffering of the decedent;

"(3) The reasonable funeral expenses of the decedent;

"(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered, including but not limited to compensation for the loss of the reasonably expected:

"a. Net income of the decedent,

"b. Services, protection, care and assistance of the decedent, whether voluntary or obligatory, to the persons entitled to the damages recovered,

"c. Society, companionship, comfort, guidance, kindly offices and advice of the decedent to the persons entitled to the damages recovered.

"(5) Such punitive damages as the decedent could have recovered had he survived, and punitive damages for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence;

"(6) Nominal damages when the jury so finds."

There was no evidence concerning expenses recoverable under (1) unless the ambulance bill of $23 is so considered. Injury and death having occurred simultaneously, there was no basis for recovery under (2) on account of the pain and suffering of the deceased. The verdict provided for the recovery under (3) of funeral expenses. Although punitive damages are recoverable under (5) under specified conditions, the jury elected to make no award therefor. Since the jury awarded actual damages, the provisions of (6) relating to nominal damages are inapplicable.

In the present factual situation, whether the verdict should have been set aside as a matter of law on the ground of inadequacy of the award depends upon the answer to this question: Assuming plaintiff's right to recover, was she entitled *as a matter of law* to recover *some amount* of damages for all or any of the items set forth in G.S. 28-174(a) (4) (a), (b) and (c), when there is any evidence upon which such recovery *could be based?* The court instructed the jury that damages were recoverable for these items. However, the jury did not see fit to award damages therefor.

Subdivisions a, b, and c of G.S. 28-174(a)(4) enumerate *some* of the factors to be considered in determining "[t]he present *monetary* value of the decedent to the persons entitled to the damages recovered." (Our italics.) Obviously, damages for any of these items, unless the decedent was a person of established earning capacity beyond his or her personal needs, involve in large measure speculative and intangible considerations.

The present monetary value of the decedent to the persons entitled to receive the damages recovered will usually defy any precise mathematical computation. 22 Am. Jur. 2d Death § 267 (1965). Therefore, the assessment of damages must, to a large extent, be left to the good sense and fair judgment of the jury —subject, of course, to the discretionary power of the judge to set its verdict aside when, in his opinion, equity and justice so require. *See Walston v. Greene,* 246 N.C. 617, 99 S.E. 2d 805 (1957); 25A C.J.S. Death § 115 (1961). The fact that the full extent of the damages must be a matter of some speculation is no ground for refusing all damages. *See Bowen v. Rental Co.,* 283 N.C. at 419, 196 S.E. 2d at 805-806. Notwithstanding, where actual pecuniary damages are sought, the plaintiff must satisfy the jury by the greater weight of the evidence of the existence of damages and of facts which will furnish some basis for a reasonable assessment. *Lieb v. Mayer,* 244 N.C. 613, 94 S.E. 2d 658 (1956). "[T]he damages in any wrongful death action are to some extent uncertain and speculative. A jury may indulge in such speculation where it is necessary and there are sufficient facts to support speculation. Conversely, damages may not be assessed on the basis of sheer speculation, devoid of factual substantiation." *Gay v. Thompson,* 266 N.C. 394, 398, 146 S.E. 2d 425, 428 (1966). *A fortiori,* a jury will not be required to award damages when the evidence adduced does not establish to its satisfaction facts which will reasonably support an assessment. In such a situation, by Subsection (6) the Legislature *authorized* "[n]ominal damages *when the jury so finds.*" (Our italics.) Permission is granted; no command is given.

In every wrongful death action, as in other suits for damages, and as the judge did here, the court instructs the jurors that they are the sole judges of the facts; that the plaintiff must satisfy the jury by the greater weight of the evidence the amount of damages, if any, that he is entitled to recover for the death of his decedent; that otherwise they will answer the issue of damages "Nothing." *See Paris v. Aggregates, Inc.,*

271 N.C. 471, 157 S.E. 2d 131 (1967). The jurors being "the sole judges of the facts" are necessarily the sole judges of whether they are "satisfied from the evidence and by its greater weight" that plaintiff sustained damages and, if so, whether there is evidence from which they can reasonably determine the approximate amount of the plaintiff's pecuniary loss.

[1] We hold, therefore, that in awarding damages for wrongful death the jury is not ordinarily required *as a matter of law* to award damages for all or any of the items specified in a, b, and c of G.S. 28-174(a)(4). It is only when the jury has arbitrarily disregarded the law and the evidence that the judge must exercise his judicial discretion and set the verdict aside.

On her appeal to this Court plaintiff contends that the decision of the Court of Appeals is in conflict with our decision in *Robertson v. Stanley,* 285 N.C. 561, 206 S.E. 2d 190 (1974), and should be reversed for that reason.

Robertson v. Stanley, supra, is distinguishable in the respects noted below. In *Robertson,* the separate actions grew out of the serious injuries sustained by a nine-year-old boy who survived. His injuries necessitated operations and hospitalization. Medical and hospital bills incurred by the boy's father for the treatment of the boy's injuries amounted to $1,970. The boy's action for personal injuries, including pain and suffering, and the father's action to recover for medical and hospital expenses (stipulated to be $1,970) were consolidated for trial. After answering the issues of negligence and contributory negligence in favor of the plaintiffs, the issue of damages in the father's case was answered "$1,970." The issue of damages in the boy's case was answered "none." Since the boy's personal injuries, including pain and suffering, were established facts, this Court held "the verdict [was] contrary to law, inconsistent, invalid and should have been set aside *ex mero motu.*" *Id.* at 564, 206 S.E. 2d at 192.

Here, as also in *Bowen, supra,* there was no interval between decedent's injury and death and thus no pain and suffering. Further, the evidence tending to show "the present monetary value" of Brown to his parents was inconclusive.

Since a new trial is awarded on other grounds, we do not consider plaintiff's contention that the court's failure to set aside the verdict on account of inadequacy of the award was an abuse of discretion.

Plaintiff renewed in this Court her contention that her case was substantially prejudiced by the admission over her objection of incompetent evidence. This evidence consists (1) of testimony elicited by defendant's counsel during his cross-examination of Terry Gray and (2) of defendant's testimony on direct examination. This testimony, together with testimony first received and later stricken, was offered to show that Brown was accustomed to riding with Moore; that, on previous occasions, Moore, accompanied by Brown, had driven his car on many roads to determine the maximum speed at which he could "take the curves"; that Brown had continued to ride with Moore notwithstanding his knowledge of Moore's habit and practice in "taking the curves"; that Brown voluntarily got into Moore's car on the night of 18 August 1972 to "ride around"; that notwithstanding Moore drove with accelerating speed along the curves of Rural Paved Road 1763, Brown did not protest but gave directions as to the proper way to negotiate the curve; and that, under these circumstances, if the negligence of Moore was wilful and wanton, the contributory negligence of Brown was also wilful and wanton.

Defendant's allegations of contributory negligence relate solely to Brown's failure to protest the manner in which Moore was operating his car on the evening of 18 August 1972 and his failure "to remove himself from a place of known and obvious danger despite numerous opportunities to do so in safety." Defendant did not allege that Brown's contributory negligence was wilful and wanton; nor did he allege any facts concerning his own driving on any prior occasion in the presence or absence of Brown.

In cross-examining Gray, defendant's counsel asked whether he, Brown, and Moore, prior to the night of 18 August 1972, had been together in Moore's car when Moore had "taken the curves on any other street in this area." Plaintiff's objections having been overruled, Gray answered that they had been together "maybe twice" when Moore had "taken the curves" on Rotary Drive, "a real curvy road . . . hard to take at high speeds"; that on one of these occasions, when they were going "maybe 50," they hit a bump in the road and "[t]he wheels came off the ground and the car slipped sideways" and stopped "against the curb."

The testimony of defendant on direct examination relating to prior conversations and transactions with Brown is set forth below:

Defendant was asked: "Can you tell us what kind of motor [defendant's 1962 Chevrolet four-door sedan] had in it, how it was equipped, and so forth?" Over plaintiff's objection, defendant answered: "Well, the car was, had a 283 in it, three-quarter cam with a double barrel, and I had it geared for drag, it would run 110 miles per hour wide open." Thereupon, defendant was asked: "Did your friend, Mr. Brown, know that?" Prior to plaintiff's objection, defendant had answered to this extent: "Yes, sir, he knew it. He was one that really encouraged me to gear it like that. We talked about cars all the time. He said, 'Mike, it would be best—' "

At this point defendant's testimony was interrupted by plaintiff's objection on the ground the testimony was incompetent under G.S. 8-51. After a colloquy with counsel, the court ruled that defendant could be examined "with regard to what type automobile he had, what type engine, and that sort of thing." After announcing his ruling, the court stated: "I will sustain the objection." Thereupon, upon motion of plaintiff's counsel, the court instructed the jury as follows: "Members of the Jury, you will not consider this witness's testimony as to what the deceased person may have encouraged him to do about his automobile or engine."

After testifying fully concerning what had occurred on the night of 18 August 1972, which included testimony that the tachometer indicated his speed was "between 70 and 75" shortly before the wreck, defendant was asked: "Now, then, on previous occasions prior to this night had you been with Mr. Mike Brown on other streets in and around the City of Greensboro where you all had taken some curves?"

Upon plaintiff's objection, the court stated: "Well, the door has been opened as to previous occasions on Rotary Drive. If you would limit your examination—"

After a brief recess, defendant testified, in response to his counsel's questions, that he had heard Gray testify "about *some* other occasions on Rotary Drive here in High Point about [Moore] and [Gray] and Mike Brown being together." (Our italics.) When defendant was asked to "tell the jury about that

episode and *those* occasions," (our italics) plaintiff objected. Overruling plaintiff's objections, the court instructed the jury as follows:

"Members of the Jury, I instruct you that this evidence will be considered by you insofar only as it may tend to support or corroborate the testimony of the witness, Terry Gray, who testified about the *same* matters yesterday. It is not to be considered by you for any other purpose." (Our italics.)

Thereafter, defendant testified as follows: "Well, a street back over in Emerywood section, Rotary Drive, and it consists of a few S-curves down through there, and well, just about every Saturday night *we* would go down through them." (Our italics.)

Plaintiff objected again, stressing the point that there was nothing in Gray's testimony about "every Saturday night" and defendant's testimony did not corroborate the testimony of Gray. Overruling this objection, the court instructed the jury as follows:

"Members of the Jury, you will not consider any evidence which does not corroborate the testimony of Terry Gray insofar as this may vary from his testimony; you are not to consider it as substantive evidence in any way."

Thereupon, defendant testified: "Just about every Saturday night, I am not sure, some nights we might skip a night—*we* would go down through them curves and sometimes I would go down through them by myself." Defendant's further extensive testimony was to the effect that he and "all the boys up to about seven" had driven through unidentified curves at various speeds.

With reference to the occasion when, according to Gray, Moore's car had slid sideways into the curb, defendant testified: "[I], Donnie Presnell and Terry Gray came up over the drive and there was leaves or something on the road and the car turned sideways and it started sliding, and I straightened it back up and the back wheels slid up against the curb and just touched it and come back around. I wouldn't turn the wheel, I could whip it one way and the other and got it straight and kept on going. The only thing said about that was '[w]e about lost it.' "

When plaintiff objected to the portion of this testimony which did not corroborate Gray, the court stated: "The jury has been instructed concerning that."

At this point, the record shows the following: "The Jurors retired to the Jury Room. In the absence of the Jury, it was clarified that when the car slid sideways on Rotary Drive that only Terry Gray and Donnie Presnell were with the witness *and that Mike Brown was not present.*" (Our italics.)

When the jury returned, the court gave the following instruction: "Members of the Jury, in your absence I have ALLOWED a motion to strike a portion of the testimony of this witness relating to the time he lost control of his car temporarily and it slid to the side of the street and hit the curb and he was whipping the steering wheel back and forth to get it straightened out. It appears from the record that the deceased, Mike Brown, was not in the automobile on that occasion, and it is not competent as evidence in this case and you should disregard the testimony of this witness concerning that event."

After defendant had testified that Brown was not present with him, Gray and Presnell on the occasion referred to in Gray's testimony, he was asked concerning occasions when Brown was with him when he was driving on Rotary Drive. Although defendant did not identify any particular instance and stated he was unable to state the number of such instances, the thrust of his testimony was that Brown had been with him on such occasions over a period of four years.

Defendant was asked: "Was there any other street other than Rotary Drive where the curves were being taken at certain speeds when Mike was present—before the accident?" Plaintiff's objection having been overruled, defendant answered: "In the City, just Rotary Drive. Outside the City, it is a country road out there going towards my brother-in-law's house and he was with me about between eight and fifteen times, I'd say, out that way."

Defendant was asked: "Have you been in a car when Mike Brown was present when cars were being driven by other boys when these curves were taken?" Plaintiff's objection having been overruled, defendant answered: "Yes, sir."

G.S. 8-51 in pertinent part provides: "Upon the trial of an action . . . a party . . . interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the administrator . . . of a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . ; except where the . . . administrator . . .

is examined in his own behalf, or the testimony of the . . . deceased person is given in evidence concerning the same transaction or communication."

[2] Plaintiff-administratrix offered the testimony of Gray relating to what happened during the evening of Friday, 18 August 1972, from the time he, Brown and defendant got together until the wreck causing Brown's death. Thereby she rendered competent the testimony of Moore concerning the same transactions and communications. *Carswell v. Greene,* 253 N.C. 266, 116 S.E. 2d 801 (1960). Plaintiff interposed no objection to any of defendant's testimony concerning what happened when he, Gray and Brown were together during the evening of 18 August 1972. However, Gray's testimony concerning what happened during this period did not render competent testimony of defendant concerning what may have occurred between him and Brown on unrelated prior occasions. 1 Stansbury, North Carolina Evidence (Brandis Revision) § 75.

Plaintiff assigns as error the admission over her objection of testimony by defendant concerning transactions and communications between them on occasions prior to 18 August 1972. She contends this testimony, if relevant, was incompetent under G.S. 8-51 as construed in *Boyd v. Williams,* 207 N.C. 30, 175 S.E. 832 (1934), and *Stegall v. Sledge,* 247 N.C. 718, 102 S.E. 2d 115 (1958).

Plaintiff objected to the cross-examination of Gray by defendant's counsel concerning prior occasions when Brown had been a passenger in Moore's car. Although these objections were general, the evidence these questions sought to elicit was not within the issues raised by the pleadings. See G.S. 1A-1, Rule 15. Defendant's plea of contributory negligence contained no allegation to the effect that Moore was in the habit of taking the curves at maximum speed and that Brown knew it. Nor did the court treat defendant's pleading as having been amended to incorporate such an allegation. Under the court's instruction, contributory negligence in this respect was not submitted to the jury. In this connection, see *Roberts v. William N. and Kate B. Reynolds Mem. Park,* 281 N.C. 48, 187 S.E. 2d 721 (1972).

Over plaintiff's objection, Gray testified that he and Brown were in Moore's car "maybe twice" when Moore had taken the curves on Rotary Drive. Later, it was determined that Brown was not present on the only occasion Gray had attempted to identify.

[3] G.S. 8-51 did not disqualify Gray from giving testimony otherwise competent concerning transactions and communications between Brown and Moore in Gray's presence on prior occasions. Assuming Gray's testimony was sufficiently definite to have probative value and was otherwise properly admitted in evidence, it was permissible for defendant to testify only with reference to transactions and communications referred to in Gray's testimony. It was determined that Gray's testimony was incorrect—since Brown was not present—with reference to the one occasion identified by Gray. Gray's testimony that "maybe" there had been a different occasion when both Brown and Gray had been with Moore when Moore had taken the curves, without any suggestion as to the time, place or circumstances of such an occasion, was insufficient to identify any specific occasion to which testimony by defendant could relate.

The extensive testimony of defendant concerning rides by Brown with Moore practically every Saturday, including rides on county roads as well as on Rotary Drive, when Moore had taken the curves, did not relate to transactions and communications involved in Gray's testimony and was incompetent under G.S. 8-51. It related to occasions when Gray was not present, entirely different from any occasion referred to in Gray's testimony. The testimony did not purport to corroborate Gray. The ruling that it be treated as corroborative rather than substantive evidence added nothing to its competency.

Unquestionably, the admission of defendant's testimony, concerning numerous unidentified prior occasions when Brown was riding with him, seriously prejudiced plaintiff's case in that the thrust thereof was to cast Brown in the role of a willing participant in a dangerous venture in which the risks were known and voluntarily assumed by him. It seems probable and prejudicial impact of this erroneously admitted incompetent testimony played a material part in causing the jury to restrict plaintiff's recovery to the exact amount of the out-of-pocket expenses Brown's parents incurred on account of his death.

The court, in reviewing defendant's testimony, stated to the jury: "His [defendant's] testimony further tended to show that on previous occasions the deceased, Mike Brown, had ridden with the defendant on Rotary Drive, which is a curvy road, and also on a county road going to the defendant's brother-in-law's house, at which times the defendant had been driving his

car at a high rate of speed." We apprehend that this tended to emphasize the prejudicial impact of the incompetent evidence.

We hold that plaintiff is entitled to a new trial because of prejudicial error in the admission of incompetent evidence over her objections. Hence, the decision of the Court of Appeals is reversed. The case is remanded to that court with direction that it be remanded to the Superior Court of Guilford County for trial *de novo*.

Reversed and remanded.

Justices COPELAND and EXUM did not participate in the hearing or decision of this case.

STATE OF NORTH CAROLINA v. ERNEST RAY SIMMONS

No. 44

(Filed 14 April 1975)

1. **Jury § 6— capital punishment beliefs — questions by trial judge**

The trial judge had the right and duty to question prospective jurors in order to clarify their answers concerning their beliefs as to capital punishment.

2. **Jury § 5— excusal of juror by judge — absence of challenge**

In exercising his duty to see that a fair and impartial jury is impaneled, the trial judge, in his discretion, may in proper cases excuse a prospective juror without a challenge by either party.

3. **Constitutional Law § 29; Criminal Law § 135; Jury § 7— capital punishment beliefs — equivocal answers — excusal for cause**

Although a prospective juror's *voir dire* answers concerning her beliefs as to capital punishment were equivocal and not models of clarity, the trial court properly excused her for cause where a contextual consideration of the entire *voir dire* examination of the juror indicates that she could not vote for a guilty verdict in a capital case even though the State might have proved to her by the evidence beyond a reasonable doubt that defendant was guilty as charged.

4. **Jury § 5— standing prospective juror at bottom of panel — excusal for cause**

Any possible prejudice resulting from the court's standing of a prospective juror at the bottom of the panel was removed by her subsequent examination and excusal for cause. G.S. 9-21.

5. **Jury § 8— failure to read names of jurors before impaneling**

Failure of the court to have the clerk read the names of the jurors before the jury was impaneled was not prejudicial error where defendant failed to object to the failure to read the names of the jurors until after the jury was impaneled. G.S. 9-21.

6. **Constitutional Law § 32— oral waiver of counsel**

An indigent defendant's waiver of counsel prior to in-custody interrogation is no longer required to be in writing. G.S. 7A-457(c).

7. **Criminal Law § 76— admission of confession — necessity for findings of fact**

It is not error for the trial judge to admit a confession without making specific findings of fact where no conflicting testimony was offered on *voir dire*, although it is always the better practice for the court to make such findings.

8. **Criminal Law § 75— admissibility of incriminating statements**

The trial court properly admitted defendant's inculpatory statements in evidence where the uncontradicted evidence on *voir dire* was that defendant was fully advised of his constitutional rights prior to each interrogation or encounter with law enforcement officers; that on each occasion he knowingly, intelligently and voluntarily waived those rights; and that he then proceeded to make inculpatory statements or otherwise to aid law enforcement officers in the investigation of this crime.

9. **Criminal Law § 42; Homicide § 20— admission of pistol "similar" to one owned by deceased**

In a prosecution for murder committed in the perpetration of burglary and robbery, the trial court did not err in the admission of a pistol allegedly belonging to deceased where witnesses testified the pistol was "similar" to the one owned by deceased and a witness identified the pistol as one he bought from another person charged with this crime but tried separately.

10. **Homicide § 25— felony-murder indictment — allegation of two felonies — guilt of killing in perpetration of either felony**

In a prosecution upon an indictment charging murder in the perpetration of the felonies of burglary and attempted robbery, the trial court did not err in instructing the jury it could return a verdict of first degree murder if it found the killing was committed in the perpetration of either burglary or attempted robbery where the felonies charged constituted part of the same transaction.

11. **Homicide § 28— defense of intoxication — instructions — error favorable to defendant**

The trial court's instruction on intoxication in a homicide case contained error in defendant's favor, and defendant cannot complain thereof, where the court failed to instruct the jury that a defendant must be so drunk as to be utterly incapable of forming a specific intent and that the burden was on defendant to prove to the satisfaction of the jury his plea of intoxication.

State v. Simmons

12. **Constitutional Law § 36; Criminal Law § 135— constitutionality of death penalty**

The death penalty as imposed in North Carolina does not violate the principles of *Furman v. Georgia*, 408 U.S. 238.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL by defendant from *Webb, S. J.*, 10 June 1974 Criminal Session of NASH Superior Court.

Defendant was tried upon a bill of indictment, proper in form, which charged that Ernest Ray Simmons "unlawfully and wilfully, feloniously and of his malice aforethought did kill and murder Mary C. Powell which said murder was committed in the perpetration of the felony crime of burglary and the attempted perpetration of the felony crime of robbery. . . ." Defendant, through his court-appointed counsel, entered a plea of not guilty.

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

On Saturday morning, 15 December 1973, Almeta Mills, a part-time domestic employee, went to the Powell home to work and there discovered Mrs. Powell's body on the floor near a fireplace in the front room. She immediately went to Ned Pittman's house for help. Pittman, who lived on Mrs. Powell's farm, went to Avent's Store and requested Mrs. Avent to notify the Nash County Sheriff's Department. Mrs. Powell lived alone, and Ned Pittman had cut wood and placed it on her porch on the preceding Friday but did not see Mrs. Powell at that time.

James Harrison, apparently the last person to see Mrs. Powell alive, testified that he went to Mrs. Powell's house on Thursday, 13 December, between four o'clock and five o'clock p.m. and talked with her at that time. Several witnesses testified that they observed an orange-colored automobile with a light top and fluorescent stripes parked across the road from Mrs. Powell's house between the hours of 8:00 and 9:30 p.m. on the night of 13 December.

Dr. D. E. Scarborough, a physician specializing in pathology, testified that the cause of Mrs. Powell's death was hemorrhage resulting from gunshot wounds.

Jimmie Smith testified that he purchased and gave to Mrs. Powell a .25 caliber automatic Galese pistol and further stated

that the pistol marked State's Exhibit 5 was similar to the pistol which he gave Mrs. Powell some five years prior to her death. Ernest Richardson identified State's Exhibit 5 as the pistol which he purchased from Frank Silver, the other person charged with this crime but tried separately. Richardson said that Silver first offered to sell him the pistol on 14 December 1973, but he and Silver could not agree on a price. Silver returned to the Richardson home on 18 December and completed the sale. Two or three days later Nash County Sheriff G. O. Womble, an S.B.I. agent, and Frank Silver went to the Richardson house, and Richardson at that time gave the pistol to the S.B.I. agent.

Martha Jones testified that defendant came to her house on the night of 13 December 1973. Later in the evening Frank Silver, his wife, his child, his brother, and his sister came to her home in a red automobile with a white top driven by Silver. Silver and defendant left in Silver's car, and when they returned about an hour later, defendant asked her for a shotgun. She observed that he had been drinking and would not let him have the gun. The two men left again but returned later in the night. They both then left her home, and she did not see either of them again that night.

William D. Driver testified that he sold Frank Silver four Victory .12 gauge shotgun shells on the night of 13 December 1973.

Sheriff Womble testified that on 15 December 1973, along with other law enforcement officers, he went to the home of Mrs. Mary Powell, where he found her body lying in the front room in front of the fireplace. He observed a hole in the right middle pane of the window located to the right of the front door, and glass was spread all over the room. A gun wadding was found near the body. One of the other officers discovered a spent .12 gauge gun shell in the driveway leading to the Powell house. Over objection of defense counsel and after conducting a *voir dire* examination, Judge Webb allowed Sheriff Womble to relate to the jury certain inculpatory statements made to him by defendant. Further facts concerning the content and admissibility of these statements appear in the opinion.

Defendant offered no evidence.

The jury returned a verdict of guilty of murder in the first degree, and Judge Webb imposed the mandatory death sentence.

Attorney General James H. Carson, Jr., by Assistant Attorneys General William F. O'Connell and William Woodward Webb, for the State.

Thomas W. Henson for defendant.

BRANCH, Justice.

Defendant contends that the trial judge committed prejudicial error by questioning prospective jurors concerning their views as to capital punishment and by removing Juror Dozier from the jury panel because of her views concerning capital punishment.

[1] This Court considered and answered the first portion of defendant's contention in *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817. There the Court stated: "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." Certainly the trial judge in the exercise of his duty to supervise and control the trial so as to insure a fair trial to all parties had the right and duty to interrogate prospective jurors in order to clarify their answers concerning their beliefs as to capital punishment. *State v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

By this assignment of error defendant also argues that Judge Webb offended the principles advanced in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776.

During the *voir dire* examination of Juror Dozier, the following exchange occurred:

> "Q. Mrs. Dozier, do you have any moral or religious scruples or beliefs against capital punishment?
>
> A. Yes, I don't believe in killing.
>
> Q. On account of your beliefs about capital punishment, 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 were to prove the defendant's guilt beyond a reasonable doubt? I am asking would you be able to return a verdict of guilty if we satisfied you that the defendant was guilty and satisfied you from the evidence and beyond a reasonable doubt, knowing that upon that

verdict the defendant would be sentenced to die in the gas chamber—would you be able to return a verdict of guilty under those circumstances?

JUROR DOZIER: I don't understand you.

Q. You told me you did not believe in the death penalty and in killing?

A. Yes.

Q. I ask you with that belief would it be impossible for you to find the defendant guilty, if the State satisfied you from the evidence and beyond a reasonable doubt that he is guilty—if the State proved his guilt beyond a reasonable doubt, would it be impossible for you to return a verdict of guilty, knowing he would be sentenced to die in the gas chamber?

A. I don't know what to say there, to tell the truth.

THE COURT: As I understand it, you say you do not believe in capital punishment?

A. Yes, sir.

THE COURT: Even though the State's evidence satisfied you or all the evidence satisfied you beyond a reasonable doubt that the defendant is guilty, would it be impossible for you to return a verdict of guilty knowing that if you did so the defendant would be sentenced to die in the gas chamber—do you understand my question?

A. (No answer.)

THE COURT: Well, let me phrase it another way. If you should be satisfied from the evidence beyond a reasonable doubt that the defendant was guilty, would you find him guilty in this case?

A. No.

THE COURT: You would not? And is the reason you would not be because you would know that would cause him to be sentenced to die in the gas chamber? Do you understand the question?

A. No, not definite I don't.

THE COURT: Well, as I understood it, you said that even though all the evidence convinced you beyond a reasonable doubt that the defendant was guilty, you would not find him guilty. Is that the way you answered the question?

A. That is the way I understood it.

THE COURT: Well, is that the way you meant to answer it—you would find the defendant not guilty even though all the evidence convinced you beyond a reasonable doubt that he was guilty? I am not trying to put words in your mouth, I just want to know if that is the way you answered that question? Do you understand my question to you? You understand that you are going to be called on as a juror, once the evidence is in, to return to the jury room and then vote as to whether this defendant is guilty or not guilty. Do you understand that?

A. Yes, I understand that.

THE COURT: You understand that is what your function as a juror will be?

A. Yes.

THE COURT: That is what your duty as a juror will be. Do you understand that?

A. Yes, I understand that but I don't know.

THE COURT: If all the evidence convinced you beyond a reasonable doubt that the defendant was guilty of first degree murder, would you vote for a verdict of guilty of first degree murder—do you understand that question? If you were convinced after hearing all the evidence if you were convinced beyond a reasonable doubt that the defendant was guilty of first degree murder, what would you vote for? Would you vote for guilty or not guilty?

A. I would vote for not guilty.

THE COURT: And is the reason you would vote for not guilty is because you would know if you voted for a verdict of guilty, if the defendant were found guilty, what the sentence would be, that is that he would be sentenced to die in the gas chamber—is that the reason you would vote for not guilty, even though you were convinced beyond a reasonable doubt that he was guilty?

A. (No answer.)

THE COURT: All right. Well, the Court will excuse you from the trial of this case then. Thank you.

MR. HENSON: On what grounds?

THE COURT: I am excusing her in the discretion of the Court. I am excusing her as a juror."

[2] A defendant is not entitled to a jury of his choice but only to "a jury selected pursuant to law and without unconstitutional discrimination against a class or substantial group of the community from which the jury panel is drawn. He has no 'vested right to a particular juror.' " *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241, *reversed as to punishment,* 403 U.S. 948, 91 S.Ct. 2283, 29 L.Ed. 2d 859; *State v. Vann,* 162 N.C. 534, 77 S.E. 295. In exercising his duty to see that a fair and impartial jury is impaneled, the trial judge, in his discretion, may in proper cases excuse a prospective juror without a challenge by either party. *State v. Atkinson, supra; State v. Vann, supra; State v. Vick,* 132 N.C. 995, 43 S.E. 626.

Although there was no formal challenge of Juror Dozier by the State and the trial judge stated that he excused the juror "in the discretion of the Court," it is obvious from the circumstances disclosed by the record that the juror was excused because of her expressed scruples against capital punishment. Thus, our remaining question under this assignment of error focuses upon whether Juror Dozier's responses to questions on *voir dire* indicated that, knowing that the penalty would be death, she could not return a verdict of guilty, even though the State proved to her by the evidence and beyond a reasonable doubt that the defendant was guilty of the capital crime charged. *Witherspoon v. Illinois, supra; State v. Washington,* 283 N.C. 175, 195 S.E. 2d 534, *cert. denied,* 414 U.S. 1132, 94 S.Ct. 873, 38 L.Ed. 2d 757; *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652, *vacated as to punishment,* 409 U.S. 1004, 93 S.Ct. 453, 34 L.Ed. 2d 295.

It is now established in this jurisdiction that even though a prospective juror's *voir dire* answers to questions concerning his beliefs as to capital punishment may be equivocal and not models of clarity, it is proper for the trial judge to excuse the juror for cause when a contextual consideration of the entire *voir dire* examination indicates that the juror could not vote for

a verdict which would result in the imposition of the death penalty. *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750. *See* Annotation, 39 A.L.R. 3d 550.

[3] We hold that, when considered contextually, the answers of the prospective Juror Dozier reveal that she could not vote for a verdict of guilty in this capital case even though the State might have proved to her by evidence beyond a reasonable doubt that defendant was guilty as charged. We note that the record fails to show that defendant exhausted his peremptory challenges.

The only argument brought forward in defendant's brief concerning removal of jurors from the panel relates to Juror Dozier. We have nevertheless carefully examined the exceptions as to the removal of other jurors and find no error prejudicial to defendant.

[4, 5] Defendant assigns as error the action of the trial court in standing the Juror Sharpe at the foot of the panel and in failing to have the names of the jurors read prior to impaneling the jury.

The purpose or requiring the Clerk to read the names of the jurors is to enable a defendant to exercise intelligently his right to challenge before the jury is impaneled. *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674. Here counsel for defendant interposed no objection to the Clerk's failure to read over the names of the jurors until after the jury was impaneled. The record is silent as to whether counsel had a written list of the jurors. Furthermore, any possible prejudice resulting from standing Juror Sharpe at the foot of the panel was removed by her subsequent examination and excusal for cause. The State concedes that a technical violation of the provisions of G.S. 9-21 occurred, but takes the position that such error was not prejudicial, particularly since defendant did not object prior to the impaneling of the jury. We agree. This assignment of error is overruled.

Defendant assigns as error the admission into evidence of his custodial confession.

[6] He first argues that the confession was inadmissible because there was no written waiver of counsel. He relies upon *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561, in which this Court

interpreted G.S. 7A-457 to hold that all waivers of counsel by indigent persons must be in writing. However, by Chapter 1243 of the Session Laws of 1971, the General Assembly amended G.S. 7A-457, effective 30 October 1971, by adding Subsection (c), which provides:

> "An indigent person who has been informed of his right to be represented by counsel at any out-of-court proceeding, may, *either orally or in writing*, waive the right to out-of-court representation by counsel." (Emphasis supplied.)

The challenged statement was made subsequent to 30 October 1971, and the 1971 enactment by the Legislature supersedes that portion of *Lynch* which interpreted G.S. 7A-457 to require that all waivers of counsel by indigent persons be in writing. This portion of defendant's argument obviously lacks merit. We therefore turn to the question of whether defendant's custodial statements were voluntarily made.

When the Assistant District Attorney asked Sheriff Womble to relate to the jury a statement made to him by defendant, counsel for defendant objected. The trial judge thereupon properly excused the jury and conducted a *voir dire* hearing concerning the admissibility of this statement. On *voir dire* Sheriff Womble testified that he talked to Ernest Ray Simmons on 20 December 1973 about the death of Mrs. Mary C. Powell. The Sheriff testified that, before defendant made any inculpatory statements, the following exchange between the Sheriff and defendant occurred:

> "I told him I wanted to talk to him about the death of Mrs. Powell; told him that the law required me to warn him of his rights; he did not have to make any statements, other than what he had given me, his name and his address. Told him that anything that he did make could and would be used against him in court; that he had a right to an attorney if he wanted one, of his own choosing; and if he wanted one and wasn't able to afford one that one would be appointed him before any questions was [sic] asked, or during questioning. I also told him that if he decided to make any statements or answer any questions that he had a right to quit talking at any time he wanted to; and I asked him if he understood his rights and he said he did. I asked if he understood what I had said to him. He said he did. I asked him if he wanted a lawyer

now. He said he did not. I asked him if he wanted to make some statements. He said he did."

The Sheriff further testified that he promised defendant nothing, that he did not threaten defendant, and that defendant, who appeared "normal," talked freely and appeared to understand all questions asked him.

Simmons then, in substance, told the Sheriff that on the night of 13 December 1973 he and Frank Silver went to Mrs. Powell's home after parking Silver's automobile across the road. He went to the house and looked in while Silver waited for him near a fence. Mrs. Powell was looking at television, and he at that time saw what he described as a big dog in the house. He then told Silver that he was not going into the house without a gun. Thereupon they went to Martha Jones's house, where Simmons unsuccessfully attempted to get a gun. Silver told him that he knew where they could get a gun. They stopped at Driver's Store, where Silver purchased four shotgun shells, and then proceeded to the home of Silver's father, where they obtained a shotgun. Upon returning to the vicinity of the Powell home, Silver parked his car in a path across the road from the Powell home. Silver was loading the gun as they walked along the driveway to the Powell house, and it accidently went off. Silver breached the gun, and the shell flew out. When Mrs. Powell looked out the window, they left and approached the house from a different direction. With Simmons leading the way, they finally came to the front of the house. He again looked in, saw Mrs. Powell, and told Silver that she was "poking in the fire." Silver stepped up and shot her through the window. The Sheriff stated on cross-examination that Silver had said "that Ernest was the one doing the shooting." The Sheriff also stated that he talked with Simmons on Friday, 21 December 1973, and Saturday, 22 December 1973, and on these occasions Simmons made statements which further implicated him in the killing. Before talking to Simmons on 21 December and 22 December, he again warned Simmons of his rights in language substantially the same as that employed prior to his interrogation on 20 December. The only other State's witness on *voir dire* was SBI Agent E. H. Cross, who testified that at the request of Sheriff Womble he went to the farm where defendant worked and requested him to come in to talk to the Sheriff. Defendant agreed to accompany him to Nashville. He did not interrogate defendant, but he did "warn him of his rights" after they reached the courthouse.

Defendant offered no evidence on *voir dire*. At the conclusion of the *voir dire* hearing, Judge Webb found and ruled as follows:

> " . . . Let the record show then at the end of the voir dire hearing, the Court finds as a fact that on the dates of December 20, 21, 22, 1973, at the time of questioning the defendant that Glenn O. Womble, Sheriff of Nash County, before receiving any statement from the defendant, fully advised him of his right to remain silient [sic]; his right to have counsel represent him; his right to have the State pay for counsel if he could not afford counsel and warned him of his possible self-incrimination. That the defendant fully understood these rights; that he freely, voluntarily and understandingly waived his right to remain silent and to have counsel present at any questioning. Any statements the defendant made to the sheriff, Glenn O. Womble, on December 20, 21 and 22, 1973 are admissible in evidence. The defendant's objections to these questions are overruled."

[7, 8] It is familiar law that, where competent evidence supports the findings of fact of a trial judge concerning the voluntariness of a custodial statement, such findings are binding upon an appellate court. *State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844; *State v. Smith*, 278 N.C. 36, 178 S.E. 2d 597, *cert. denied*, 403 U.S. 934, 91 S.Ct. 2266, 29 L.Ed. 2d 715; *State v. Wright*, 274 N.C. 380, 163 S.E. 2d 897. Further, where, as here, no conflicting testimony is offered on *voir dire*, it is not error for the judge to admit the confession without making specific findings of fact. *State v. Lynch, supra; State v. Bishop*, 272 N.C. 283, 158 S.E. 2d 511; *State v. Keith*, 266 N.C. 263, 145 S.E. 2d 841. As we noted in *Lynch*, however, it is "always a better practice for the Court to find the facts upon which it concludes any confession is admissible." In instant case the facts are uncontradicted that defendant was fully advised of his constitutional rights prior to each interrogation or encounter with law enforcement officers; that on each occasion he knowingly, intelligently, and voluntarily waived these rights; and that he then proceeded to make inculpatory statements or otherwise to aid law enforcement officers in the investigation of this crime.

We hold that the evidence fully supports the trial judge's findings, conclusions, and ruling admitting into evidence defendant's inculpatory statements. This assignment of error is overruled.

[9] Defendant next contends that the Court committed prejudicial error by admitting into evidence State's Exhibit 5, the pistol allegedly belonging to deceased. Defendant seems to take the position that since witnesses were able to testify only that the pistol was similar to the one used by deceased without positively identifying the weapon as being the property of the deceased, the pistol should not have been admitted into evidence.

The general rule in this jurisdiction is that weapons may be admitted into evidence upon such testimony "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. In *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38, this Court stated:

> " . . . 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)."

In *State v. Macklin,* 210 N.C. 496, 187 S.E. 785, it was proved that the deceased was killed with a shotgun. A single-barrel shotgun was found in the defendant's room, and a witness testified that the gun "was like the one" carried by defendant on the night deceased was shot. This Court held that the shotgun was properly admitted into evidence. *Accord: State v. Crowder, supra; State v. Patterson,* 284 N.C. 190, 200 S.E. 2d 16; *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Muse,* 280 N.C. 31, 184 S.E. 2d 214, *cert. denied,* 406 U.S. 974, 92 S.Ct. 2409, 32 L.Ed. 2d 674, *rehearing denied,* 409 U.S. 898, 93 S.Ct. 99, 34 L.Ed. 2d 157; *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. Jarrett,* 271 N.C. 576, 157 S.E. 2d 4; *State v. Fikes,* 270 N.C. 780, 155 S.E. 2d 277; *State v. Keith, supra.*

Finally, any doubt as to the admissibility of State's Exhibit 5 was dispelled by the testimony of the witness Ernest Richardson, who testified without objection or motion to strike that "[t]he Exhibit you are showing me marked State's Exhibit 5 for identification is the pistol." He further testified that he

bought this pistol from Frank Silver on 18 December after negotiations which began on 14 December 1973. The testimony of the witness Richardson, when coupled with the testimony of several other witnesses that State's Exhibit 5 was similar or looked like the pistol formerly belonging to deceased, was sufficient to establish relevancy and identity of the weapon and thereby make it properly admissible into evidence. There is no merit in this assignment of error.

[10] Defendant next contends that the trial judge erroneously charged the jury with respect to the definition of the crime charged. More particularly, he argues that, since the indictment charged murder in the perpetration of the felonies of burglary *and* attempted robbery, it was prejudicial error for the trial judge to instruct the jury that it could return a verdict of guilty of murder in the first degree if it found that the killing was committed in the perpetration of *either* burglary *or* attempted robbery.

G.S. 14-17, in pertinent part, provides:

> "A murder . . . which shall be committed in the perpetration or attempt to perpetrate any arson, rape, *robbery, kidnapping, burglary* or other felony, shall be deemed to be murder in the first degree and shall be punished with death. . . ." (Emphasis supplied.)

In interpreting this statute, we have stated:

> "It is evident that under this statute [G.S. 14-17] a homicide is murder in the first degree if it results from the commission or attempted commission of *one* of the four specified felonies or of any other felony inherently dangerous to life, without regard to whether the death be intended or not."

State v. Streeton, 231 N.C. 301, 56 S.E. 2d 649.

We are unable to find any case precisely governing the point here raised. However, we think that some light is shed upon the question by *State v. O'Keefe*, 263 N.C. 53, 138 S.E. 2d 767, *cert. denied*, 380 U.S. 985, 85 S.Ct. 1355, 14 L.Ed. 2d 277. There defendant was charged with crime against nature in violation of G.S. 14-177. The indictment did not specify whether the unnatural sexual act was *per os* or *per anum*, but the evidence for the State tended to show the commission of both

types of crime as a part of the same incident. In rejecting a challenge to the sufficiency of the indictment, this Court made the following statement:

> " 'Acts entering into a single and continuous transaction may be charged together as a single offense.' 42 C.J.S., Indictments and Informations, § 164, p. 1117; *State v. Sherman,* 107 P. 33 (Kan.). Where a single offense may be committed by several means, it may be charged in a single count if the ways and means are not repugnant and are component parts of one transaction. *State v. Laundy,* 204 P. 958 (Ore.). Proof of any one means will support conviction. *United States v. Otto,* 54 F. 2d 277 (C.C. 2d). And an instruction to this effect is not error. *State v. Davis,* 203 N.C. 47, 53, 164 S.E. 732."

The requirement that the indictment in such a case as this one be couched in the conjunctive rather than the disjunctive is a sound rule of criminal pleading designed to inform the defendant of the crime for which he stands charged. *State v. Sellers,* 273 N.C. 641, 161 S.E. 2d 15; 42 C.J.S. *Indictments and Informations* § 166; 41 Am. Jur. 2d *Indictments and Informations* § 96. However, where, as here, the felonies charged clearly constitute part and parcel of the same transaction, we perceive no usful purpose in requiring that the proof must indicate the commission of *both* crimes. A finding that the homicide was committed in the perpetration of *either* crime suffices to support the conviction of murder in the first degree. We hold that it was not prejudicially erroneous for the trial judge to instruct that sufficient evidence of the perpetration of either felony would suffice to bring defendant within the felony-murder provision of G.S. 14-17.

Defendant contends that the trial judge erred in his instructions to the jury on intoxication as a defense. The trial judge, in part, charged:

> "Generally, voluntary intoxication is not an excuse for a crime. However, if you should find the defendant was intoxicated you should consider whether this condition affected his ability to fomulate [sic] the specific intent which is required in this case. First of all as I charged you on attempted armed robbery, you would have to be satisfied beyond a reasonable doubt that the defendant intended to rob Mary C. Powell; or you would also have to be satisfied

if it is an attempted armed robbery that the defendant intended to deprive Mary C. Powell of the use of her property permanently. You would also have to be satisfied beyond a reasonable doubt that the defendant knew he was not entitled to take the property.

"As for a burglary, you would have to be satisfied beyond a reasonable doubt, in order for you to find that there was a burglary in progress, you would have to be satisfied beyond a reasonable doubt that at the time of the breaking and entering the defendant intended to commit some felony, in this case, robbery.

* * *

"Ladies and gentlemen of the jury, I have been asked to charge you, which I will do, if considering the evidence with respect to the defendant's intoxication you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of murder in this case, you will return a verdict of not guilty."

One of the essential elements of attempted robbery is the felonious intent to deprive the owner of his property permanently and to convert it to the use of the criminals. *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869. Likewise, one of the essential elements of the crime of burglary is the intent to commit a felony in the dwelling house broken into. *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10. If, at the time Mrs. Powell was killed, defendant was so drunk that he could not have formed the felonious intent required in order to constitute the crimes of burglary and attempted robbery, he could not be guilty of murder in the first degree since the State proceeded on the felony-murder theory, *i.e.,* the theory that the murder was committed in the perpetration of a felony. An essential element of both crimes would be lacking, and the murder could not have been committed in the perpetration of the specified felony. *State v. Hamby,* 276 N.C. 674, 174 S.E. 2d 385; *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560; *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352; *State v. Kelly,* 216 N.C. 627, 6 S.E. 2d 533; *State v. Sterling,* 200 N.C. 18, 156 S.E. 96.

[11] We do not think that there was sufficient evidence in instant case to require the trial judge to submit the plea of intoxication. Further, one of the principal omissions in the charge on intoxication was the stringent language adopted by this Court

to the effect that a defendant must be so drunk as to be utterly incapable of forming a specific intent. Neither did the trial judge instruct the jury that the burden was upon defendant to prove to the satisfaction of the jury his plea of intoxication. *State v. Creech,* 229 N.C. 662, 51 S.E. 2d 348; *State v. Absher,* 226 N.C. 656, 40 S.E. 2d 26. Thus, the instruction complained of, if erroneous, contained error in defendant's favor, and he cannot be heard to complain of such error. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305; *State v. Holbrook,* 232 N.C. 503, 61 S.E. 2d 361; *State v. Johnson,* 229 N.C. 701, 51 S.E. 2d 186; *State v. King,* 222 N.C. 239, 22 S.E. 2d 445; *State v. Levy,* 220 N.C. 812, 18 S.E. 2d 355; *State v. Carpenter,* 215 N.C. 635, 3 S.E. 2d 34; *State v. Whitehurst,* 202 N.C. 631, 163 S.E. 683. We find no prejudicial error in this assignment.

[12] Defendant assigns as error the entry of the judgment of death and presents the contention that the death penalty as imposed in North Carolina violates the principles of *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346. All of the contentions which defendant presents under this assignment of error have been considered and rejected by this Court in numerous recent cases. *See, e.g., State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106; *State v. Avery, supra; State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113; *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *State v. Noell, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19. On the authority of these cases, this assignment of error is overruled.

We have carefully examined each assignment of error as well as the entire record of this case and perceive no reversible error.

No error.

Chief Justice SHARP dissents as to the death sentence and votes to remand for the imposition of life imprisonment for the reasons stated in her dissenting opinion in *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975).

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for

the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams*, 286 N.C. 422, 212 S.E. 2d 113 (1975), other than those relating to the effect of Section 8 of Chapter 1201 of the 1973 Session Laws.

STATE OF NORTH CAROLINA v. CRAWFORD DEAN LOWERY

No. 36

(Filed 14 April 1975)

1. **Criminal Law §§ 34, 169— evidence of another offense — res gestae — similar testimony admitted without objection**

Defendant in a rape case was not prejudiced by the admission into evidence, over objection, of testimony that defendant engaged in a separate and distinct criminal offense against the person of his victim by participating in the crime against nature perpetrated upon her by defendant's friend, since defendant allowed the same evidence complained of to come in without objection many times during the course of the trial; further, the evidence of the commission of the unnatural sex act, when viewed with the other evidence, tended to exhibit a chain of circumstances in respect to the rape charge and was a part of the *res gestae*, and the evidence was admissible even if defendant had promptly objected at each opportunity.

2. **Criminal Law § 128— failure of court to order mistrial on its own motion — error corrected by striking testimony and instructing jury**

The trial court did not err in failing to declare a mistrial on its own motion when a State's witness testified, " . . . if the girl had been raped, the guilty person should be prosecuted," since the court sustained defendant's objection, allowed the motion to strike, and instructed the jury not to consider it.

3. **Criminal Law § 162— prejudicial testimony — failure to object — objection waived**

Defendant in a rape case was not prejudiced by testimony of a witness that the victim had told him that she had studied sociology and the possibility of rape and was advised always to stay calm and try to talk the attacker out of causing her any harm, particularly since defendant did not object to the testimony at trial.

4. **Criminal Law § 162— failure to object to evidence at trial — objection waived**

It is well settled that with the exception of evidence precluded by statute in furtherance of public policy, the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal.

5. **Criminal Law § 86— cross-examination of defendant as to other offenses — propriety**

A criminal defendant may not be asked if he has been arrested or indicted for a specific offense, but he may, for the purpose of impeachment, be asked if he has committed criminal acts or other specific acts of reprehensible conduct, provided the question is in good faith.

6. **Criminal Law § 86— cross-examination as to subsequent rape — propriety — good faith question**

Where the record in this rape case showed that defendant was in fact indicted at the time of this trial for a subsequent rape of another victim, there was ample basis for the district attorney to ask defendant in good faith whether he committed the offense, and the trial court did not err in failing to declare a mistrial upon its own motion.

7. **Constitutional Law § 36; Rape § 7— death penalty — constitutionality**

Judgment of death in this rape case does not contravene the Eighth and Fourteenth Amendments to the U. S. Constitution.

Chief Justice SHARP and Justices COPELAND and EXUM dissenting as to death sentence.

APPEAL by defendant under G.S. 7A-27(a) from *Clark, J.*, at the June 10, 1974 Criminal Session of ALAMANCE Superior Court.

On an indictment proper in form, defendant was convicted of rape and received the death penalty.

Miss Lynn Snyder, seventeen years of age, testified that on Saturday, 7 July 1973, she returned to her home in Burlington from Carolina Beach about 6:00 p.m. She went to her brother's house nearby around 7:00 or 7:30 p.m. Frank Coots, a friend of several years, was there, and she asked him if he would ride with her to look for Tommy Wilson, a friend she had met at Carolina Beach on prior occasions. She had seen Tommy's mother while at the beach, and his mother had asked her to give him a message when she returned to Burlington. Frank agreed to accompany her.

They went first to the "Footsball" place near the Alamance County Hospital. Wilson was not there. Later, at about 11:00 p.m., they went to a place known as "Choosie Mothers." Miss

Snyder left the car and asked a group of people there if any of them knew Tommy Wilson. Defendant answered that he did and offered to take Miss Snyder and Mr. Coots to find him. Defendant and a friend named Danny Cox entered the back seat of Coots's automobile and Cox described the place to which they were going as the meeting place of the "Zulu Club." The car stopped at a wooded area, and Miss Snyder and defendant got out. Miss Snyder told Coots to stay in the car and defendant told Coots to turn off the headlights. Miss Snyder took about four steps and called Tommy Wilson's name. She then decided that Wilson could not be at a place like this and started to turn around. At this point, defendant held her arm and she felt something sharp in her back. Defendant told her to walk straight or he would kill her.

Defendant led her down a path to a sawdust pile. He then cut off her blouse with a knife and struck her several times about the face. He held a knife to her neck, removed her cut-off jeans and underwear and pushed her back on the sawdust pile. While holding the knife at her throat, and while lying on top of her, he removed his pants with his other hand, and in this position attempted to have intercourse with her. He did manage penetration of one or two inches. She did not give him permission to do so.

At this point, Danny Cox emerged from the woods, saying the police had come. Defendant told Cox he could do anything he wanted with Miss Snyder. Defendant and Cox then dragged her about one hundred feet to the other side of the sawdust pile. Five other males then came over the top of the sawdust pile. Miss Snyder was putting her jeans back on when defendant asked the other boys if they wanted to see her naked, and defendant again pulled off Miss Snyder's jeans. Defendant held one of her arms while the other boys ran their hands over her body, and one of the boys put his mouth on her vagina, at which time she screamed. She was then released and allowed to put her jeans on. Defendant made one of the other boys give her his shirt. Defendant told her that if she opened her mouth about what happened, they would kill her.

Miss Snyder then ran down the path and followed the railroad track until she emerged from the woods. She saw headlights and observed an automobile operated by Officer Helm of the Graham Police Department. She sat in the police car but did not at that time tell Helm what happened because she was

scared and embarrassed to be connected with "those people." She then got back into the car with Frank Coots and on the way home told him to turn around because she wanted to go to the Graham Police Department and tell them what happened. She arrived at the police department about 1:00 a.m. and talked to Officer Helm for a "couple of hours." She had another conversation with Officer Helm later in the day (Sunday, 8 July) in the presence of her mother, her stepfather and attorney. She had a conversation with Mr. Bill Frick, the administrative assistant for the District Attorney, "sometime after" 8 July.

On cross-examination, Miss Snyder testified that she knew dope was used and available at "Choosie Mothers," and that she had smoked pot two years ago. At no time did she ask Frank Coots to accompany her and defendant to the sawdust pile or call for his help. She hesitated to scream because she was afraid she would be killed, but started screaming when one of the boys placed his finger in her rectum. Her vision without glasses is 50-50 and she cannot recognize objects more than four feet away without her glasses. She described the blouse she was wearing as being low-neck and made of flimsy material, and stated that she was not wearing a bra because she was sunburned from the beach.

Mr. Fred Darlington, attorney for the family of Miss Snyder, testified that he was present with Sergeant Helm and members of the Alamance County Sheriff's Department when Miss Snyder identified the defendant as her assailant. On the evening of 8 July he noticed a cut on Miss Snyder's arm and on her upper and lower lip inside her mouth. He testified that Miss Snyder's testimony in court was substantially what she told him during their discussions of the alleged rape.

Sergeant Bobby Helm of the Graham Police Department testified that while on patrol at about 11:45 p.m. on 7 July 1973, he saw Frank Coots in his automobile parked on River Street about 300 to 400 feet south of the sawdust pile. While he was talking to Frank Coots, Miss Snyder emerged from the woods and was crying and upset. She was wearing a green shirt with blood on it and she had blood on her mouth. She told him her name was "Tina" and that she was looking for her friend Tommy Wilson. He could tell she was in no condition to answer questions, so he told her if she wanted to make a statement later to contact the Graham Police Department. She came to the Graham

Police Department at appproximately 2:00 a.m. on 8 July and told officers what happened, and returned about 11:00 p.m. with her mother, stepfather and attorney to make a full statement, which was introduced in evidence and which essentially corroborated Miss Snyder's testimony.

On cross-examination, Sergeant Helm testified that when Miss Snyder emerged from the woods at 12:30 a.m. on the night of the alleged rape, she answered "No" when he asked her if she had been criminally assaulted in any way.

Mr. William W. Frick, administrative assistant for the District Attorney's Office, testified that he interviewed Miss Snyder on 27 September 1973 regarding the circumstances surrounding the alleged rape. Her statement to him was introduced in evidence and essentially corroborated Miss Snyder's testimony.

Dr. Edward B. Sutton, a medical doctor specializing in obstetrics and gynecology, testified that he examined Miss Snyder at 2:55 p.m. on 8 July 1973. No spermatozoa were found in her vagina but spermatozoa might have been washed out since Miss Snyder was in the process of menstruation. He found no bruises or abrasions on her body.

Mark Steven Woods, an acquaintance of defendant, testified that on 7 July 1973 he was a recent initiate of the "Zulu Club," of which defendant was the leader. As an initiation rite he had to fight five individuals at the sawdust pile. He was present when Miss Snyder came to "Choosie Mothers" looking for Tommy Wilson, and heard defendant offer to take her to him. As he entered the car, defendant turned, smiled and said to the others who remained, "Sawdust pile." Defendant then left with Miss Snyder and two others. Shortly thereafter, Woods and four friends left "Choosie Mothers" and went to the sawdust pile. There, Woods saw defendant holding Miss Snyder, who was crying, and saw an individual named "Hoss" commit an oral sex act on her. One or two days later, he heard "Hoss" bragging about committing the oral sex act on Miss Snyder. He also heard defendant say he had tried to put his private parts into Miss Snyder's private parts but could not because she "moved too much and was too tight."

On cross-examination, Mr. Woods stated that he could not see too well in the dark and that he was not positive that "Hoss" was committing an oral sex act.

Defendant testified that he led Miss Snyder to the sawdust pile but at no time threatened her with a knife. At the sawdust pile, he asked her if she was going "to give [him] some." She did not respond but allowed him to place his hand inside her blouse. She removed her blouse and pants. At that time, Danny Cox arrived and said the police were there. At no time did defendant remove his clothing or attempt to place his private parts in hers. The other boys then came and he observed Lee "Hoss" Somers commit an oral sex act on Miss Snyder. When he observed her start to fall, he pushed her back on her feet to keep her from hitting the ground. He did not turn to his friends and say "Sawdust pile" before leaving "Choosie Mothers" with Miss Snyder.

Douglas Ferguson testified for the State that he was present at the sawdust pile on 7 July 1973 and saw a "sharp object" in the hand of defendant. On 9 July 1973, he took police officers to an area near the sawdust pile and showed them Miss Snyder's blouse in some bushes where he had seen defendant drop it after the alleged rape. He stayed in the cell with defendant at the Alamance County Jail the night before his testimony in this trial and defendant told him not to testify against him because " . . . you won't live if you do."

Defendant was recalled and denied that he had threatened Douglas Ferguson.

Other facts pertinent to decision are set out in the opinion.

Attorney General James H. Carson, Jr. and Assistant Attorney General Claude W. Harris for the State.

Donnell S. Kelly for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the admission into evidence, over objection, testimony that defendant engaged in a separate and distinct criminal offense against the person of Miss Lynn Snyder by participating in the crime against nature perpetrated upon her.

On direct examination, Miss Snyder testified that after defendant raped her Danny Cox arrived and defendant told Cox he could do anything he wanted to with her. She stated further that five other males appeared and defendant again disrobed

her. All of this was without objection and appears in narrative form.

The following then appears:

"ANSWER BY MISS SNYDER: 'He (defendant) held my arms while another boy held my arm and he gave the boys permission to . . . '

"MR. KELLY: OBJECTION.

"THE COURT: 'THE OBJECTION IS OVERRULED.' "

The record does not set out the question asked nor does it disclose any objection to the question.

After this there is another narrative paragraph where Miss Snyder testified that the defendant held one of her arms and told the other boys that they could do anything they wanted to do with her and that one of the boys put his mouth on her vagina. No objection or motion to strike appears.

1 Stansbury's N. C. Evidence § 27, pp. 69-70 (Brandis Rev. 1973), states:

" . . . In case of a specific question, objection should be made as soon as the question is asked and before the witness has time to answer. Sometimes, however, inadmissibility is not indicated by the question, but becomes apparent by some feature of the answer. In such cases the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it. . . . "

This was not done. The record further discloses that the same evidence complained of came in without objection many times during the course of the trial, and on some occasions in response to questions by defendant's counsel.

On cross-examination, Miss Snyder stated that defendant and another boy held her arms while the other boys kissed and fondled her and while one of them committed the unnatural sex act on her.

Without objection, Officer Helm and Investigator Frick, in corroboration, testified as to Miss Snyder's statements to them regarding the unnatural sex act.

Mark Steven Woods, an eyewitness, told the same story without objection.

Defendant himself told of this act but claimed that Miss Snyder was falling to the ground and that all he did was push her up.

The well established rule is that when evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is ordinarily lost. 1 Stansbury's, *supra*, § 30; *State v. Little*, 278 N.C. 484, 180 S.E. 2d 17 (1971); *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4 (1967). Defendant here allowed similar evidence without objection and therefore lost the benefit of the objection.

Further, under the facts of this case we think the evidence was admissible even if defendant had promptly objected at each opportunity. Ordinarily, the State cannot offer proof of another crime independent of and distinct from the crime for which the defendant is being prosecuted even though the separate offense is of the same nature as the crime charged. 1 Stansbury's *supra*, § 91; *State v. Humphrey*, 283 N.C. 570, 196 S.E. 2d 516 (1973); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 (1954). Such evidence is competent, however, to show "' . . . the *quo animo*, intent, design, guilty knowledge, or scienter, or to make out the *res gestae*, or to exhibit a chain of circumstances in respect of the matter on trial, when such crimes are so connected with the offense charged as to throw light upon one or more of these questions. [Citations omitted.]'" *State v. Jenerett*, 281 N.C. 81, 89, 187 S.E. 2d 735, 740 (1972), quoting from *State v. Atkinson, supra*. *See* 1 Stansbury's, *supra*, § 92.

The evidence tends to show that when the defendant left the footsball place with Miss Snyder, he turned to several other males, smiled, and said, "Sawdust pile." Several other males arrived at the sawdust pile shortly after the alleged rape, and Lee "Hoss" Somers, with the aid of defendant, committed the unnatural sex act on Miss Snyder. We think the evidence of commission of the unnatural sex act, when viewed with other evidence, tended to exhibit a chain of circumstances in respect to the rape charge, and was a part of the *res gestae*. The evidence was properly admitted. This assignment is overruled.

[2] Defendant next contends that the trial court erred in failing to declare a mistrial on its own motion when the State's witness, Mr. Darlington, testified as follows:

> "QUESTION BY MR. PIERCE: What was your interest in the matter?
>
> "ANSWER BY MR. DARLINGTON: I have a daughter myself and they are close friends of mine and I felt if the girl had been raped, the guilty person should be prosecuted.
>
> "MR. KELLY: Your Honor, we OBJECT and move the answer be stricken.
>
> "THE COURT: SUSTAINED, MOTION ALLOWED, and I instruct the jury not to consider that."

No motion for a mistrial was made. Defendant elected to proceed with the trial and to take his chances with the jury then impaneled. Under these circumstances he may not successfully contend that the court, of its own motion, should have declared a mistrial. ". . . Indeed, without defendant's consent or a motion by him, had the court declared a mistrial, *ex mero motu,* at the onset of the next trial the judge would most certainly have been confronted with defendant's plea of former jeopardy. [Citations omitted.]" *State v. Moore,* 276 N.C. 142, 150, 171 S.E. 2d 453, 458 (1970). " . . . It is only in cases of necessity in attaining the ends of justice that a mistrial may be ordered in a capital case without the consent of the accused. [Citations omitted.]" *State v. Harris,* 223 N.C. 697, 700, 28 S.E. 2d 232, 235 (1943). *Accord, State v. Moore, supra; State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954). Here, the court sustained the objection, allowed the motion to strike, and instructed the jury not to consider it. We do not believe that this generalized statement made by Mr. Darlington that *"if* the girl had been raped, the guilty party should be prosecuted" (emphasis added) was so inherently prejudicial that its initial impact was not erased by the judge's prompt and emphatic instruction that the jury should not consider it. As Justice Devin (later Chief Justice) said in *State v. Ray,* 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):

> "[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions

of the court, and are presumed to have done so. [Citation omitted.]"

Accord, Highway Comm. v. Helderman, 285 N.C. 645, 207 S.E. 2d 720 (1974); *State v. Moore, supra.* This assignment is overruled.

[3] Defendant next assigns as error the admission into evidence the testimony of the witness Frick that the prosecuting witness in her statement to him said: ". . . [S]he had taken sociology in school and in taking this course they had studied the possibility of rape cases and so forth, and was advised to always stay calm and to attempt to talk the attacker out of causing her any harm and to try to save her life or from getting beat up or scarred for life." The record does not disclose that the defendant made any objection to the testimony of this witness.

[4] It is well settled that with the exception of evidence precluded by statute in furtherance of public policy, which exception is not applicable to this assignment of error, the failure to object to the introduction of the evidence is a waiver of the right to do so, and its admission, even if incompetent, is not a proper basis for appeal. 1 Strong, N. C. Index 2d, Appeal and Error § 30 (1967); *State v. Gurley,* 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967); *State v. Howell,* 239 N.C. 78, 79 S.E. 2d 235 (1953). " . . . It is too late after the trial to make exceptions to the evidence. [Citations omitted.]" *State v. Howell, id.* at 81-82, 79 S.E. 2d at 237. We do not believe this innocuous statement prejudicial. This assignment is overruled.

[5, 6] Next, defendant assigns as error the failure of the trial court to declare upon its own motion a mistrial after the following question was asked by the district attorney of the defendant on cross-examination: "On April 5, 1974, didn't you insert your private parts into Kathy Cox?" The court then said, "When?" When told "April 5, 1974," the court sustained the objection. The trial court's ruling was error in favor of defendant. Defendant concedes that under the rule in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), the solicitor properly asked this question. In *Williams,* it is stated:

"It is permissible, for purposes of impeachment, to cross-examine a witness, including the defendant in a criminal case, by asking disparaging questions concerning col-

lateral matters relating to his criminal and degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others. We do not undertake here to mark the limits of such cross-examination except to say generally (1) the scope thereof is subject to the discretion of the trial judge, and (2) the questions must be asked in good faith." *Id.* at 675, 185 S.E. 2d at 181.

A criminal defendant may not be asked if he has been arrested or indicted for a specific offense, but he may, for the purpose of impeachment, be asked if he has committed criminal acts or other specific acts of reprehensible conduct, provided the question is in good faith. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Williams, supra.* The record shows that defendant was in fact indicted at the time of this trial for the rape of Kathy Cox on April 5, 1974; hence, there was ample basis for this question to be asked in good faith. This assignment is without merit.

Finally, defendant contends that the judgment imposing the death penalty contravenes the Eighth and Fourteenth Amendments to the Constitution of the United States.

[7] The questions raised by the defendant have been raised in a number of recent cases before the Supreme Court of North Carolina. The answer in each is that the judgment of death does not contravene the Eighth and Fourteenth Amendments. *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. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19 (1973). We adhere to our decisions in those cases.

It is noted that the court's charge was not brought forward in the record. Therefore, it is presumed that the jury was clearly charged as to the law arising upon the evidence as required by G.S. 1-180. 3 Strong, N. C. Index 2d, Criminal Law § 158 (1967); *State v. Moore, supra; State v. Cooper,* 273 N.C. 51, 159 S.E. 2d 305 (1968).

We have carefully reviewed the entire record in this case 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 SHARP dissenting as to the death penalty:

The rape for which defendant was convicted occurred on 7 July 1973, a date between 18 January 1973, the day on which the opinion in *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19, was filed and 8 April 1974, the day on which the 1973 General Assembly rewrote G.S. 14-21 at its second session by the enactment of Ch. 1201, Sec. 2, N. C. Sess. Laws (1973). 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), an opinion in which Justice Higgins and I joined, I dissent as to the death sentence and vote to remand for the imposition of a sentence of life imprisonment. *See also* the dissents in *State v. Waddell, supra* at 453 and 476, 194 S.E. 2d at 30 and 47.

Justice COPELAND dissents as to death sentence and votes to remand for imposition of a sentence of life imprisonment for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422 at 437, 212 S.E. 2d 113 at 122 (1975).

Justice EXUM dissents from that portion of the majority opinion which affirms the death sentence and votes to remand this case in order that a sentence of life imprisonment can be imposed for the reasons stated in his dissenting opinion in *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975).

STATE OF NORTH CAROLINA v. FRANK JAMES SILVER

No. 35

(Filed 14 April 1975)

1. **Criminal Law § 76— admissibility of confession — consideration of voir dire evidence only improper**

In determining the admissibility of a confession, the Court must look to the entire record, not merely to the evidence presented on a *voir dire* hearing.

2. **Criminal Law § 76— involuntary confession — admissibility of subsequent confession — presumption**

Where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior

influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence.

3. **Criminal Law § 76— voir dire to determine voluntariness of confession — necessity for findings of fact**

The general rule is that when the trial judge concludes a *voir dire* hearing concerning the admissibility of a confession, he should make findings of fact to show the bases of his rulings.

4. **Criminal Law § 76— prior inculpatory statement — no determination of voluntariness — error**

Evidence in this murder case did not support the trial court's finding that, "On December 22, 1973, and before the defendant made any statement to the Sheriff concerning any of the events surrounding the death of Mrs. Mary C. Powell, the Sheriff advised the defendant as follows . . . , " since there was evidence that defendant made inculpatory statements to the sheriff on 20 December 1973; further, in view of the patently incriminating nature of the statements made on 20 December, it was incumbent upon the trial judge during the *voir dire* hearing to find facts, to enter proper conclusions, to rule on the voluntariness of the statements, and if the statements were found to be involuntary, to determine whether the State had met its burden of overcoming the prior influences which rendered the 20 December statements involuntary, thus causing no presumption of involuntariness to be imputed to the 22 December confessions.

5. **Constitutional Law § 36; Homicide § 31— first degree murder — death sentence constitutional**

Imposition of the death penalty in a first degree murder case was constitutional.

APPEAL by defendant from *Rouse, J.*, 1 April 1974 Session of NASH Superior Court.

Defendant, by a bill of indictment proper in form, was charged with the murder of Mary C. Powell.

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

On Saturday morning, 15 December 1973, Almeta Mills, a part-time domestic employee, went to the Powell home to work and there discovered Mrs. Powell's body on the floor near the fireplace in the front room. She immediately went to Ned Pittman's house for help. Pittman, who lived on Mrs. Powell's farm, went to Avent's store and requested Mrs. Avent to notify the Nash County Sheriff's Department. Mrs. Powell lived alone, and Ned Pittman had cut wood and placed it on her porch on the preceding Friday but did not see Mrs. Powell at that time.

James Harrison, apparently the last person to see Mrs. Powell alive, testified that he went to Mrs. Powell's home on

Thursday, 13 December, between 4:00 and 5:00 p.m. and talked with her at that time. Charles Thomas Battle testified that he observed an automobile parked near the Powell home between 8:00 and 9:00 p.m. on 13 December 1973. The automobile appeared to be a 1968 or 1969 Roadrunner and was painted with fluorescent stripes. Howard Jones also testified that he noticed a two-tone Roadrunner automobile parked in the same driveway on the night of 13 December. Wilma Jones also saw a two-tone Roadrunner in the same locality on Thursday night, 13 December.

Jimmy Smith, Jr., testified that he obtained a .25 caliber automatic Galesi pistol for Mrs. Powell. Ernest Richardson testified that he purchased a .25 caliber Galesi pistol from defendant for thirty-two dollars on Friday, 14 December, and that he later delivered this pistol to an SBI agent. William Driver stated that about 7:00 p.m. on 13 December 1973, defendant came to his store and purchased four Victor twelve-gauge shotgun shells.

Upon being notified of Mrs. Powell's death, Sheriff G. O. Womble and A.B.C. Officers Joyner and Driver proceeded to the Powell home, where they found Mrs. Powell's body in the front room of her house. She had been shot in the area of her right buttock, and the shot formed a pattern of approximately six inches in area. Mrs. Powell was dead; her body was stiff. The officers observed a hole in the window of the front room, and glass from the window pane was strewn inside the front room. They also found inside the room a shotgun wadding and a spent twelve-gauge Victor shell casing on the edge of a path leading to the Powell home. During Sheriff Womble's testimonv he stated that he talked with defendant on 22 December 1973. At this point counsel for defendant objected, and the trial judge excused the jury and conducted a *voir dire* hearing to determine the admissibility of statements made by defendant.

Sheriff Womble testified that, on 22 December 1973, defendant, who was then in the Nash County Jail, sent for him. The Sheriff and Deputy Sheriff Doughtie went to the jail and talked to defendant. Sheriff Womble stated:

> "He had given me his name, his age, and his address. I told him that that was all the law required him to tell me, that he did not have to make any other statements, and that any statement he did make could and would be used

against him in court. I told him that he had a right to have a lawyer of his own choosing if he wanted one; that if he wanted one and was not able to afford one that one would be appointed for him before any questions were asked or during questioning. I also told him that if he decided to answer any questions without an attorney that he had a right to quit answering them, quit talking, any time he wished to. And I asked him if he understood his rights and if he understood what I had just told him. He said he did. I asked him if he wanted a lawyer present now, and he said, 'No.' I asked him if he wanted to make any statements, and he said he did."

The Sheriff further stated that he did not at any time either threaten defendant in any way or make any promises to him. On this occasion Silver made a partial statement and then indicated that he would stop talking unless Ernest Simmons was brought in. Simmons was brought in, and Silver thereupon completed his statement. On cross-examination the Sheriff stated that he had talked to defendant on 20 and 21 December.

On 20 December defendant and his wife came to the courthouse pursuant to a message concerning a repossession of defendant's car. At that time, defendant's wife told the Sheriff in defendant's presence about a telephone call made by defendant. In this connection, the Sheriff said:

". . . The only thing in the world I had was I had a description of a car that partly fitted his, and I was trying to find the owner of that car to talk to him to see if he had seen anything or heard anything. I didn't know anything other than that."

On the same morning Mr. Frank Brown, defendant's parole officer, requested defendant to speak certain words into a tape recorder, and defendant complied. Defendant was arrested and charged with murder sometime on 20 December. Simmons also was arrested *on Thursday, 20 December,* again as a result of statements that defendant made to the officers. On the same day (20 December), Silver accompanied the Sheriff and SBI Agent Dowdy to the home of Ernest Richardson, where a .25 Galesi pistol was obtained from Richardson. Sheriff Womble testified that he warned defendant of his rights when he talked with him on Thursday. On Friday defendant sent for Sheriff Womble twice, and the Sheriff told defendant that he did not want to

talk to him and that he needed a lawyer. Defendant made some statements, and the Sheriff told him that if he still wanted to talk, he and Deputy Doughtie would see him on the next day. The Sheriff said that he warned defendant of his rights on Thursday, Friday, and Saturday, and on each occasion defendant told the Sheriff that he did not want a lawyer. The Sheriff denied that he told defendant that he would recommend that defendant be charged with a lesser offense. Defendant, on 22 December, made a full incriminatory statement to the Sheriff.

Defendant, on *voir dire,* testified that Parole Officer Frank Brown and SBI Agent Dowdy came to his father's home where he was living, and Brown told him that they wanted to see him in Nashville about a car and something else. He drove his car to Nashville, where he met Mr. Brown, who then told him they wanted to see him about his car and "something that had happened over and around Gold Rock." He went to the Sheriff's office, and while there Mr. Brown asked him to repeat something on a tape. He was given no warnings by the officers, and he asked the officers on four occasions to contact his lawyer, Mr. Rosser. They refused. Later the officers told him that his wife, who was in another part of the courthouse, had told them about the telephone call. When he saw his wife, she said that she told them about the phone call only after they told her that he had admitted making the call. He went to Hollister to get the pistol and told the Sheriff other things about the crime because the Sheriff told him that he was only going to charge him with second-degree murder or manslaughter.

Defendant's father, Frank James Silver, testified that he; his son, James, Jr.; his daughter Geraldine; and Frank's wife saw defendant at the courthouse in Nashville about 8:00 p.m. on Thursday, 20 December. Sheriff Womble, SBI Agent Dowdy, and Frank Brown were also present. At that time the Sheriff said, "The boy has cooperated with us so good I am going to talk with the Solicitor and the Judge and try to get his case from first degree murder to second degree murder." James Silver, Jr., gave testimony which tended to corroborate that of his father. Sheriff Womble, in rebuttal, testified that defendant did not mention to him Mr. Rosser's name or any other lawyer's name on Thursday, 20 December.

At the conclusion of the *voir dire,* the trial judge found facts and concluded:

"1. The defendant, Frank James Silver, was placed under arrest upon a charge of murder in the first degree during the evening of Thursday, December 20, 1973.

2. At the time he was arrested he was at the courthouse in Nashville.

3. Following his arrest the defendant was placed in jail in the Nash County Jail, where he remained.

4. The defendant was informed on Friday, December 21, 1973, that a lawyer would be appointed for him if he could not get his own. The Sheriff advised him that he would get the Clerk to talk to him and fill out the papers. The defendant indicated that he did not want the Sheriff to get him a lawyer.

5. During the morning hours of Saturday, December 22, 1973, the defendant sent for Sheriff G. O. Womble.

6. *On December 22, 1973, and before the defendant made any statement to the Sheriff concerning any of the events surrounding the death of Mrs. Mary C. Powell,* the Sheriff advised the defendant as follows. That the defendant did not have to make any statements and that any statements that he made could and would be used against him in court; that he had a right to have a lawyer of his own choosing if he wanted one; that if he was not able to afford one that one would be appointed for him before any questions were asked or during questioning; that if he decided to answer any questions without an attorney that he had the right to quit answering or quit talking any time he wished to.

7. After the foregoing warning was given to the defendant, the Sheriff asked him if he understood his rights and if he understood what he had just told him. The defendant replied that he did.

8. The Sheriff then asked the defendant if he wanted a lawyer present, and the defendant replied, 'No.' Whereupon, the Sheriff asked him if he wanted to make any statements, and the defendant said that he did.

9. The defendant is 22 years of age and has testified on this voir dire. He is in full control of his mental faculties and from observation the Court is of the opinion that he has sufficient mental capacity to fully understand the proceedings and the warning which was given to him by the Sheriff.

10. The defendant fully understood the warning which had been given to him by the Sheriff and fully understood what he was doing when he waived his right to counsel. The defendant was not promised anything nor was he threatened in any way. The defendant did not request the presence of counsel at any time. His family knew he was in custody from the time of his arrest.

11. The defendant was not confused at the time of his interview with the Sheriff.

UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES:

1. That there was no offer of hope, reward or inducement to the defendant to make a statement.

2. That there was no threat or suggested violence or a show of violence to persuade or induce the defendant to make a statement.

3. *That any statement made by the defendant to Sheriff Womble on December 22, 1973 was made voluntarily, knowingly and understandingly.*

4. That the defendant was in full understanding of his constitutional rights to remain silent and rights to counsel.

5. That he purposely, freely, knowingly and voluntarily waived each of those rights and, thereupon, made a statement to Sheriff Womble.

6. That the warning given by Sheriff Womble was in all respects in compliance with the requirements of 'Miranda.' " (Emphasis supplied.)

Judge Rouse thereupon overruled defendant's objection to the admission of statements made by defendant.

The jury returned to the courtroom, and Sheriff Womble, in substance, testified as follows:

Silver had told him that he and Ernest Simmons had been drinking together and that they went to Mrs. Powell's home on his (Silver's) automobile and parked about sixty-five yards north of the Powell driveway. Simmons then went up to the house, came back, and told him that Mrs. Powell was looking at television and that she had a big dog in there. He stated that he was not going into the house unless they had a gun to kill the dog. They thereafter went to Driver's store, and defendant went in and bought four gun shells. They then went to his father's house and obtained a single-barrel shotgun from under his father's bed. They then returned to a point about one hundred seventy-five yards from the Powell home, where they pulled into a driveway on the opposite side of the highway. They then went to Mrs. Powell's house with the intention of robbing her. As they were going up the drive, he loaded the shotgun, and it went off. When he unbreached the gun, the shell flew out. Mrs. Powell looked out the window, and they retreated and came to the house from another direction. He stepped up on the edge of the front porch, brought the gun up, and it went off accidentally as he was trying to get the safety off. They entered the house and found Mrs. Powell lying flat of her back in front of the fireplace. He stayed in the room with Mrs. Powell while Simmons ransacked the house. They found a .25 automatic pistol in a little box containing eight or nine dollars. He wanted to make a telephone call to get assistance for Mrs. Powell, who was still breathing, but Simmons told him to "let the old bitch die." They also obtained a double-barrel shotgun and a rifle from the Powell home. They left the Powell home, returned his father's shotgun, and went to the Simmons home, where they left the stolen shotgun and rifle. He then went and picked up his wife at Martha Jones's home. Silver stated that he sold the .25 automatic pistol to a man at Hollister. After talking with defendant, the Sheriff, SBI Agent Dowdy, Silver, and his wife went to the home of Ernest Richardson, where they obtained a .25 automatic pistol from Richardson. Richardson stated at the time that he bought the pistol from Silver on 14 December. (According to Sheriff Womble's *voir dire* testimony, this trip to Hollister occurred on *Thursday, 20 December.)*

During the course of his statement, Silver said that he did not want to say anything else until they brought Ernest Sim-

mons in. Simmons came into the room, and he completed his statement. Thereafter, Silver accompanied the officers to the Powell premises and showed them where the automobile was parked and retraced their route as they approached the Powell home. He showed them where Mrs. Powell was lying in the front room and showed the officers where they found the .25 pistol.

Dr. D. E. Scarborough, a physician specializing in pathology, testified that the cause of Mrs. Powell's death was hemorrhage resulting from gunshot wounds.

Frederick Mark Hurst, Jr., of the SBI Technical Crime Laboratory testified that the shotgun obtained from defendant's father fired the shell that was found in the driveway at the Powell home.

The State rested. Defendant offered no evidence.

Attorney General Rufus L. Edmisten, by Assistant Attorneys General William W. Melvin and William B. Ray, for the State.

L. G. Diedrick for defendant.

BRANCH, Justice.

The principal question presented by this appeal is whether the trial judge erred in admitting into evidence defendant's custodial confession.

[1] This record clearly discloses that the trial judge based his conclusions of law upon facts found on the basis of evidence related solely to events which took place on 22 December 1973. If we were restricted to consideration of evidence elicited solely on *voir dire,* the trial judge's findings would be adequately supported by the evidence and therefore would be binding on this Court. Further, such findings would support the conclusions of law entered by Judge Rouse, and his conclusions of law would, in turn, support his ruling. *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404; *State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561; *State v. McRae,* 276 N.C. 308, 172 S.E. 2d 37; *State v. Barber,* 270 N.C. 222, 154 S.E. 2d 104; *State v. Childs,* 269 N.C. 307, 152 S.E. 2d 453; *State v. Hammonds,* 229 N.C. 108, 47 S.E. 2d 704; *State v. Vann,* 82 N.C. 631. However, in determining the admissibility of a confession, we must look to the entire record,

not merely to the evidence presented on a *voir dire* hearing. *Davis v. North Carolina,* 384 U.S. 737, 86 S.Ct. 1761, 16 L.Ed. 2d 895; *Blackburn v. Alabama,* 361 U.S. 199, 80 S.Ct. 274, 4 L.Ed. 2d 242; *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753. The conflicting holding of this Court in *State v. Rogers,* 233 N.C. 390, 64 S.E. 2d 572, can no longer be considered authoritative.

[2] It is well settled "that where a confession has been obtained under circumstances rendering it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." *State v. Moore,* 210 N.C. 686, 188 S.E. 421. The burden is upon the State to overcome this presumption by clear and convincing evidence. *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492; *State v. Woodruff,* 259 N.C. 333, 130 S.E. 2d 641; *State v. Hamer,* 240 N.C. 85, 81 S.E. 2d 193; *State v. Gibson,* 216 N.C. 535, 5 S.E. 2d 717; *State v. Drake,* 113 N.C. 625, 18 S.E. 166; *State v. Drake,* 82 N.C. 592; *State v. Lowhorne,* 66 N.C. 638; *State v. Roberts,* 12 N.C. 259.

The trial judge's findings of fact, conclusions of law, and ruling concerning defendant's confession were made without any consideration of statements made prior to 22 December. In fact, very little appears in the record concerning defendant's statements to officers on 20 December; nevertheless, a contextual reading of the record points unerringly to the conclusion that defendant made an inculpatory statement on that date. The record reveals that before Sheriff Womble talked to defendant on 20 December, he did not know that he was going to talk with him "about a murder matter" but was "simply trying to find out who made a telephone call." Although we can glean little concerning either defendant's statements of 20 December or the circumstances under which they were made, the record does show that after the officers talked with defendant, his alleged accomplice, Ernest Simmons, was arrested on that same day and charged with the murder of Mrs. Mary C. Powell. In this connection, the Sheriff stated: "I didn't know I wanted Simmons until Silver told me." According to Sheriff Womble, defendant was not suspected of murdering Mrs. Powell when he was invited to the courthouse; yet, defendant was arrested and charged with her murder *after* his conversation with the officers on 20 December. Further, according to Sheriff Womble's *voir*

dire testimony and the testimony of SBI Agent Dowdy before the jury, they took defendant on that same day to the home of Ernest Richardson at Hollister, where they obtained the pistol later identified as being the property of the deceased. At that time Richardson stated that defendant sold the pistol to him on Friday, 14 December, the day after Mrs. Powell's death. Thus, we are unable to escape the conclusion that defendant made incriminatory statements to the officers while in custody on 20 December.

[3] The general rule is that when the trial judge concludes a *voir dire* hearing concerning the admissibility of a confession, he should make findings of fact to show the bases of his rulings. *State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53; *State v. Bishop,* 272 N.C. 283, 153 S.E. 2d 511; *State v. Conyers,* 267 N.C. 618, 148 S.E. 2d 569. In *State v. Barnes,* 264 N.C. 517, 142 S.E. 2d 344, *vacated and remanded on other grounds,* 375 U.S. 28, 84 S.Ct. 137, 11 L.Ed. 2d 45, this Court considered the requirements of a *voir dire* hearing as related to admissibility of a confession. There Justice Higgins, for the Court, wrote:

> " . . . Under present procedure it is essential not only that a full investigation be made and the evidence recorded, but the facts must be found which disclose the circumstances and conditions surrounding the making of the incriminating admissions. . . ."

We dealt with a similar question in *State v. Williford,* 275 N.C. 575, 169 S.E. 2d 851. There the arresting officer testified that he placed defendant, who was wounded and bleeding profusely at the time, under arrest and carried him to the hospital. He further stated that he fully warned defendant of his *Miranda* rights and subsequently talked with him in the emergency room of the hospital. While he was still in great pain and receiving treatment in the emergency room, defendant made incupatory statements in response to the questions of police officers. At the conclusion of the *voir dire* hearing, the court found that the officers had properly warned defendant of his rights although it made no finding as to defendant's mental or physical condition and as to the immediate circumstances and conditions surrounding the making of the purported confession. This Court unanimously held that the failure to make such findings was prejudicial error:

> " . . . Clearly the evidence in the case sustains the facts found; however, the findings of fact are not sufficient to

support the conclusion that the statements made by the defendant . . . to [the law enforcement officer] . . . were made voluntarily and with understanding."

Here the trial judge's crucial finding of fact is Finding Number 6 which, in part, states:

"6. On December 22, 1973, and before the defendant made any statement to the Sheriff concerning any of the events surrounding the death of Mrs. Mary C. Powell, the Sheriff advised the defendant as follows. That the defendant did not have to make any statements . . . . "

[4] We do not think that the evidence supports Finding of Fact Number 6. Further, in view of the patently incriminating nature of the statements made on 20 December 1973, we think that it was incumbent upon the trial judge during the *voir dire* hearing to find facts, to enter proper conclusions, and to rule on the voluntariness of the statements made on 20 December. If such statements were found to be involuntary, he should have determined whether the State had met its burden of overcoming the prior influences which rendered the 20 December statement involuntary. Of course, if the first statements were found to have been voluntarily made, no presumption of involuntariness would have been imputed to the 22 December confessions. We note in passing that the only evidence in the record concerning the propriety of the 20 December statement was the general statement by Sheriff Womble, elicited on cross-examination, that he warned defendant of his rights on 20 December 1973. There is no showing and finding that defendant intelligently and understandingly rejected an offer of counsel on 20 December, *State v. Blackmon,* 284 N.C. 1, 199 S.E. 2d 431, or that he understandingly and voluntarily made the inculpatory statement which led to his being charged with murder.

We express no opinion as to whether the confession of 22 December, admitted into evidence, was voluntary or involuntary. We conclude only that the meager evidence and the lack of findings and proper conclusions as to the 20 December statements make it impossible for us to determine whether the 22 December statement was correctly admitted.

[5] Defendant's assignment of error concerning the imposition of the death penalty has been answered adversely to him in *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721. *Accord: State*

v. Lampkins, 286 N.C. 497, 212 S.E. 2d 106; *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142; *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113; *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750. This assignment of error is overruled on the authority of the above-cited cases.

We do not deem it necessary to consider the remaining assignments of error since they relate to matters which may not recur at the next trial.

For the reasons stated, there must be a

New trial.

EUDY v. EUDY

No. 33 PC.

Case below: 24 N.C. App. 516.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1975.

FOODS, INC. v. SUPER MARKETS

No. 18 PC.

Case below: 24 N.C. App. 447.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1975.

FRAZIER v. GLASGOW

No. 56 PC.

Case below: 24 N.C. App. 641.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

HIGHWAY COMM. v. MANUFACTURING CO.

No. 109.

Case below: 24 N.C. App. 478.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 2 April 1975.

HOMES, INC. v. PEARTREE

No. 30 PC.

Case below: 24 N.C. App. 579.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

HUBBARD v. CASUALTY CO.

No. 28 PC.

Case below: 24 N.C. App. 493.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

INSURANCE GROUP v. PARKER

No. 20 PC.

Case below: 24 N.C. App. 452.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1975.

NIVENS v. TIRE & RUBBER CO.

No. 107.

Case below: 24 N.C. App. 473.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975. Appeal dismissed ex mero motu for lack of substantial constitutional question 2 April 1975.

OATES v. DEPT. OF MOTOR VEHICLES

No. 40 PC.

Case below: 24 N.C. App. 690.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

PILAND v. PILAND

No. 42 PC.

Case below: 24 N.C. App. 653.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

RIGGS v. FOSTER & CO. and HILL v. FOSTER & CO.

No. 11 PC.

Case below: 24 N.C. App. 377.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

SERVICE STATIONS v. PRESSLEY

No. 25 PC.

Case below: 24 N.C. App. 586.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

STATE v. BROOKS

No. 76.

Case below: 24 N.C. App. 338.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question denied 21 March 1975.

STATE v. GARNETT

No. 111.

Case below: 24 N.C. App. 489.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 17 April 1975.

STATE v. GUNN

No. 27 PC.

Case below: 24 N.C. App. 561.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. HOPKINS

No. 49 PC.

Case below: 24 N.C. App. 687.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

STATE v. JARRELL

No. 32 PC.

Case below: 24 N.C. App. 610.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 April 1975.

STATE v. LEE

No. 37 PC.

Case below: 23 N.C. App. 560.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

STATE v. LEE

No. 54.

Case below: 24 N.C. App. 666.

Petition for writ of certiorari to North Carolina Court of Appeals allowed 2 April 1975.

STATE v. MASON

No. 43 PC.

Case below: 24 N.C. App. 568.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

STATE v. TEAT

No. 35 PC.

Case below: 24 N.C. App. 621.

Petition for writ of certiorari to North Carolina Court of Appeals denied 2 April 1975.

PETITION TO REHEAR

TRUST CO. v. GILL, STATE TREASURER

No. 123 Fall Term 1974 and No. 131 Spring Term 1975.

Reported: 286 N.C. 342.

Petition by defendants to rehear allowed 15 April 1975.

APPENDIXES

AMENDMENT TO
CODE OF JUDICIAL CONDUCT

AMENDMENT TO
NORTH CAROLINA SUPREME COURT
LIBRARY RULES

AMENDMENT TO CODE OF JUDICIAL CONDUCT

The Code of Judicial Conduct adopted by the Supreme Court of North Carolina in conference on 26 September 1973, and published in 283 N.C. 771-781, is hereby amended in the following respects:

I

Canon 6 C as now reported in 283 N.C. at 779, is deleted; and in lieu thereof Canon 6 C shall provide:

"C. Public Reports. A judge shall report the date, place, and nature of any activity for which he received compensation, and the name of the payor and the amount of compensation so received. No report is required if no such compensation or reimbursement of expenses is received. The word 'activity' as used in Canon 6 does not include the receipt of rents, dividends or interest or profits realized from capital gains. Any required report should be made annually and filed as a public document as follows: The members of the Supreme Court should file such reports with the Clerk of the Supreme Court; the members of the Court of Appeals should file such reports with the Clerk of the Court of Appeals; and each Superior Court Judge, Regular, Special, and Emergency, and each District Court Judge, should file such report with the Clerk of the Superior Court of the county in which he resides. For each calendar year, such report should be filed during the month of January of the following year."

II

Canon 7 A(b) as now reported in 283 N.C. at 780, is deleted; and in lieu thereof Canon 7 A(b) shall provide:

"(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge who is not at that time a candidate for election to judicial office may endorse, as between contestants for a judicial office, the candidate he considers best qualified and may contribute to a campaign fund in behalf of such candidate, but may not solicit funds in behalf of such candidate."

The foregoing amendments to the North Carolina Code of Judicial Conduct were adopted by the Supreme Court of North Carolina in conference on 30 December 1974, and become effective upon publication thereof in the Advance Sheets of the North Carolina Reports.

For the Court
By MOORE, J.
Associate Justice

AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

As directed by the Supreme Court, and by authority of N. C. GEN. STAT. § 7A-13(d) (1969), North Carolina Supreme Court Library Rule 5(c) hereby is amended by adding at the end thereof the following sentence:

> Library use permits may be used only between the hours of five o'clock in the afternoon and twelve o'clock midnight, Mondays through Fridays.

This the 14th day of April, 1975.

Raymond M. Taylor
Librarian

Approved: SUSIE SHARP
Chairman, For the Library Committee

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g. Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

APPEAL AND ERROR

§ 6. Judgments and Orders Appealable

In a tort action by a father and son against a county board of education, Supreme Court should consider whether defendant's motions for directed verdict should have been granted only on either of two specified grounds asserted therein—that the evidence failed to show actionable negligence on the part of defendant and established contributory negligence on the part of plaintiff son. *Clary v. Board of Education*, 525.

§ 42. Matters Omitted from Record

Failure to include a subrogation receipt from insured to plaintiff in the record was a technical oversight not constituting reversible error. *Insurance Co. v. Tile Co.*, 282.

§ 46. Presumptions and Burden of Showing Error

Where members of the Court were equally divided and one Justice was not present and did not participate in the hearing, judgment entered in the superior court is affirmed without becoming a precedent. *In re Willis*, 207; *Sharpe v. Pugh*, 209; *S. v. Johnson*, 331.

§ 58. Injunctions

On appeal in injunction proceedings, Supreme Court is not bound by the findings of fact of the hearing judge but may review the evidence and find the facts for itself. *Setzer v. Annas*, 534.

§ 68. Law of the Case and Subsequent Proceedings

The decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Transportation, Inc. v. Strick Corp.*, 235.

ARREST AND BAIL

§ 7. Right of Person Arrested to Communicate with Friends or Counsel

Refusal of chief of police to allow defendant to make a phone call until he gave the officer his name, date of birth and address, after which defendant confessed, was harmless error beyond a reasonable doubt. *S. v. Avery*, 459.

ARSON

§ 4. Sufficiency of Evidence

Evidence was sufficient to permit the jury to find that defendant committed murder in the perpetration of arson. *S. v. McLaughlin*, 597.

ATTORNEY AND CLIENT

§ 5. Representation of Client and Liabilities to Client

Plaintiff's evidence raised a genuine issue of material fact as to whether the senior member of a professional association of labor attorneys was acting within the scope of his apparent authority and as agent for the professional association in receiving funds from a corporate client's employee for investment in stock. *Zimmerman v. Hogg & Allen*, 24.

ATTORNEY AND CLIENT — Continued

§ 7. Compensation and Fees

Evidence would support findings that contingent fee contract entered into between an attorney and his client was reasonable, was fairly and freely made, was made in good faith and was made without undue influence; however, the matter must be remanded for findings of fact to be made by the superior court. *Rock v. Ballou*, 99.

AUTOMOBILES

§ 72. Sudden Emergencies

In an action to recover damages for personal injuries sustained when plaintiff was struck by defendant's automobile at night after it had collided with a chain between two trucks, plaintiff's evidence was sufficient to permit a jury finding that negligence on the part of defendant was one of the proximate causes of the emergency with which he was confronted immediately prior to the collision. *Foy v. Bremson*, 108.

§ 89. Sufficiency of Evidence for Submission of Issue of Last Clear Chance

Trial court erred in failing to submit an issue of last clear chance in an action to recover for death of a minor struck from the rear by defendant's vehicle while walking in the street at night. *Earle v. Wyrick*, 175.

§ 90. Instructions in Accident Cases

Trial court erred in failing to instruct that the sudden emergency rule would not be available to defendant in the event his prior negligence contributed to the creation of the emergency as a proximate cause thereof. *Foy v. Bremson*, 108.

Trial court erred in placing on defendant the burden of establishing that he was confronted by a sudden emergency. *Ibid.*

§ 117. Prosecutions for Speeding

Warrant was insufficient to charge defendant with failure to decrease speed in violation of former G.S. 20-141(c). *S. v. Crabtree*, 541.

§ 127. Sufficiency of Evidence and Nonsuit in Prosecution for Driving Under the Influence

Evidence consisting of testimony by the arresting officer was sufficient to be submitted to the jury in a prosecution for operating a motor vehicle on a public highway while under the influence of drugs. *S. v. Lindley*, 255.

BASTARDS

§ 4. Burden of Proof

Results of blood tests which establish nonpaternity are not conclusive of that issue but may be considered along with other evidence in determining the issue of paternity. *S. v. Camp*, 148.

§ 5. Competency and Relevancy of Evidence

When paternity is in issue, defendant is entitled to have blood tests made upon demand and the results of such tests are admissible in evidence. *S. v. Camp*, 148.

BILLS AND NOTES

§ 7. Indorsement, Transfer and Ownership

A bank was not a transferee of warehouse receipts by negotiation and acquired only the title and rights of the payee under the receipts where the receipts were delivered by the payee to the bank without the payee's indorsement. *Trust Co. v. Gill*, 342.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

Burglary indictment need not allege the hour the crime was committed if it avers it was committed in the nighttime. *S. v. Wood*, 248.

§ 5. Sufficiency of Evidence and Nonsuit

The State's evidence in a first degree burglary case was sufficient to support a jury finding that a breaking and entering of a motel room occurred during the nighttime. *S. v. Wood*, 248.

CONSTITUTIONAL LAW

§ 4. Persons Entitled to Raise Constitutional Questions

Mecklenburg County could not accept the benefits of the taxing power conferred upon it by statute and at the same time reject on constitutional grounds the statutory classification of property which was exempt from taxation. *In re Appeal of Martin*, 66.

§ 20. Equal Protection

Imprisonment of indigent defendant beyond the statutory maximum on account of his nonpayment of a fine and court costs would constitute a violation of equal protection. *S. v. Roberts*, 265.

§ 29. Right to Trial by Duly Constituted Jury

Trial court properly allowed challenges for cause of prospective jurors who would not return verdict requiring death penalty under any circumstances. *S. v. Williams*, 422; *S. v. Avery*, 459; *S. v. Lampkins*, 497; *S. v. Simmons*, 681.

§ 31. Right of Confrontation

Defendant had no constitutional right to disclosure of the identity of a confidential informant who furnished information essential to a finding that officers had probable cause to arrest and search defendant without a warrant but who did not participate in or witness the alleged crimes. *S. v. Ketchie*, 387.

§ 32. Right to Counsel

Defendant's constitutional rights were not violated by his confinement in jail for eight days without appointment of counsel where defendant told police officers he intended to procure his own attorney. *S. v. Avery*, 459.

Indigent defendant's waiver of counsel prior to in-custody interrogation is no longer required to be in writing. *S. v. Simmons*, 681.

§ 33. Self-incrimination

Trial court erred in allowing prosecutor to comment on defendant's failure to testify. *S. v. Monk*, 509.

CONSTITUTIONAL LAW — Continued

Defendant is entitled to a new trial where the prosecutor commented on defendant's failure to answer an accusatory question and on his failure to testify in his own behalf. *S. v. McCall*, 472.

Trial court erred in allowing into evidence the response of defendant to an accusatory question since the response acted as a claim by defendant of his right to remain silent. *Ibid.*

§ 36. Cruel and Unusual Punishment

Imposition of the mandatory death sentence in a first degree murder case was proper. *S. v. Avery*, 459; *S. v. McLaughlin*, 597; *S. v. Woods*, 612; *S. v. Simmons*, 681; *S. v. Silver*, 709.

Death sentence imposed in rape case was constitutional. *S. v. Williams*, 422; *S. v. Stegmann*, 638; *S. v. Lowery*, 698.

CONTRACTS

§ 14. Contracts for Benefit of Third Persons

Benefit derived by travelers upon a highway from its being maintained in good condition is incidental to the real purpose of a contract between defendant city and the State Board of Transportation for maintenance of the highway, and one injured by the breach of the contract is not a third party beneficiary entitled to sue for damages. *Matternes v. Winston-Salem*, 1.

§ 21. Performance and Breach

Subcontract provision requiring the subcontractor to use labor "of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" could not be enforced against the subcontractor on the ground the subcontractor's employees were not operating under a union contract because such enforcement would violate the Right to Work Laws. *Poole & Kent Corp. v. Thurston & Sons*, 121.

CORPORATIONS

§ 7. Powers and Authority of Officers and Agents

When a corporate agent acts within the scope of his apparent authority, and a third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent. *Zimmerman v. Hogg & Allen*, 24.

Plaintiff's evidence raised a genuine issue of material fact as to whether the senior member of a professional association of labor attorneys was acting within the scope of his apparent authority and as agent for the professional association in receiving funds from a corporate client's employee for investment in stock. *Ibid.*

§ 13. Liability of Officers and Agents to Third Persons for Mismanagement and Fraud

Defendants stated a counterclaim of fraud in the sale of stock by the corporate president where they alleged the president falsely told defendants the business was a "gold mine" and a "going concern" when he knew that the working capital was depleted and the corporate income was so inadequate the corporation could not pay its normal operating expenses. *Ragsdale v. Kennedy*, 130.

COURTS

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 50. Expert Testimony

Trial court did not err in allowing an expert's testimony as to cloth fibers from a murder victim's dress and from defendant's vehicle and the similarity between the two. *S. v. Woods*, 612.

§ 55. Blood Tests

Inability of the State to show the blood type of a stain found in the kidnapping vehicle went to the weight of the evidence and not to its admissibility. *S. v. Woods*, 612.

§ 64. Evidence as to Intoxication

Opinion testimony of the arresting officer that defendant was under the influence of some drug was properly admitted in a prosecution for operating a motor vehicle on public highways while under the influence of drugs. *S. v. Lindley*, 255.

§ 66. Evidence of Identity by Sight

In-court identification of defendant was of independent origin and not tainted by photographic identification. *S. v. Woods*, 612.

§ 75. Voluntariness of Confession and Admissibility

Refusal of chief of police to allow defendant to make a phone call until he gave the officer his name, date of birth and address, after which defendant confessed, was harmless error beyond a reasonable doubt. *S. v. Avery*, 459.

Trial court in a murder case properly found defendant had mental capacity to make confessions to hospital emergency room personnel. *S. v. Cooper*, 549.

Trial court properly admitted defendant's inculpatory statements into evidence. *S. v. Simmons*, 681.

§ 76. Determination and Effect of Admissibility of Confession

Defendant's statements made in response to questions during an on-the-scene investigation were properly admitted into evidence in a murder prosecution. *S. v. Pruitt*, 442.

Both oral and written confessions obtained from defendant were made under the influence of fear or hope or both growing out of the language and acts of those who held him in custody, and both were involuntary and improperly admitted. *Ibid.*

It was not error for the trial judge to admit a confession without making findings of fact where no conflicting testimony was offered on voir dire. *S. v. Simmons*, 681.

When a trial judge concludes a voir dire hearing concerning the admissibility of a confession, he should make findings of fact to show the bases of his rulings. *S. v. Silver*, 709.

Where defendant made a prior inculpatory statement and the trial court failed to determine its voluntariness, it was error for the court to determine the voluntariness of a second confession and allow it into evidence. *Ibid.*

§ 77. Admissions and Declarations

Trial court in a first degree murder case properly admitted testimony of defendant's girl friend who recounted to the jury defendant's confession to her. *S. v. Edwards*, 140.

CRIMINAL LAW — Continued

§ 84. Evidence Obtained by Search

Trial judge properly considered a photostatic copy of the original search warrant which had been lost. *S. v. Edwards*, 162.

Trial court did not err on voir dire in placing on defendants the burden of going forward on their motions to suppress evidence seized from their apartment. *S. v. Crews*, 41.

Officers lawfully seized without a warrant a brown-tinted pint-size bottle containing multi-colored pills which the officers observed on a closet shelf. *Ibid.*

Trial court properly allowed into evidence the engagement ring and wedding band of a rape, murder and kidnapping victim given to officers by defendant's wife. *S. v. Woods*, 612.

§ 86. Credibility of Defendant and Parties Interested

Cross-examination of decedent's wife as to whether she had employed private prosecution in a homicide case was competent to show bias on her part against defendant. *S. v. White*, 395.

Trial court properly allowed cross-examination of defendant in a rape case concerning a subsequent rape committed by him. *S. v. Lowery*, 698.

§ 87. Direct Examination of Witnesses

Trial court in a rape case did not err in permitting the State to present a rebuttal witness whose name did not appear on the list of witnesses for the State given to defendant's counsel by the solicitor before the trial began. *S. v. Lampkins*, 497.

§ 88. Cross-examination

Trial court did not err in allowing solicitor to cross-examine defendant concerning his failure to subpoena witnesses who were at the crime scene. *S. v. Carver*, 179.

§ 89. Credibility of Witnesses

Where counsel for defendant relied on defense of consent in a rape case, evidence as to the prosecuting witness's character was properly admitted. *S. v. Stegmann*, 638.

§ 102. Argument and Conduct of Counsel or Solicitor

Defendants in a rape case are entitled to a new trial where the solicitor on voir dire told a juror who expressed misgivings regarding the death penalty "that no one has been put to death in North Carolina since 1961." *S. v. Hines*, 377.

Jury argument by the prosecutor in a capital case that "If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina —it is necessary. If any error is made in this court, that Court will say," was improper, and the harmful effect of such argument was not removed by the trial court's subsequent instructions. *S. v. White*, 395.

Defendant is entitled to a new trial where the prosecutor commented on defendant's failure to answer an accusatory question and on his failure to testify in his own behalf. *S. v. McCall*, 472.

Trial court erred in allowing prosecutor to comment on defendant's failure to testify. *S. v. Monk*, 509.

CRIMINAL LAW — Continued

Prosecutor's argument concerning defendant's prior criminal record was improper, and failure of the court to give a curative instruction entitled defendant to a new trial. *Ibid.*

§ 111. Form and Sufficiency of Instructions

When there are conflicting instructions on a material point, there must be a new trial. *S. v. Carver*, 179.

§ 112. Instructions on Burden of Proof and Presumptions

Trial court's definition of "reasonable doubt" as a possibility of innocence was favorable to defendant and did not constitute prejudicial error. *S. v. Edwards*, 140.

Trial court's definition of reasonable doubt was proper. *S. v. Ward*, 304.

§ 113. Statement of Evidence and Application of Law Thereto

Trial court in a homicide case did not err in failing to include in its recapitulation of the evidence a doctor's statement that defendant acted under an irresistible impulse. *S. v. Cooper*, 549.

Defendant was not entitled to an instruction on alibi where he failed to make a request therefor. *S. v. Woods*, 612.

§ 114. Expression of Opinion by Court on Evidence in Charge

Trial court did not express an opinion that the jury should find that the victim was killed in stating the State's contention that defendant was attempting to steal goods or moneys or commit rape "at the time of the killing of" the victim. *S. v. Edwards*, 140.

§ 126. Unanimity of Verdict

N. C. Constitution requires a unanimous verdict for conviction of any crime. *S. v. Williams*, 422.

§ 128. Discretionary Power of Court to Set Aside Verdict and Order Mistrial

Trial court did not err in failing to declare a mistrial on its own motion where error was corrected by striking testimony and instructing the jury to disregard it. *S. v. Lowery*, 698.

§ 130. New Trial for Misconduct of Jury

Defendant was not prejudiced where three jurors took notes and carried them into the deliberation room. *S. v. Ward*, 304.

§ 134. Form and Requisites of Sentence

Imprisonment of indigent defendant beyond the statutory maximum on account of his nonpayment of a fine and court costs would constitute a violation of equal protection. *S. v. Roberts*, 265.

§ 135. Judgment and Sentence in Capital Case

Life imprisonment was proper sentence for one convicted of first degree murder committed prior to 18 January 1973. *S. v. Edwards*, 140.

Trial court prpoperly allowed challenges for cause of prospective jurors who would not return verdict requiring death penalty under any circumstances. *S. v. Williams*, 422; *S. v. Avery*, 459; *S. v. Lampkins*, 497.

CRIMINAL LAW — Continued

Defendant's constitutional rights were not violated by imposition of the death penalty. *S. v. Williams*, 422; *S. v. Avery*, 459.

Legislative Act dividing the crime of rape into two degrees and providing that punishment for second degree rape shall be imprisonment for life or for a term of years is not retroactive and is not applicable to a crime of rape committed prior to its enactment on 8 April 1974. *S. v. Williams*, 422; *S. v. Lampkins*, 497.

Although a prospective juror's voir dire answers concerning her beliefs as to capital punishment were equivocal, trial court properly excused her for cause where a consideration of the entire voir dire examination indicates she could not vote for a guilty verdict in a capital case under any circumstances. *S. v. Simmons*, 681.

§ 146. Nature and Grounds of Appellate Jurisdiction of Supreme Court in Criminal Cases

Constitutionality of the statute giving the State Board of Health authority to reschedule substances under the Controlled Substances Act was not properly before the Supreme Court. *S. v. Crews*, 41.

§ 162. Objections and Assignments of Error to Evidence

Defendant's assignment of error to evidence did not comply with Rules of Practice where it failed to show what question was intended to be presented without the necessity of going beyond the assignment of error itself. *S. v. Little*, 185.

§ 163. Exceptions and Assignment of Error to Charge

Defendant's assignment of error to the trial court's instruction was insufficient where it did not quote the portion of the charge to which defendant objected or set out what the court should have charged. *S. v. Little*, 185.

§ 169. Harmless and Prejudicial Error in Exclusion of Evidence

Defendant failed to show exclusion of a witness's answer was prejudicial where the record does not show what the answer would have been. *S. v. Little*, 185.

DAMAGES

§ 4. Damages for Injury to Personal Property

The measure of damages for injury to personal property is the difference between its fair market value immediately before and immediately after the injury. *Heath v. Mosley*, 197.

§ 13. Competency of Evidence on Issue of Compensatory Damages

In an action to recover damages for injury to a boat, the amount plaintiff paid for the boat purchased 14 months earlier at a government surplus sale 200 miles away was admissible. *Heath v. Mosley*, 197.

§ 16. Instructions on Measure of Damages

Trial court's instruction stated the correct rule to govern determination of the amount of damages in an action against a city to recover for damage to a stock of merchandise by infiltration of dust and dirt as a result of sidewalk reconstruction work. *Kaplan v. Winston-Salem*, 80.

DEATH

§ 7. Determination of Life Expectancy; Damages

In awarding damages for wrongful death, the jury is not required as a matter of law to award damages for the present monetary value of decedent to persons entitled to the damages recovered. *Brown v. Moore,* 664.

DIVORCE AND ALIMONY

§ 5. Recrimination

The doctrine of recrimination is recognized in N. C. *Harrington v. Harrington,* 260.

§ 13. Separation for Statutory Period

An action for divorce from bed and board or alimony without divorce or a valid separation agreement may constitute a legalized separation which will thereafter permit either of the parties to obtain an absolute divorce on the ground of one year's separation. *Harrington v. Harrington,* 260.

A child custody proceeding in which the trial court found abandonment by the wife did not constitute a judicial separation that would deprive the innocent husband of the use of either abandonment or adultery as a defense in a divorce action instituted by the wife based on one year's separation. *Ibid.*

EASEMENTS

§ 8. Nature and Extent of Easement

Trial court erred in granting plaintiff a preliminary injunction prohibiting defendant from obstructing a right-of-way over his property by the erection of gates since the trial court failed to consider the question of defendants' right to enclose his land by fence and to place gates across the roadway as a part of such enclosure. *Setzer v. Annas,* 534.

EVIDENCE

§ 11. Transactions or Communications with Decedent

When plaintiff offered testimony in a wrongful death case relating to what happened during the evening of decedent's death, she thereby rendered competent testimony of defendant concerning the same transactions or communications but did not render competent testimony that decedent had accompanied defendant on numerous prior unidentified occasions when he drove his car to determine the maximum speed at which it could take curves. *Brown v. Moore,* 664.

§ 29. Accounts, Ledgers and Private Writings

Trust receipts prepared by insured were sufficient evidence to permit the trial judge to determine insured's loss in a fire. *Insurance Co. v. Tire Co.,* 282.

FRAUD

§ 9. Pleadings

Defendants stated a counterclaim of fraud in the sale of stock by the corporate president where they alleged the president falsely told defend-

FRAUD — Continued

ants the business was a "gold mine" and a "going concern" when he knew that the working capital was depleted and the corporate income was so inadequate the corporation could not pay its normal operating expenses. *Ragsdale v. Kennedy*, 130.

HOMICIDE

§ 4. First Degree Murder

Though kidnapping was not listed in G.S. 14-17 at the time of the offense charged as one of the felonies that would support a conviction under the felony-murder rule, it was well established that any felony inherently dangerous to life was within the purview of the statute though not specified therein. *S. v. Woods*, 612.

§ 7. Defense of Insanity

In a prosecution for murder of defendant's wife and children, defendant's motion for directed verdict on the ground of insanity was properly overruled, the issue of insanity being for the jury. *S. v. Cooper*, 549.

Trial court in a homicide case did not err in failing to include in its recapitulation of the evidence a doctor's statement that defendant acted under an irresistible impulse. *Ibid.*

Trial court in a first degree murder case did not err in failing to instruct the jury it should consider evidence of defendant's mental disease on the question of premeditation and deliberation. *Ibid.*

§ 8. Effect of Intoxication Upon Mental Capacity

Trial court in a first degree murder case was not required to instruct the jury as to defendant's intoxication. *S. v. McLaughlin*, 597.

§ 12. Indictment

A bill of indictment drawn under G.S. 15-144 is sufficient to sustain a verdict of guilty of murder in the first degree if the jury finds defendant committed premeditated murder or murder in the perpetration of a felony. *S. v. McLaughlin*, 597.

§ 20. Physical Objects as Demonstrative Evidence

Trial court properly admitted a pistol which a witness testified was "similar" to one owned by deceased. *S. v. Simmons*, 681.

§ 21. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for first degree murder where it tended to show that defendant strangled the victim to death in an attempt to rape her. *S. v. Edwards*, 140.

State's evidence was sufficient for the jury in a prosecution for first degree murder of a restaurant owner by shooting him with a shotgun. *S. v. White*, 395.

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where death occurred by shooting. *S. v. McCall*, 472.

Evidence was sufficient to permit the jury to find that defendant committed murder in the perpetration of arson. *S. v. McLaughlin*, 597.

Evidence was sufficient to be submitted to the jury where it tended to show that defendant kidnapped his victim, raped her and killed her. *S. v. Woods*, 612.

HOMICIDE — Continued

§ 25. Instructions on First Degree Murder

In a prosecution on an indictment charging murder in the perpetration of felonies of burglary and attempted robbery, trial court properly instructed the jury it could return a verdict of first degree murder if it found the killing was committed in the perpetration of either burglary or attempted robbery. *S. v. Simmons*, 681.

§ 27. Instructions on Manslaughter

Defendant in a first degree murder case is entitled to a new trial where the trial court instructed that in order to reduce the crime to manslaughter the defendant must prove to the jury's satisfaction that he acted in self-defense. *S. v. Carver*, 179.

§ 28. Instructions on Defenses

Trial court did not err in submitting insanity issue after issues of first and second degree murder, although the better procedure would have been to submit the issue of insanity as the first issue for jury consideration. *S. v. Cooper*, 549.

Trial court's instruction on intoxication in a homicide case contained error in defendant's favor, and defendant cannot complain thereof. *S. v. Simmons*, 681.

§ 30. Submission of Question of Guilt of Lesser Degrees of the Crime

Defendant in a first degree murder prosecution who shot her boyfriend as he sat and talked with defendant's rival in his home was not entitled to have the issue of her guilt of voluntary manslaughter submitted to the jury. *S. v. Ward*, 305.

In a prosecution for second degree murder, the trial court properly failed to submit involuntary manslaughter to the jury. *S. v. Harrington*, 327.

§ 31. Verdict and Sentence

Life imprisonment was proper sentence for one convicted of first degree murder committed prior to 18 January 1973. *S. v. Edwards*, 140.

Since arson was an essential element in the State's proof of murder, the arson afforded no basis for additional punishment. *S. v. McLaughlin*, 597.

Since proof of rape or kidnapping was an indispensable element in the State's proof of murder in the first degree, neither rape nor kidnapping afforded basis for additional punishment under the merger rule. *S. v. Woods*, 612.

Imposition of the mandatory death sentence in a first degree murder case was proper. *S. v. McLaughlin*, 597; *S. v. Woods*, 612; *S. v. Simmons*, 681; *S. v. Silver*, 709.

INDEMNITY

§ 2. Construction and Operation of Agreement

Indemnity provision in which a contractor agreed to indemnify a railway for any liability which the railway incurred for property damage or personal injury caused by or resulting from any acts or omissions of the contractor or its employees, whether negligent or not, is not against public policy. *Railway Co. v. Werner Industries*, 89.

MASTER AND SERVANT

§ 15. State Regulation of Collective Bargaining

Subcontract provision requiring the subcontractor to use labor "of a standing or affiliation that will permit the work to be carried on harmoniously and without delay" could not be enforced against the subcontractor on the ground the subcontractor's employees were not operating under a union contract because such enforcement would violate the Right to Work Laws. *Poole & Kent Corp. v. Thurston & Sons*, 121.

§ 48. Employers Subject to Workmen's Compensation

Egg producers who sold and delivered eggs over stated routes to stores, institutions and individuals were not engaged in "agriculture" within the meaning of the statute which exempts "agriculture" from the meaning of "employment" under the Workmen's Compensation Act. *Hinson v. Creech*, 156.

§ 49. "Employees" Within Meaning of the Act

An employee whose duties consisted of cleaning, grading and packaging eggs, delivering eggs by motor vehicle to retail customers and keeping records of sales and collecting for the eggs she delivered was not a "farm laborer" excluded from coverage under the Workmen's Compensation Act. *Hinson v. Creech*, 156.

§ 108. Right to Unemployment Compensation

Claimants seeking unemployment benefits were not available for work within the meaning of G.S. 96-13(3) where terms of a guaranteed annual income plan provided for in their collective bargaining contract effectively kept them out of temporary jobs for which they were qualified. *In re Beatty*, 226.

MUNICIPAL CORPORATIONS

§ 14. Injuries in Connection With Streets

Liability of a city for damages for injuries sustained by a user of its streets due to the defective condition of the street arises only for a negligent breach of duty to exercise ordinary care to maintain streets in a reasonably safe condition for those who use them in a proper manner. *Matternes v. Winston-Salem*, 1.

Apart from defendant city's contract with the State Board of Transportation, the city has no responsibility for the maintenance or condition of a bridge which is a part of the State highway system located within its boundaries and is not liable to any person injured by reason of the city's failure to remove snow and ice therefrom. *Ibid.*

§ 16. Actions and Procedural Matters in Injuries Connected with Streets

Benefit derived by travelers upon a highway from its being maintained in good condition is incidental to the real purpose of a contract between defendant city and the State Board of Transportation for maintenance of the highway, and one injured by the breach of the contract is not a third party beneficiary entitled to sue for damages. *Matternes v. Winston-Salem*, 1.

MUNICIPAL CORPORATIONS — Continued

§ 30. Zoning Ordinances and Building Permits

Board of Aldermen erred in denying petitioners a special use permit based on evidence which was not disclosed at any public hearing and was unknown to petitioners. *Refining Co. v. Board of Aldermen*, 170.

Zoning ordinance which prohibited operation of a building material salvage yard and which allowed a grace period of three years for removal of such business was constitutional. *S. v. Joyner*, 366.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses

Neither the offense of unauthorized possession nor the offense of unauthorized sale of a controlled substance is included within the other offense and one placed in jeopardy as to the one offense is not thereby placed in jeopardy as to the other; thus, one charged with both offenses may be convicted of both and sentenced to imprisonment for each. *S. v. Aiken*, 202.

§ 4.5. Instructions

Trial court did not err in instructing the jury that under the indictment charging defendant with possession of heroin with intent to deliver it might find defendant guilty of the unauthorized possession of a controlled substance. *S. v. Aiken*, 202.

NEGLIGENCE

§ 42. Instructions on Burden of Proof

Trial court erred in placing on defendant the burden of establishing that he was confronted by a sudden emergency. *Foy v. Bremson*, 108.

PHYSICIANS AND SURGEONS

§ 17. Departing from Approved Methods or Standard of Care

Plaintiff's evidence was insufficient for the jury in an action based on alleged negligence of defendant physicians and defendant hospital in the installation and maintenance of a traction rig on plaintiff's broken arm. *Ballance v. Wentz*, 294.

PLEADINGS

§ 38. Motions for Judgment on the Pleadings

Movant for judgment on the pleadings is held to a strict standard and must show no material issue of fact exists and that he is clearly entitled to judgment. *Ragsdale v. Kennedy*, 130.

PRINCIPAL AND AGENT

§ 5. Scope of Authority

When a corporate agent acts within the scope of his apparent authority, and a third party has no notice of the limitation on such authority, the corporation will be bound by the acts of the agent. *Zimmerman v. Hogg & Allen*, 24.

Plaintiff's evidence raised a genuine issue of material fact as to whether the senior member of a professional association of labor attorneys

PRINCIPAL AND AGENT — Continued

was acting within the scope of his apparent authority and as agent for the professional association in receiving funds from a corporate client's employee for investment in stock. *Ibid.*

§ 6. Ratification and Estoppel

Grain warehouse ratified fraudulent warehouse receipts issued by its agent and cannot be heard to deny their vailidity in the hands of a bank. *Trust Co. v. Gill,* 342.

PROPERTY

§ 4. Criminal Prosecution for Wilful and Malicious Destruction of Property

In a prosecution for damaging occupied real property by the use of an explosive, evidence of defendant's conversations with various witnesses was admissible to show the requisite intent and motive for the commission of the crime. *S. v. Little,* 185.

In a prosecution for wilfully and maliciously damaging occupied real property by use of an explosive, trial court's instruction defining "malicious" was sufficient. *Ibid.*

RAPE

§ 1. Nature and Elements of the Offense

Force necessary to constitute rape need not be physical force. *S. v. Hines,* 377.

§ 4. Relevancy and Competency of Evidence

Where counsel for defendant relied on defense of consent in a rape case, evidence as to the prosecuting witness's character was properly admitted. *S. v. Stegmann,* 638.

§ 5. Sufficiency of Evidence

Trial court properly submitted the case to the jury in a rape prosecution. *S. v. Hines,* 377.

State's evidence was sufficient for the jury to find that defendant raped a 13-year-old girl after she accepted a ride in his dump truck. *S. v. Williams,* 422.

State's evidence was sufficient to show that defendant raped the prosecutrix after pulling her to a place to which she did not want to go and throwing her to the ground. *S. v. Lampkins,* 497.

Evidence was sufficient to be submitted to the jury where it tended to show that defendant kidnapped his victim, raped her and killed her. *S. v. Woods,* 612.

§ 6. Instructions and Submission of Question of Guilt of Lesser Degree of the Crime

Trial court in a rape case did not err in failing to submit lesser included offenses of assault with intent to commit rape and assault on a female. *S. v. Lampkins,* 497.

§ 7. Verdict and Judgment

Legislative act dividing the crime of rape into two degrees and providing that punishment for second degree rape shall be imprisonment for

life or for a term of years is not retroactive and is not applicable to a crime of rape committed prior to its enactment on 8 April 1974. *S. v. Williams*, 422; *S. v. Lampkins*, 497.

Death sentence imposed in a rape case was constitutional. *S. v. Stegmann*, 638; *S. v. Lowery*, 698.

REFORMATION OF INSTRUMENTS

§ 1. Mutual Mistake

Nothing in the Uniform Commercial Code deprives a court of equity of its power to reform a warehouse receipt so as to correct a mistake of the draftsman. *Trust Co. v. Gill*, 342.

§ 7. Sufficiency of Evidence

Bank did not act in bad faith or engage in any sharp practice so as to render its hands unclean and bar it from asking a court of equity to reform fraudulent warehouse receipts to make them show the correct poundage of grain they represented. *Trust Co. v. Gill*, 342.

ROBBERY

§ 5. Instructions and Submission of Lesser Degrees of the Crime

In a prosecution for robbery with a dangerous weapon by threatening the victim with a knife that was for sale in the victim's store and taking the knife from the store, trial court did not err in failing to charge the jury it might return a verdict of guilty of the lesser included offense of common law robbery. *S. v. Black*, 191.

RULES OF CIVIL PROCEDURE

§ 8. General Rules of Pleadings

Defendant's answer was insufficient to raise an issue of fact as to governmental immunity by a county board of education. *Clary v. Board of Education*, 525.

§ 12. Motion for Judgment on the Pleadings

Movant for judgment on the pleadings is held to a strict standard and must show no material issue of fact exists and that he is clearly entitled to judgment. *Ragsdale v. Kennedy*, 130.

§ 15. Amended Pleadings

Where there was a variance between allegations of plaintiff's complaint and the evidence, plaintiff's complaint should be deemed amended to conform to the proof. *Hartley v. Ballou*, 51.

§ 43. Evidence

A defendant called by plaintiff as her witness can be impeached by a letter written by such defendant. *Ballance v. Wentz*, 294.

§ 50. Motion for Directed Verdict

In a tort action by a father and son against a county board of education, Supreme Court should consider whether defendant's motions for directed verdict should have been granted only on either of two specified

RULES OF CIVIL PROCEDURE — Continued

grounds asserted therein—that the evidence failed to show actionable negligence on the part of defendant and established contributory negligence on the part of plaintiff son. *Clary v. Board of Education*, 525.

§ 52. Findings by the Court

In an action tried without a jury, trial court must find the facts specially and state separately its conclusions of law. *Hartley v. Ballou*, 51.

§ 56. Summary Judgment

When a movant for summary judgment carries the burden of showing lack of a genuine issue of material fact, the burden shifts to the opposing party to show that there is a genuine issue for trial or to provide an excuse for not doing so. *Zimmerman v. Hogg & Allen*, 24; *Railway Co. v. Werner Industries*, 89.

SALES

§ 6. Implied Warranties

Vendor in the business of building dwellings impliedly warrants in every contract of sale that the dwelling is sufficiently free from major structural defects and is constructed so as to meet the standard of workmanlike quality then prevailing at the time and place of construction. *Hartley v. Ballou*, 51.

Defendant builder-vendor impliedly warranted to plaintiff that the basement of the newly constructed dwelling which he sold plaintiff had been sufficiently waterproofed. *Ibid.*

§ 14. Actions or Counterclaims for Breach of Warranty

Trial court in an action for breach of warranty of fitness of trailers erred in excluding evidence of hardness tests made on the top rails of the trailers six years after their manufacture. *Transportation, Inc. v. Strick Corp.*, 235.

In a breach of warranty action, evidence of value of trailers six years after their delivery and acceptance was too remote in time to be competent. *Ibid.*

Depreciation schedules and depreciated values did not fairly point to the value of trailers at the time they were delivered by defendant and accepted by plaintiff and such evidence was properly excluded. *Ibid.*

§ 17. Sufficiency of Evidence of Breach of Warranty

In an action to recover damages for alleged breach of warranty, plaintiff was entitled to recover for inconvenience and expense incurred from the time he first occupied the dwelling sold him by defendant until defendant made repairs to the basement. *Hartley v. Ballou*, 51.

SCHOOLS

§ 11. Liability for Torts

Defendant's answer was insufficient to raise an issue of fact as to governmental immunity by a county board of education. *Clary v. Board of Education*, 525.

In an action against a county board of education to recover medical expenses and damages on account of personal injuries received by high

SCHOOLS—Continued

school basketball player when he collided with a wire-glass window near the end of the court, plaintiff's evidence was sufficient to permit a jury finding of actionable negligence on the part of the board of education and did not establish plaintiff was contributorily negligent as a matter of law. *Ibid.*

§ 13. Principals and Teachers

Board of education is not required to follow the recommendation of the superintendent of schools when it considers the election of career teachers at the end of their third consecutive school year or when it considers renewal of a probationer's contract or the employment of a teacher who is not under contract. *Taylor v. Crisp*, 488.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Officers lawfully seized without a warrant a brown-tinted pint-size bottle containing multi-colored pills which the officers observed on a closet shelf. *S. v. Crews*, 41.

Officer had probable cause to arrest defendant and search his car for marijuana without a warrant on the basis of the minute particularity with which a reliable informant described defendant and his car and the independent verification of this description by the officer. *S. v. Ketchie*, 387.

Officers' warrantless seizure and impoundment of defendant's vehicle was proper where officers had probable cause to believe the vehicle had been involved in the kidnapping, rape and murder of deceased. *S. v. Woods*, 612.

§ 2. Consent to Search Without Warrant

Trial court properly allowed into evidence the engagement ring and wedding band of a rape, murder and kidnapping victim given to officers by defendant's wife. *S. v. Woods*, 612.

§ 3. Requisites and Validity of Search Warrant

The lawful seizure of a bottle containing amphetamines from defendants' apartment without a warrant, coupled with a question officers heard the female defendant ask the male defendant, "What about the others?", constituted probable cause for issuance of a warrant to search the apartment. *S. v. Crews*, 41.

Trial judge properly considered a photostatic copy of the original warrant which had been lost. *S. v. Edwards*, 162.

Affidavit stating that "A confidential and reliable informant who has given reliable information says that there is non tax paid whiskey at above location at this time" was insufficient to establish probable cause for issuance of a warrant to search for nontaxpaid whiskey. *Ibid.*

§ 4. Search Under the Warrant

Officers could lawfully search an automobile located on premises for which they had a valid search warrant. *S. v. Reid*, 323.

SPECIFIC PERFORMANCE

Evidence was insufficient to support a finding that defendant's contract to convey her land was procured by unfair and overreaching conduct

SPECIFIC PERFORMANCE—Continued

on plaintiff's part, and the court erred in denying specific performance of the contract. *Hutchins v. Honeycutt*, 314.

STATUTES

§ 4. Procedure to Test Validity

Only those persons who have been injuriously affected in their persons, property or constitutional rights may call into question the validity of a statute. *In re Appeal of Martin*, 66.

§ 5. General Rules of Construction

It is a well-settled principle of statutory construction that where a statute is intelligible without any additional words, no additional words may be added, and where the language of the statute is clear and unambiguous, there is no room for judicial construction, but the courts must give it its plain and definite meaning and they are without power to interpolate, or superimpose, provisions and limitations not contained therein. *S. v. Camp*, 148.

TAXATION

§ 2. Uniform Rule and Discrimination

The General Assembly may establish classifications for taxation if such classifications are founded upon reasonable distinctions and bear a substantial relation to the object of the legislation. *In re Appeal of Martin*, 66.

§ 23. Construction of Taxing Statutes

Statutes providing exemption from taxation are strictly construed. *In re Appeal of Martin*, 66.

§ 25. Ad Valorem Taxes

The General Assembly intended to exempt from taxation goods placed in a public warehouse for transshipment for whatever length of time the goods remained in the warehouse. *In re Appeal of Martin*, 66.

The name of the ultimate consignee was not required on the original bill of lading of goods placed in a public warehouse for transshipment in order to retain the tax exempt status of the goods. *Ibid.*

§ 31. Use Tax

Furniture manufacturer's use of fabrics in production of swatch books of sample fabrics for distribution without charge to its potential customers either in or out of the State is not subject to the use tax. *In re Clayton-Marcus Co.*, 215.

A commercial chicken hatchery is a manufacturing industry or plant, and machinery purchased for use in the hatchery is subject to a use tax of only 1% rather than the regular rate of 3%. *Hatcheries, Inc. v. Coble*, 518.

TRIAL

§ 58. Findings and Judgment of the Court

When the parties waive jury trial, the court must make findings of fact sufficient to support its judgment. *Rock v. Ballou*, 99.

WAREHOUSEMEN—Continued

§ 2. Rights and Liabilities of Holders of Certificates

Grain warehouse ratified fraudulent warehouse receipts issued by its agent and cannot be heard to deny their validity in the hands of a bank. *Trust Co. v. Gill*, 342.

WITNESSES

§ 1. Competency of Witness

Trial court in a rape case did not err in permitting the State to present a rebuttal witness whose name did not appear on the list of witnesses for the State given to the defendant's counsel by the solicitor before the trial began. *S. v. Lampkins*, 497.

§ 4. Impeachment of Party's Own Witness

A defendant called by plaintiff as her witness can be impeached by a letter written by such defendant. *Ballance v. Wentz*, 294.

WORD AND PHRASE INDEX