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SUPREME COURT OF NORTH CAROLINA

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[1] Resigned 12 May 1976.
[2] Deceased 10 September 1976.
[3] Appointed 30 June 1976.
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[1] Retired 30 September 1976.
[2] Appointed Chief Judge 1 October 1976.
[3] Appointed 1 October 1976.
[4] Appointed Chief Judge 19 August 1976.
[5] Resigned 6 July 1976.
[6] Appointed 24 September 1976.
[7] Deceased 25 July 1976.
[8] Appointed 10 September 1976.

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PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

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LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Secretary of the Board of Law Examiners of the State of North Carolina, do certify that the additional named person below duly passed the examinations of the Board of Law Examiners, and by Resolution of the Board dated May 21, 1976, said person has been issued a license certificate by the Board:

REID GLENN BROWN ..... Waynesville

Given under my hand and the Seal of the Board of Law Examiners, this the 30th day of June, 1976.

FRED P. PARKER III

Executive Secretary

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1975

STATE OF NORTH CAROLINA v. DONALD E. MILLER

No. 52

(Filed 17 December 1975)

1. **Criminal Law § 60— fingerprints — time of impressing — sufficiency of evidence for jury**

Testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury.

2. **Criminal Law § 60; Burglary and Unlawful Breakings § 5— fingerprint evidence — sufficiency of evidence for jury**

In a prosecution for felonious breaking and entering of a launderette and larceny pursuant to the breaking and entering, evidence that (1) defendant's thumbprint was found on a vending machine lock at the scene of the crime, a fact defendant solemnly admitted in open court, (2) no other fingerprints—of defendant or anyone else—were found at the scene, and (3) when informed of the fingerprint defendant stated to the police that he had never been in the launderette—a statement later conceded to be false—raised legitimate inferences from which a jury could properly conclude that the thumbprint could only have been impressed on the lock at the time the crime was committed, and defendant's motion to nonsuit on the breaking and entering count was properly denied.

APPEAL by defendant from decision of the Court of Appeals, 26 N.C. App. 440, 216 S.E. 2d 160 (1975), upholding judgment of *Cowper, J.*, 9 December 1974 Session, NEW HANOVER Superior Court.

Defendant was charged in a bill of indictment, proper in form, with (1) feloniously breaking and entering a building occupied by Williams Launderette located at 1107 Princess Street in the City of Wilmington with intent to commit the felony of larceny therein, and (2) larceny pursuant to the breaking and entering.

The State's evidence tends to show that James Rhue, an employee, closed Williams Launderette about 9 p.m. on the night of 23 September 1974. He fastened the back door with four hooks provided for that purpose, turned out the lights, and locked the front door. At 3:55 a.m. the following morning, Officer McNew found the lights on and the back door open. Various vending machines for candy, drinks and cigarettes had been pried open. A heavy chrome padlock which had secured the cigarette machine had been "busted off" and was lying on the floor with some burglary tools.

H. R. Williams, owner of the launderette, testified that no one had been given permission to enter the building that night. Mr. Williams said his launderette is open to the public and many people come and go during business hours and buy drinks, candy and cigarettes from the various vending machines. He testified that there is a row of chairs beside the cigarette machine and the padlock on the cigarette machine is on the side next to the chairs. Many people come in and sit in the chairs to socialize, drink and smoke.

T. W. Pollard, identification officer with the Wilmington Police Department, examined the chrome padlock for fingerprints and found one latent print of defendant's right thumb thereon. No other fingerprints were found, and Officer Pollard testified that the thumbprint on the padlock could have been placed there lawfully during business hours insofar as he knew. *Defendant stipulated in open court at trial that the thumbprint was his.*

Officer Cecil Gurganeous, a detective with the Wilmington Police Department, participated in the investigation and talked to defendant on 11 October 1974. After advising defendant of

his rights, he told defendant that the officers had lifted a fingerprint from a padlock which had been on the cigarette machine at Williams Launderette. *Defendant became very upset and said he had never been in the Williams Launderette.* Officer Gurganeous attempted to talk further with him but "he sat there and cursed and hollered and got real boisterous so I quit the conversation with him."

Defendant offered no evidence. His motion for nonsuit was denied as to the charge of breaking and entering but allowed as to the charge of larceny. The jury returned a verdict of guilty of felonious breaking and entering and defendant was sentenced to an active prison term. The Court of Appeals found no error, *Martin, J.*, dissenting, and defendant appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2).

James Oliver Carter of the firm of Carter and Carter, attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; Archie W. Anders, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

Defendant's sole assignment of error rests on his contention that the trial court erred in denying his motion for nonsuit on the breaking and entering count and the Court of Appeals erred in upholding that ruling. He challenges only the sufficiency—not the competency—of the evidence to withstand his motion for nonsuit and carry the case to the jury.

Motion to nonsuit requires the trial court 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. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968). 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).

The use of fingerprint evidence for identification purposes is so general and so accurate that in many cases it has been expressly declared that the courts will take judicial notice thereof. *See* Annot., Evidence—Finger, Palm, or Footprint, 28 A.L.R. 2d 1115, § 2 at 1119 (1953). *See generally State v. Rogers,*

233 N.C. 390, 64 S.E. 2d 572 (1951); *State v. Combs,* 200 N.C. 671, 158 S.E. 252 (1931).

[1] The sufficiency of fingerprint evidence to establish the identity of an accused has been considered by this Court in various cases. *State v. Jackson,* 284 N.C. 321, 200 S.E. 2d 626 (1973); *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972); *State v. Smith,* 274 N.C. 159, 161 S.E. 2d 449 (1968); *State v. Tew,* 234 N.C. 612, 68 S.E. 2d 291 (1951); *State v. Rogers, supra; State v. Reid,* 230 N.C. 561, 53 S.E. 2d 849, *cert. denied* 338 U.S. 876, 94 L.Ed. 537, 70 S.Ct. 138 (1949); *State v. Minton,* 228 N.C. 518, 46 S.E. 2d 296 (1948); *State v. Helms,* 218 N.C. 592, 12 S.E. 2d 243 (1940); *State v. Huffman,* 209 N.C. 10, 182 S.E. 705 (1935); *State v. Combs, supra.* These cases establish the rule that testimony by a qualified expert that fingerprints found at the scene of the crime correspond with the fingerprints of the accused, when accompanied by substantial evidence of circumstances from which the jury can find that the fingerprints could only have been impressed at the time the crime was committed, is sufficient to withstand motion for nonsuit and carry the case to the jury. The soundness of the rule lies in the fact that such evidence logically tends to show that the accused was present and participated in the commission of the crime.

What constitutes substantial evidence is a question of law for the court. What the evidence proves or fails to prove is a question of fact for the jury. *State v. Stephens,* 244 N.C. 380, 93 S.E. 2d 431 (1956).

Implicit in the rule itself is the requirement that, to warrant a conviction by the jury, the fingerprints corresponding to those of the accused must have been found in the place where the crime was committed *under such circumstances that they could only have been impressed at the time the crime was committed. State v. Tew, supra; State v. Helms, supra;* 30 Am. Jur. 2d, Evidence, § 1144 (1967). "The fact that finger-prints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the finger-prints could have been impressed only at the time when the crime was perpetrated." *State v. Minton, supra. See generally* 1 Stansbury's North Carolina Evidence, §§ 86, 134 (Brandis rev. 1973). The question whether the fingerprints could have been impressed only at the

time when the crime was committed is ordinarily a question of fact for the jury. *State v. Helms, supra.*

[2] This brings us to an analysis of the evidence in light of the foregoing legal principles. The State's evidence establishes these facts and circumstances: (1) Defendant's right thumbprint was found on the lock at the scene of the crime, a fact defendant solemnly admitted in open court; (2) no other fingerprints—of defendant or anyone else—were found at the scene; and (3) when informed of the fingerprint defendant stated to the police that he had never been in the Williams Launderette—a statement now conceded, both in his brief and on oral argument, to be false. What does all this tend to prove with respect to when or under what circumstances the defendant's thumbprint was impressed on the lock? Do these facts and circumstances raise legitimate inferences from which a jury may properly conclude that the thumbprint could only have been impressed on the lock at the time the crime was committed? We think so.

In *State v. Tew, supra,* the testimony of a fingerprint expert tended to show that fingerprints, found on a piece of broken glass from the front door which had fallen inside a filling station allegedly entered by the defendant, corresponded with defendant's fingerprints. The only evidence of circumstances from which the jury could find that defendant's fingerprints could have been impressed only at the time of the breaking and entering was the testimony of the filling station proprietor that she personally attended her service station and did not know and had not seen defendant before the date of the crime. Held: The evidence was sufficient to take the case to the jury and to support a finding by it that defendant was present when the crime was committed and participated in its commission.

In *State v. Helms, supra,* defendant was charged with (1) breaking and entering a dwelling with felonious intent to steal and (2) larceny. A fingerprint expert testified that prints lifted from a window on the back porch where the entry had been effected were identical with defendant's fingerprints. Defendant testified he had painted the dwelling for the owners and the fingerprints, if his, must have been impressed when he opened the window while painting the house. The State then offered evidence that after the painting was done the windows were washed on both the inside and outside. Held: Whether

the evidence was sufficient to establish beyond a reasonable doubt that the fingerprints found at the scene of the crime corresponded with those of the defendant and, if so, whether under the circumstances of the case the fingerprints could only have been impressed on the window at the time the crime was committed was a question for the jury.

When the evidence in this case is viewed in light of applicable legal principles, we are of the opinion that defendant's motion to nonsuit on the breaking and entering count was properly denied. Defendant's thumbprint on the lock conclusively establishes that defendant was in the launderette *at some unspecified time.* Furthermore, we know defendant falsely stated he had *never* been in the building. There is no evidence whatsoever that defendant was *lawfully* in or around the launderette at any time. When the thumbprint evidence is considered under these attendant circumstances, the most compelling permissible inference arising from defendant's falsehood is that he broke into and entered the building on the night the crime was committed and left his thumbprint on the lock at that time. Otherwise, had his thumbprint been impressed at any other time and under lawful circumstances, he would have so stated when the potentially incriminating presence of his thumbprint was brought to his attention by the officers. This suffices to repel nonsuit and carry to the jury the question whether defendant's thumbprint on the lock could have been impressed only at the time the offense was committed. The weight to be accorded such evidence is a question for the jury to determine in light of all the surrounding facts and circumstances. *State v. Tew, supra; State v. Helms, supra; State v. Huffman, supra; State v. Combs, supra;* 30 Am. Jur. 2d, Evidence, § 1144 (1967).

For the reasons stated the decision of the Court of Appeals upholding defendant's conviction is

Affirmed.

WATSON SEAFOOD & POULTRY COMPANY, INC. v. GEORGE W. THOMAS, INC. AND ROBERT PRIDGEN

No. 36

(Filed 17 December 1975)

1. **Automobiles § 20— passing at intersections — negligence per se**

Violations of the provisions of G.S. 20-150(c) prohibiting the passing of a vehicle going in the same direction at any intersections designated and marked by the Board of Transportation by appropriate signs and at any street intersections in cities and towns have been held by the Supreme Court to constitute negligence *per se.*

2. **Criminal Law § 1— absence of criminal intent — act or omission of act as crime**

The Legislature may make the doing of an act or the omission to do some act a crime even in the absence of criminal intent.

3. **Automobiles § 7; Criminal Law § 1— lack of knowledge that act is criminal — punishment proper — application to motor vehicle laws**

Both federal and state courts have specifically held that it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal, and the bases for inclusion of violations of motor vehicle and traffic laws within the scope of this rule are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon our roads and (2) the punishments for such violations are usually a small fine.

4. **Automobiles §§ 20, 77— passing at intersection in city — no notice of city limits — negligence per se**

When an employee of plaintiff who was driving plaintiff's pickup truck overtook and attempted to pass defendant's truck at an intersection in the Town of Rose Hill, he was guilty of negligence *per se,* and this was so without regard to his knowledge of whether he was within the city limits of Rose Hill.

Chief Justice SHARP dissenting.

Justice COPELAND joins in the dissenting opinion.

APPEAL as of right by plaintiff pursuant to G.S. 7A-30(2) to review decision of the Court of Appeals reported in 26 N.C. App. 6, 214 S.E. 2d 605 (1975) (opinion by Morris, Judge, with Vaughn, Judge, concurring, and Clark, Judge, dissenting), finding no error in trial before *Crumpler, District Judge,* 14 October 1974 Session, DUPLIN County District Court.

Civil action to recover property damages to plaintiff's 1973 Chevrolet pickup truck growing out of a collision between the pickup truck operated by plaintiff's driver, Roger Parker, and defendants' 1967 G.M.C. tractor-trailer which plaintiff alleged was being negligently operated by defendant, Robert Pridgen, as agent of defendant, George W. Thomas, Inc. Defendants answered denying negligence on the part of defendant Pridgen and alleging that plaintiff's driver was guilty of contributory negligence. It was admitted that each driver was acting within the course and scope of his employment and as agent of his respective employer at the time of the collision.

Roger Parker testified that on the 1st day of August 1973 at about 9:00 a.m. he and corporate defendant's driver were operating their respective trucks in the same direction on rural paved road 1146 and that he came up behind the truck operated by defendant Pridgen, blew his horn and started to pass. As he came alongside the G.M.C. tractor-trailer, defendant Pridgen turned left into plaintiff's truck. He at no time observed any turn signals as he approached the truck. He further testified that a narrow dirt road intersected the rural paved road. There were no city limit signs in the area although there was a "Welcome to Rose Hill" sign off the shoulder of the road. "It was in the same position where regular highway signs are. It was not the regular original city limit type sign." Parker described the area in which the accident took place as "really growed up . . . corn, woods down one side, and a field over on the other, corn and stuff I guess. Crops." He said that "There were no regulatory markings of any intersections in that area at the time of the accident." He further stated that "I was hooked up at that time with a hatchery down at Rose Hill where the old Rose Hill Hardware used to be."

James Masters, the Chief of Police of Rose Hill, described the area in these words, "It is not built up in between Church Street to 1146. It's no houses in there. A corn field lies in there. Or tobacco. This is out in farm country." The Chief of Police also stated that he investigated the accident and that he gave defendant Pridgen a ticket for improper equipment because the left rear directional signal on the tractor-trailer was not working. Pridgen entered a plea of guilty to the charge. Mr. Parker was not charged. Masters further testified that city limit signs had been erected since the accident but that none were there on the date of the accident.

Defendant Pridgen testified that prior to the collision he heard no horn and did not see plaintiff's truck. He was going about ten miles per hour when he started making his turn.

It was stipulated that the accident occurred within the city limits of Rose Hill.

The jury answered the issues submitted as follows:

Was the plaintiff's property damaged by the negligence of the defendant Pridgen?

Answer: "Yes."

Did the plaintiff through the negligence of Roger Parker contribute to his damages?

Answer: "Yes."

Plaintiff appealed from judgment entered upon the jury verdict.

Crossley & Johnson, by Robert White Johnson, for plaintiff appellant.

Horton, Conely & Michaels, by Richard B. Conely, for defendant appellee.

BRANCH, Justice.

Plaintiff's sole assignment of error is that the trial court erred in instructing the jury concerning passing at an intersection.

The trial judge instructed the jury on the issue of contributory negligence as follows:

> If you answer it [the first issue] "yes," you go to the second issue, which is as follows: "Did the plaintiff by his own negligence—that is Mr. Parker—contribute to his own injury or damage, as the defendant Pridgen alleges?"
>
> This means that the defendant Pridgen is claiming that the plaintiff Parker is guilty of what we call "contributory negligence." By contributory negligence we mean the lack of ordinary care on the part of the plaintiff, which cooperating and concurring with the actionable negligence of the defendant was also a proximate cause of the plaintiff's injury or damage.

Now Mr. Pridgen contended, as I have related before, that when he left that morning his lights were working, and even after the accident one light was still burning.

He testified that he was not going 35 miles an hour, he was going about 15, and he braked it down to around 10 to make his turn. Now let me give you the law relating to this particular case on overtaking and passing on a two-lane highway. Our motor vehicle laws require that the driver of a vehicle overtaking and undertaking to pass another vehicle traveling in the same direction on a two-lane highway shall ascertain that the left lane is clearly visible and free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be made in safety.

Further he shall not overtake and pass at an intersection, that is a street intersection, that is a street intersection in a city or town, or a highway intersection marked as such by the State Highway Commission. Now the evidence we have before us, it is stipulated by the parties that this was in the town of Rose Hill and that it is a street intersection.

Further that he shall pass at least two feet on the left of the vehicle being passed.

Now in this connection if you find that the plaintiff Parker did not use that degree of care and prudence that is required under our laws, which I have just explained to you, then you would answer this issue "yes," as to the second issue. This would mean that Parker is not entitled to recover anything, because he would be guilty along with Pridgen of doing some negligent act which was one of the proximate causes of this accident. If you find to the contrary, your answer to that shall be "no."

G.S. 20-150(c) provides:

(c) The driver of a vehicle shall not overtake and pass any other vehicle proceeding in the same direction at any railway grade crossing nor at any intersection of highway unless permitted so to do by a traffic or police officer. For the purpose of this section the words "intersection of highway" shall be defined and limited to intersections designated and marked by the Board of Transportation

by appropriate signs, and street intersections in cities and towns.

We considered the effect of G.S. 20-150(c) in the case of *Adams v. Godwin,* 252 N.C. 471, 114 S.E. 2d 76, and there held:

> . . . The meaning of the section is that one motorist may not pass another going in the same direction under either of two conditions: (1) At any place designated and marked by the State Highway Commission as an intersection; (2) at *any* street intersection in any city or town. . . . (Emphasis ours.)

All of the evidence in this case shows that the intersection involved had not been designated and marked as an intersection by the Highway Commission (now the Board of Transportation).

[1] Initially we recognize that, absent specific Legislative exemption, a person who violates the provisions of a safety statute may be held to be negligent as a matter of law. This doctrine was clearly enunciated by Justice Walker in the case of *Stone v. Texas Co.,* 180 N.C. 546, 105 S.E. 425, as follows:

> . . . The question as to whether the violation of a statute, or ordinance, especially one intended to safeguard the citizens of a town and their property, is negligence *per se,* or only evidence of negligence, has been discussed extensively by this Court in several cases, but the law of this State was finally settled in *Leather v. Tobacco Co.,* 144 N.C., 330; where it was held that it is negligence *per se,* and as a matter of law, and the rule in regard to it, as stated by Judge Thompson in his treatise on Negligence (vol. 1, sec. 10), was adopted, and is substantially as follows: When the legislature of a State, or the council of a municipal corporation, having in view the promotion of the safety of the public, or of individual members of the public, commands or forbids the doing of a particular act, the general conception of the courts, and the only one that is reconcilable with reason, is that a failure to do the act commanded, or doing the act prohibited, is negligence as mere matter of law, or otherwise called negligence *per se;* and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill. So that if it is the proximate cause of hurt or damage to another, and if that other is without

> contributory fault, the case is decided in his favor, and all that remains is to assess his damages. The jury, of course, must find the facts. . . .

Violations of the provisions of G.S. 20-150(c) have been held by this Court to constitute negligence *per se*. *Carter v. Scheidt*, 261 N.C. 702, 136 S.E. 2d 105; *Adams v. Godwin, supra; Cole v. Lumber Co.*, 230 N.C. 616, 55 S.E. 2d 86; *Donivant v. Swaim*, 229 N.C. 114, 47 S.E. 2d 707.

Defendants rely heavily on the case of *Adams v. Godwin, supra,* as authority for their position that the trial judge correctly charged. In that case, all the evidence showed that plaintiff and defendant were both proceeding in an easterly direction on Main Street in the corporate limits of the Town of Benson and plaintiff attempted to pass as the vehicles approached an unmarked intersection with Fayetteville Street. Defendant, without giving a signal, turned her vehicle to the left across the center line of the street and into the right side of plaintiff's automobile. The jury answered issues in favor of plaintiff and defendant appealed. Defendant assigned as error the following portion of the trial judge's charge:

> . . . "I instruct you, ladies and gentlemen, that if you are satisfied by the greater weight of the evidence that there were no signs put there, no appropriate signs put there by the State Highway Commission, then it would not constitute an intersection within the meaning of that statute and would place no duty upon the driver of the Edsel automobile."

In granting a new trial on the ground that the charge permitted plaintiff to ignore the intersection because it was not marked by the Highway Commission, we held the charge to be erroneous since G.S. 20-150(c) requires one to observe street intersections within corporate limits *whether marked or unmarked.* Although very similar factually, this case is readily distinguishable from the case before us because in *Adams* there was no contention or evidence that plaintiff did not know she was in the town limits of Benson. The crux of the question here presented is whether plaintiff is excused from the application of the doctrine of negligence per se because he did not know and did not have reasonable grounds to know that he was in the Town of Rose Hill. In this connection, plaintiff relies on the cases of *Dawson v. Jennette*, 278 N.C. 438, 180 S.E. 2d 121, and *Kelly v. Ashburn*, 256 N.C. 338, 123 S.E. 2d 775, to

sustain his contention that the trial judge did not correctly charge.

The pertinent holding in *Kelly v. Ashburn, supra,* is correctly summarized in headnote 4 of that case, to wit:

> Where a motorist who is unfamiliar with an intersection approaches it along a street upon which a stop sign had been erected but had been removed, his rights in entering the intersection must be judged by the rule of care of an ordinarily prudent man under the circumstances confronting him, unaffected by the fact that a stop sign had been erected upon the street upon which he was traveling.

In *Dawson v. Jennette, supra,* Justice Lake approved by holding in *Kelly v. Ashburn, supra,* as it related to passing in intersections. The principles set forth in *Kelly* and *Dawson* would allow us to easily solve the crucial question before us. However, these cases are distinguishable from instant case because they construed the provisions of G.S. 20-158, *Vehicle Control Signs and Signals.* G.S. 20-158 specifically provides that the failure to stop, in violation of its provisions, shall not be considered contributory negligence per se in any action for injury to person or property.

[2] We find ample authority for the proposition that the Legislature may make the doing of an act or the omission to do some act a crime even in the absence of criminal intent. The doing of such act or the failure to do the required act constitutes the crime and the knowledge or ignorance of its criminal character are immaterial circumstances on the question of guilt. The only fact to be determined in such cases is whether the defendant did the act prohibited or failed to do the act which the statute required. *State v. McLean,* 121 N.C. 589, 28 S.E. 140; ACCORD: *United States v. Balint,* 258 U.S. 250, 66 L.Ed. 604, 42 S.Ct. 301; *Shevlin-Carpenter Co. v. Minnesota,* 218 U.S. 57, 54 L.Ed. 930, 30 S.Ct. 663; *Borderland Construction Co. v. State,* 49 Ariz. 523, 68 P. 2d 207; *People v. Fernow,* 286 Ill. 627, 122 N.E. 155; *People v. Snowburger,* 113 Mich. 86, 71 N.W. 497; *State v. Manos,* 179 S.C. 45, 183 S.E. 582. Cases applying this rule to violations of motor vehicle laws are collected in the appendix of an article by Francis Bowes Sayre, Public Welfare Offenses, 33 Colum. L. Rev., p. 87:

> . . . *Commonwealth v. Pentz,* 247 Mass. 500, 509-510, 143 N.E. 322 (1924) (driving so as to endanger the safety

or lives of public); *Commonwealth v. Vartanian,* 251 Mass. 355, 146 N.E. 682 (1925). *Accord*: *Commonwealth v. Coleman,* 252 Mass. 241, 147 N.E. 552 (1925) (using a motor vehicle without the authority of the owner) ("the act irrespective of intent was made criminal," *id.* 244); *People v. Harrison,* 183 App. Div. 812, 170 N.Y. Supp. 876 (2d Dept. 1918) (causing motor vehicle to be operated in a careless or negligent manner); *People v. Schoepflin,* 78 Misc. 62 (N. Y. County Ct. 1912) (driving a motor car without a distinctive number corresponding to a proper certificate of registration; conviction affirmed though court "satisfied that this defendant meant to do no wrong." *Id.,* at 63); *State v. Ferry Line Auto Bus Co.,* 99 Wash. 64, 168 Pac. 893 (1918) (employee held liable for operating an auto stage without a license although he had no knowledge that employer had failed to secure the required license); *Hays v. Schueler,* 107 Kan. 635, 193 Pac. 311 (1920) (failure to carry on motor car a rear red light); *Provincial Motor Cab Co. Ltd. v. Dunning,* [1909] 2 K.B. 599 (failure to carry on motor car a rear light to illuminate number plate); *Rex v. Labbe, supra* note 15 (owner of automobile held liable for violation of speed regulations by another driving owner's car). . . . *People v. Billardello,* 319 Ill. 124, 149 N.E. 781 (1925); *People v. Johnson,* 288 Ill. 442, 123 N.E. 543 (1919); *People v. Fernow,* 286 Ill. 627, 122 N.E. 155 (1919); *People v. Hughes,* 226 Ill. App. 135 (1922); *State v. Dunn,* 202 Iowa 1188, 211 N.W. 850 (1927); *Ogburn v. State,* 168 Ark. 396, 270 S.W. 945 (1925). . . .

[3] Both federal and state courts have specifically held that it is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal. This is particularly so when the controlling statute does not require the act to have been done knowingly or willfully. *Williams v. North Carolina,* 325 U.S. 226, 89 L.Ed. 1557, 65 S.Ct. 1092; *State v. Balint, supra; Shevlin-Carpenter v. Minnesota, supra.* The bases for the inclusion of violations of motor vehicle and traffic laws within the scope of this rule are that (1) the requirement of proving intent or guilty knowledge would make it impossible to enforce such laws in view of the tremendous number of petty offenses growing out of the host of motor vehicles upon our roads and (2) the punishments for

such violations are usually a small fine. We would not extend the rationale of this rule beyond petty offenses involving light punishment nor would we extend its operation to any crime involving moral delinquency.

G.S. 20-150(c) is a safety statute enacted by the Legislature for the public's common safety and welfare. The statute does not contain the words "knowingly," "willfully" or any other words of like import. It was the obvious intent of the Legislature to make the performance of a specific act a criminal violation and to thereby place upon the individual the burden to know whether his conduct is within the statutory prohibition.

[4] We hold that when Roger Parker overtook and attempted to pass defendant's truck at an intersection in the Town of Rose Hill, he was guilty of negligence per se and this was so without regard to his knowledge of whether he was within the city limits of Rose Hill. We recognize the seemingly harsh result which arises from the application of this rule; however, the application of safety statutes to the individual must be balanced with the protection afforded the general public. This Court has diluted the severity of the rule by holding that in order to show actionable negligence, a person who seeks damages for injury to person or property must show a causal connection between the violation of the safety statute and the injury or damage alleged. *Aldridge v. Hasty*, 240 N.C. 353, 82 S.E. 2d 331; *Conley v. Pierce-Young-Angel Co.*, 224 N.C. 211, 29 S.E. 2d 740. It follows that in cases in which the defendant pleads contributory negligence as a bar to plaintiff's recovery, the defendant has the burden of proving by the greater weight of the evidence that plaintiff's negligence was one of the proximate causes of his injury or damage. *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305; *Jones v. Holt*, 268 N.C. 381, 150 S.E. 2d 759; *Owens v. Kelly*, 240 N.C. 770, 84 S.E. 2d 163. Here the trial judge charged the jury that in order to answer the issue of contributory negligence against plaintiff they must find that plaintiff's driver was "guilty along with Pridgen with doing some negligent act which was one of the proximate causes of the accident."

We note, in passing, that the charge was favorable to plaintiff in that it imposed only the degree of ordinary care upon plaintiff as related to the finding of contributory negligence resulting from his alleged violation of safety statutes. On the

other hand, the charge on contributory negligence was erroneous and unfavorable to plaintiff because it did not place the burden of proving that issue on defendant. *Warren v. Lewis, supra; Jones v. Holt, supra.* These matters were not assigned as error or argued in plaintiff's brief and were therefore not before us for decision.

The decision of the Court of Appeals is

Affirmed.

Chief Justice SHARP dissenting.

To the majority's decision that G.S. 20-150(c) requires a holding that plaintiff was guilty of negligence *per se* when he attempted to pass defendant's tractor-trailer under the facts of this case (set out below), I dissent.

Rose Hill is an incorporated town with a population under 5,000. The main approach to the town is U. S. Highway No. 117. On 1 August 1973 plaintiff was driving his pickup truck on rural paved road No. 1146 toward Rose Hill when he overtook defendant's diesel log-truck. Preparatory to passing, plaintiff "gave his signal, pulled out and blew the horn and came around." When he came alongside the truck its driver (defendant Pridgen) drove to his left of the center of the road without having given any signal of his intention to turn into "a little dirt road," which intersected No. 1146 at that point. There was, of course, a collision. The "little dirt road," which was about the width of the log truck, happened to be Pine Street and within the corporate limits of Rose Hill.

There were, however, no signs or markings of any kind on No. 1146 to warn a motorist that he was approaching an intersection; nor had any corporate-limits sign been posted on No. 1146 to advise the traveler he was within a city or town. Further, the area through which plaintiff had approached the intersection of Pine Street and No. 1146 was devoid of urban characteristics and gave the traveler no clue that "according to law" he was in a "city or town." "It was about a half a mile further down the road before the sign said 'Rose Hill.' "

The Chief of Police of Rose Hill described the vicinity of the accident as follows: "It's not a built-up area. . . . It's no houses in there. A corn field lies in there. Or tobacco. *This is out in farm country.*" (Emphasis added.) In attempting to

turn into Pine Street defendant was "headed back to the woods, back to . . . haul more lumber." The rear, left-turn signal on defendant's log truck was not working, and the Chief of Police, who investigated the accident, gave defendant Pridgen a "citation for improper equipment; directional signals not working."

The result of the majority's decision in this case is this: Any motorist who attempts to pass another vehicle at any intersection within any area which has been incorporated into a city or town violates G.S. 20-150(c) and is guilty of negligence *per se* even though (1) the area appears to be rural and no posted sign informs the traveler that in contemplation of law he has left the country and entered a town; and (2) the motorist has no knowledge, no reason to suspect, and no opportunity to ascertain that the intersection lies within corporate limits. In my view this construction of G.S. 20-150(c) put an unreasonable burden on the motorist and the General Assembly never intended to impose strict liability upon a motorist under such circumstance. The court should never adopt a construction which results in palpable injustice or undesirable consequences when the language of the statute is reasonably susceptible to another construction. *Puckett v. Sellars,* 235 N.C. 264, 69 S.E. 2d 497 (1952); 7 Strong's N. C. Index 2d *Statutes* § 5 (1968).

G.S. 20-150(c), as the majority opinion makes clear, is a safety statute which fixes the standard for safe conduct at certain intersections; it does not prohibit passing at all intersections. Passing at intersections outside of cities and towns is prohibited only if the Board of Transportation "by appropriate signs" has marked the intersection. The foregoing limitation denotes (1) the legislative expectation that the Board would mark all intersections at which passing would create an unreasonable risk of harm to the traveling public and (2) the legislative awareness that a motorist on an unfamiliar highway outside of developed urban areas could not reasonably be expected to obey the statutory mandate not to pass at an intersection unless he had been given notice that the intersection was ahead.

At the time of the enactment of G.S. 20-150(c) the General Assembly undoubtedly took notice of the prevailing custom of cities and towns to post their limits on all public highways, roads, and streets entering the municipality, and it legislated on the assumption that the motorist would have notice when he

crossed the line between town and country. Typical street intersections in cities and towns are only "a city block" apart and are highly visible. Intersections are the rule and, in urban areas, the motorist needs no notice that they are there.

Thus, it appears the legislature equated marked rural intersections with the city street intersections. It relied upon the marking of intersections to give the requisite notice in rural areas and upon the character of the street and its surroundings to give the notice in towns and cities. Where no sign warns of an intersection in a rural area, there is no notice of its existence and passing does not violate the statute. Similarly, where the street intersection is within unmarked corporate limits and in an area which lacks all the essential characteristics of a city there is also no notice of its existence, and passing therein does not violate the statute.

Under the majority decision, albeit the intersection and the area surrounding it have undergone no physical change, passing which was reasonable and lawful one way would become unlawful and negligence *per se* the next merely because the town extended its limits—and this irrespective of whether the new limits had been posted. Such a result does not comport with the purpose of G.S. 20-150(c) to set the standard of reasonable driver conduct at an intersection, for the reasonableness of conduct is not changed by the mere act of incorporation.

The spirit and intent of the legislature control the construction of a statute. 7 N. C. Strong's Index 2d, *Statutes* § 5 (1968). Thus, as applied to the situation we consider here, I believe the proper construction of G.S. 20-150(c) is this: When the limits of a town are unmarked a motorist who passes or attempts to pass another vehicle at an unmarked intersection within the corporate limits does not violate G.S. 20-150(c) unless he knows that he is within the town limits or the character of the intersection and surrounding area is such that any reasonable person would know he was in town. This construction in no way weakens the doctrine of negligence *per se,* for if the statute is violated the violation is negligence *per se.*

It is needless to say that a statute "should not be interpreted in such a manner as to render it unconstitutional, if a reasonable constitutional interpretation can be given." *Highway Commission v. Industrial Center,* 263 N.C. 230, 231, 139 S.E. 2d 253, 254 (1964).

The violation of G.S. 20-150(c) is a misdemeanor punishable by fine or imprisonment, G.S. 20-176. However, the Chief of Police, when he cited defendant for "improper equipment, directional signals not working," did not cite plaintiff for illegally passing at an intersection. I apprehend that any attempt to hold plaintiff criminally liable would raise the serious question whether the application of G.S. 20-150(c) to the facts of this case could satisfy the constitutional requirements of due process. Surely its application to a motorist who had no knowledge he was inside corporate limits, no reason whatever to suppose he was, and every reason to think he was not, is not only an unreasonable and arbitrary application of the statute but one which bears no reasonable relation to the legislative purpose.

The majority notes, quite correctly, that a motorist who does not know the rear lamp on his vehicle has burned out may be held liable for a violation of G.S. 20-129(d). It is argued, by analogy, that one who—for no matter what reason—does not know he is in a town should be equally liable for a violation of 20-150(c) when he attempts to pass at an unmarked intersection. This argument is not apropos. The law requires every motorist to keep his rear lamp "in good working order." He is responsible for his automobile and has control of it. No motorist, however, is responsible for posting corporate limits and for ascertaining the location of the limits of any city, town, "Middlesex village or farm" through which his journey may take him.

For errors in the charge, my vote is for a new trial.

Justice COPELAND joins in this dissent.

STATE OF NORTH CAROLINA v. LARRY ALEXANDER WADDELL

No. 30

(Filed 17 December 1975)

1. **Criminal Law §§ 91, 173— trial before outlaw order rescinded — reference to declaration as outlaw — invited error**

Defendant was not denied a fair trial because he was put to trial before an order declaring him an outlaw pursuant to G.S. 15-48 was rescinded since the statute applied only so long as defendant re-

mained at large and no rescission of the order was required once defendant was in custody; nor was defendant prejudiced by evidence that defendant had been declared an outlaw where such evidence was initially and repeatedly disclosed by defendant's own counsel.

2. **Criminal Law § 89— impeachment — specified criminal acts**

While a witness cannot be impeached by cross-examination as to whether he has been arrested for or indicted for or accused of an unrelated criminal offense, he may be asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct.

3. **Criminal Law § 89— cross-examination — specific criminal and reprehensible conduct**

A defense witness was properly asked on cross-examination whether he threatened to shoot two customers on a certain occasion and whether he shot a person on that date since the questions inquired into specific criminal and reprehensible conduct by the witness.

4. **Criminal Law § 88— scope of cross-examination**

In this jurisdiction cross-examination is not confined to the subject matter of direct testimony but may extend to any matter relevant to the case.

5. **Criminal Law § 88— cross-examination of defendant — new matter**

Questions asked defendant on cross-examination concerning actions of defendant and another immediately before and during an alleged robbery and murder were relevant and competent although the questions were not based on evidence previously introduced.

6. **Jury § 5— reexamination of prospective juror — death penalty views — excusal by court**

In a first degree murder prosecution, the trial court did not err in allowing the district attorney to reexamine a prospective juror concerning his beliefs as to capital punishment after the juror had been accepted by the State and by defendant but before the jury was impaneled, and the court in its discretion properly excused the juror when he stated upon reexamination that he could not vote for a verdict of guilty with knowledge the death penalty would be imposed even though he was satisfied of defendant's guilt.

7. **Constitutional Law § 29— absence of systematic exclusion of members of defendant's race**

Defendant failed to show that members of his race were systematically or arbitrarily excluded from the jury panel by the district attorney.

8. **Criminal Law § 66— identification testimony — necessity for voir dire**

When the State offers evidence of identification and there is an objection and a request for a *voir dire* hearing, the trial judge should conduct a *voir dire* and hear the evidence of both defendant and the State, find facts and determine the admissibility of the proffered evidence.

9. Criminal Law § 66— pretrial photographic identification — lawfulness

An out-of-court photographic identification at which a witness chose the photograph of defendant from a group of fifteen photographs of young black males was not unlawful and impermissibly suggestive and thus did not taint the witness's in-court identification of defendant.

10. Criminal Law § 66— lawfulness of lineup — identification of another at lineup — effect on in-court identification of defendant

A lineup was lawful and did not taint a witness's in-court identification of defendant where an attorney representing defendant's interest viewed the lineup, and the lineup consisted of six black males of approximately the same age and height and dressed alike; the fact that the witness failed to identify defendant at the lineup, but in fact identified another person as her husband's murderer, goes to the weight rather than the competency of her in-court identification testimony.

11. Homicide § 21— murder during robbery — sufficiency of evidence

Even if the victim's wife had not identified defendant as the person who killed her husband with a shotgun during a robbery, the State's other evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder where it tended to show that a white cloth bag containing money was taken from the victim by a black male, when defendant and a companion went to a witness's house shortly after the robbery, defendant was carrying a white cloth bag containing coins and currency, the companion was carrying a shotgun, and defendant removed from his pocket a pistol identified as belonging to the victim, the victim's pistol was later found in defendant's apartment, the witness heard defendant tell his companion he shot the victim because he saw the victim go for a gun, and defendant admitted he was in the vicinity of the crime at approximately the time it occurred.

12. Criminal Law § 113— failure to instruct on alibi

The trial court was not required to instruct the jury on alibi absent a request therefor by defendant; furthermore, the evidence did not require an instruction on alibi even if requested where defendant testified that he was in the vicinity of the crime at the time it occurred.

13. Criminal Law § 113— evidence defendant declared outlaw — absence of cautionary instruction

The trial court did not err in failing, without the request of defense counsel, to give a cautionary instruction that evidence concerning defendant having been declared an outlaw should not be considered as evidence of his guilt.

14. Constitutional Law § 36— death penalty — constitutionality

Imposition of the death penalty for first degree murder did not constitute cruel and unusual punishment.

State v. Waddell

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Thornburg, J.*, 6 January 1975 Session of the Superior Court of MECKLENBURG County.

Defendant was charged in an indictment, proper in form, with the first-degree murder of Alma Bertram Wood.

The State's evidence, in summary, was as follows:

Mrs. Margaret Wood, wife of deceased, testified that on 12 July 1974 she and her husband worked at his dry cleaning establishment until about 6:30 p.m. Upon closing the establishment, they started to their automobile. Mr. Wood, armed with a pistol, was carrying a bag containing the day's receipts. They encountered defendant at their car who at that uttered the word "Ha," and flipped some clothes from his arm revealing a sawed-off shotgun. He said "gimme the bag" and almost simultaneously with his demand, fired the shotgun toward Mr. Wood. Mrs. Wood observed defendant fleeing with the money bag and found her husband lying on his back with blood gushing from a wound in his neck. She identified State's Exhibit 5 as the pistol which her husband carried on that day. The witness, without objection from defense counsel, unequivocally identified defendant as the man who robbed and shot her husband with a sawed-off shotgun.

The State offered expert medical testimony to the effect that Mr. Wood died as a result of a wound inflicted by a shotgun, fired at close range.

Hazel Eugene Erwin testified that on 12 July 1974, he was driving by Mr. Wood's dry cleaning establishment when he heard a shot. He observed Mr. Wood stumbling backwards and saw a man wearing a lavender t-shirt and carrying a sawed-off shotgun grab a bag and flee to a nearby wooded lot.

Evelyn Byers testified that Eugene Johnson and Larry Waddell came to the house in which she lived with her mother shortly after 6:30 p.m. on 12 July 1974. She allowed defendant to use the telephone in the Byers' residence and heard him ask for "Dot" and thereafter heard him give directions to the Byers' house and ask that he be picked up there. At that time defendant had an off-white drawstring money bag containing coins and currency. Johnson was carrying a plastic bag which contained a broken-down shotgun. After defendant finished his telephone conversation, he asked her to take his braided hair

loose and comb it out. While she was unbraiding defendant's hair, he removed a pistol from his pocket. She identified State's Exhibit 5 as the pistol which she saw at that time. Upon her inquiry defendant told her that his name was Larry. The witness further testified that she heard Johnson ask defendant "Man, why did you shoot him?" Waddell responded "I seen him go for his gun." Shortly after this conversation defendant and Johnson left the house and rode away in a green car driven by an unidentified third person.

R. J. Whiteside, a Charlotte police officer, testified that Waddell was arrested for the murder of Alma Bertram Wood on 19 November 1974 in Apartment C-13 at 1701 West Boulevard, Charlotte, N. C. At the time of the arrest, Waddell was in the process of having his head shaved. The officer stated that he found two pistols in the apartment and one of the pistols was the one identified as State's Exhibit 5.

The State rested and defendant offered evidence tending to show the following:

Defendant testified that on 12 July 1974, at about 6:30 p.m., he met Ernest Johnson at the corner of Trade and Cedar Streets and Johnson inquired if he knew anyone who would give him a ride to Clanton Park. Upon his reply that he would have to make a telephone call, Johnson said that he knew a nearby place where the call could be made. They went to Evelyn Byers' house where Evelyn unbraided his hair and combed it out. He stated that he was not carrying anything with him at that time but that Johnson did have a package or a bag. He had no knowledge of its contents. He further stated that Eric Cunningham came by and gave them a ride to his (Waddell's) house. He denied he robbed or shot Mr. Wood.

John Alford, testifying for defendant, said that on 12 July 1974 he and Eric Cunningham picked up Waddell and Johnson at the Byers' home. Waddell was not carrying anything when he entered the car but Johnson was carrying a bag. When they arrived at Waddell's home, Johnson gave Waddell a gun and some money.

Marshall McCallum testified concerning a lineup procedure viewed by him and Mrs. Wood. We will consider this lineup procedure and the admissibility of the identification testimony more fully in the opinion.

Defendant moved for judgment as of nonsuit at the close of the State's evidence and at the close of the evidence for the defense. Both motions were denied.

The jury returned a verdict of guilty of first-degree murder and defendant appealed from judgment entered on the verdict imposing the death penalty.

Attorney General Rufus L. Edmisten, by Deputy Attorney General Jean A. Benoy and Associate Attorney David S. Crump, for the State.

T. O. Stennett for the defendant.

BRANCH, Justice.

[1] Defendant first contends he was denied a fair trial because he was put to trial after an order was entered declaring him to be an outlaw pursuant to G.S. 15-48 and before the order was rescinded.

G.S. 15-48 provides:

> In all cases where any justice or judge of the General Court of Justice shall, on written affidavit, filed and retained by such justice or judge, receive information that a felony has been committed, by any person, and that such person flees from justice, conceals himself and evades arrest and service of the usual process of law, the justice or judge is hereby empowered and required to issue proclamation against him reciting his name, if known, and thereby requiring him forthwith to surrender himself; and also empowering and requiring the sheriff of any county in the State in which such fugitive shall be to take such power with him as he shall think fit and necessary for the going in search and pursuit of, and effectually apprehending, such fugitive from justice, which proclamation shall be published at the door of the courthouse of any county in which such fugitive is supposed to lurk or conceal himself, and at such other places as the justice or judge shall direct; and if any person against whom proclamation has been thus issued continues to stay out, lurks and conceals himself, and does not immediately surrender himself, any citizen of the State may capture, arrest, and bring him to justice, and in case of flight or resistance by him, after being called on and warned to surrender, may slay him without accusation of any crime.

Defendant seems to take the position that the order declaring him an outlaw should have been rescinded before his trial. Obviously the statute only applied so long as defendant remained at large. Neither statutory provision nor necessity requires the rescission of such order once defendant is in custody. Further the record reveals that evidence concerning defendant's having been declared an outlaw was initially and repeatedly disclosed by defendant's counsel. On two occasions during the *voir dire* examination of prospective jurors defense counsel referred to the defendant having been declared an outlaw. Defense counsel also elicited the same information from defendant on his redirect examination and from police officer Whiteside on cross-examination.

Defendant cannot invalidate a trial by introducing evidence or by eliciting evidence on cross-examination which he might have rightfully excluded if the same evidence had been offered by the State. *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873; *State v. Williams,* 255 N.C. 82, 120 S.E. 2d 442; *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429. Neither is invited error ground for a new trial. *State v. Payne,* 280 N.C. 170, 185 S.E. 2d 101; *Overton v. Overton,* 260 N.C. 139, 132 S.E. 2d 349.

It appears that it was a part of counsel's plan and theory of defense to inform the jury that defendant had been declared an outlaw. Defendant cannot now successfully contend that the trial judge committed prejudicial error because he did not, *ex mero motu,* object to experienced counsel's plan of trial. This assignment of error is overruled.

Defendant's Assignment of Error No. 4 is as follows:

> The Trial Court erred in overruling defense objection to questions propounded by the State where no evidence had been offered that would substantiate the asking, and where State was eliciting testimony desiring the jury to infer therefrom that defendant had murdered another person.

The questions directed to defendant's witness John Thomas Alford on cross-examination to which defendant excepts are found on page 86 of the record, to wit:

> Q. That was the day you looked at the customers in there and said, "Cracker, look at me and I will blow your head off."
>
> OBJECTION. NO RULING.
>
> A. I didn't say that.

Q. You deny looking at a third customer and saying, "Honky, I am going to blow your God damned head off."?

DEFENSE COUNSEL: Objection. No ruling.

A. No, I didn't.

DEFENSE COUNSEL: Objection. No ruling.

Q. I will ask you if that wasn't the day you took a 38—

DEFENSE COUNSEL: OBJECTION.

COURT: Let me hear this question.

Q. I'll ask you if that wasn't the day you took a 38 automatic pistol and shot Gregory Leonard's heart out?

OBJECTION. OVERRULED.

A. No, I deny that.

[2] A witness, including a defendant in a criminal action, is subject to being impeached or discredited by cross-examination. *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174. The witness may be asked all sorts of disparaging questions and he may be particularly asked whether he has committed specified criminal acts or has been guilty of specified reprehensible or degrading conduct. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874; *State v. Jones,* 278 N.C. 88, 178 S.E. 2d 820; *State v. Bell,* 249 N.C. 379, 106 S.E. 2d 495. However, the rule remains that a witness cannot be impeached by cross-examination as to whether he has been arrested for or indicted for or accused of an unrelated criminal offense. *State v. Williams, supra.* The scope of cross-examination rests largely in the trial judge's discretion and his rulings thereon will not be disturbed unless it is shown that the verdict is improperly influenced thereby. *State v. Carver,* 286 N.C. 179, 209 S.E. 2d 785.

[3] Examination of the questions asked the witness Alford on cross-examination shows that they inquired only into specific criminal and reprehensible conduct on his part. There is no showing of abuse of discretion on the part of the trial judge as to the scope of the cross-examination or that the solicitor acted in bad faith.

All except one of the questions directed to the defendant Waddell and challenged by this assignment of error relate to

his actions immediately before and during the alleged murder and robbery. Representative examples of these questions are as follows:

> Q. And that when Mr. and Mrs. Wood started walking out, you told Ernest Johnson to sit there on the wall and wait for you, that you would take care of it, and you walked across the street?
>
> DEFENSE COUNSEL: Your Honor, I object to this because there is absolutely no evidence been offered here that would be in line with these questions he is asking, and I don't think that it is proper.
>
> COURT: OVERRULED.
>
> DEFENSE COUNSEL: The District Attorney is soliciting testimony without having any evidence introduced to go on.
>
> COURT: Overruled, go ahead.
>
> A. I deny that.
>
> Q. And that Ernest Johnson sat over there on the wall across the street while you walked up to Mr. Wood and blew his neck off with a sawed-off shotgun?
>
> OBJECTION. OVERRULED.
>
> A. He didn't set [sic] over there while I walked across the street. It didn't happen that way. I deny that we met down to the corner of Cedar and Fourth Street and that we two got back together.

[4] In this jurisdiction, cross-examination is not confined to the subject matter of direct testimony but may extend to any matter *relevant* to the case. *State v. Huskins,* 209 N.C. 727, 184 S.E. 480; *State v. Allen,* 107 N.C. 805, 11 S.E. 1016. We recognize this liberal practice for the purpose of allowing the cross-examiner to elicit details which might be favorable to his case, to bring out new and relevant facts and to impeach or cast doubt upon the credibility of the witness. 1 Stansbury's North Carolina Evidence (Brandis Revision) § 35, pps. 105, 107. *Barnes v. Highway Comm.,* 250 N.C. 378, 109 S.E. 2d 219.

[5] We hold that the questions asked defendant on cross-examination were relevant and were within the allowable purposes of cross-examination.

This assignment also challenges the following question:

> Q. Just one more question, as a matter of fact, I will ask you if you didn't on the 27th day of June, 1974, take that same shotgun and walk up to Marion Dale Kodel at the Payless Service Station at 3800 Wilkinson Boulevard and say, "Gimme the money bag," and bash him in the head with that same sawed-off shotgun?
>
> DEFENSE COUNSEL: OBJECTION, Your Honor.
>
> A. I did not.

This question was only directed to whether defendant had committed a specific criminal act and the question was therefore proper.

Defendant next contends that the trial judge committed prejudicial error by excusing prospective juror Stitt.

[6] During the *voir dire* examination of prospective jurors, both the defendant and the State accepted juror Stitt. Before impanelment of the jury, the District Attorney requested that he be allowed to further examine prospective juror Stitt. The District Attorney stated that Mr. Stitt's answers to defense counsel's *voir dire* questions had led the District Attorney to believe that he has misinterpreted Mr. Stitt's answers to the District Attorney's inquiries concerning the prospective juror's attitude toward imposition of the death penalty. The District Attorney, over defendant's objection, was allowed to make further inquiry. Mr. Stitt then stated that knowing that the death penalty would be imposed, he did not feel that he could vote for a verdict of guilty even though he was satisfied of defendant's guilt. Thereupon the trial judge, in his discretion, and at the request of the prospective juror, excused Mr. Stitt.

We have considered and decided the question presented by this assignment of error many times.

In *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, after both the State and defendant had accepted a juror, but before the jury was impaneled, it came to the judge's attention that service on the jury would result in extreme family hardship to juror Foster. We held that the judge's action in excusing the prospective juror Foster in this murder trial did not constitute prejudicial error.

In *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796, defendants were charged with murder. We there held that the trial judge did not commit prejudicial error by allowing the State, over defendant's objections, to reexamine a prospective juror after she had been passed by both the State and defendant when before impanelment the juror let it be known that she had changed her opinion about capital punishment.

In the very recent case of *State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51, the trial judge allowed the solicitor to examine and challenge one prospective juror for cause and another prospective juror to be peremptorily challenged after both jurors had been passed by the State and defendant when it came to the court's attention before the jury's impanelment that one of the prospective jurors had formed an opinion as to defendant's guilt. It was also established that the other prospective juror was well acquainted with defendant and the defendant was a close friend of the prospective juror's son. We found no prejudicial error in the reexamination and excusal of these prospective jurors. Accord: *State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241; *State v. Vann,* 162 N.C. 534, 77 S.E. 295; *State v. Vick,* 132 N.C. 995, 43 S.E. 626.

Although the court exercised its discretion in excusing prospective juror Stitt, the answers given by the prospective juror concerning his attitude toward the death penalty could have supported an excusal for cause. See *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280; *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750.

It is well established in this jurisdiction that it is the duty of the trial judge to see that a competent, fair and impartial jury is impaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law. *State v. Harris, supra; State v. Atkinson, supra; State v. Vann, supra.*

[7] Defendant states in his brief that the systematic maneuverings of the District Attorney excluded people of defendant's race. This contention is not supported by the record. Defendant fails to show that members of defendant's race were systematically

or arbitrarily excluded from the jury panel. See *State v. Noell, supra; State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768. We hold that the trial judge properly excused juror Stitt.

Defendant assigns as error the trial judge's denial of his motions for judgment as of nonsuit. He argues that Mrs. Margaret Wood was the only identifying witness and that her testimony was not sufficient to support a finding by the jury that defendant was the perpetrator of the crime charged.

During the direct examination of Mrs. Wood, the District Attorney asked Mrs. Wood if she could identify the man who shot her husband. There was no objection by defense counsel. In response to this question, Mrs. Wood stated "I see the man in the courtroom today that I saw murder my husband with a sawed-off shotgun." She then pointed to defendant Larry Waddell to indicate the person who shot her husband. On cross-examination Mrs. Wood admitted that during the police lineup in which defendant participated she identified another man as being her husband's assailant. She explained her misidentification: "I did not identify him because he was disguised. His head was covered with a toboggan and pulled down over. He had lost weight. I could not see his head."

There was unquestionably ample evidence to carry the case to the jury if Mrs. Wood's in-court identification was properly admitted into evidence.

[8] When the State offers evidence of identification and there is an objection and a request for a *voir dire* hearing, the trial judge should conduct a *voir dire* and hear the evidence from both the defendant and the State, find facts and determine the admissibility of the proffered evidence. *State v. Accor, State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583. Nevertheless our decisions require that there be at least a general objection in order to invoke *voir dire* proceedings. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534; *State v. Cook,* 280 N.C. 642, 187 S.E. 2d 104. However, in capital cases it is our practice, despite counsel's failure to observe recognized rules, to carefully examine the record for prejudicial error. We, therefore, elect to further consider the admission of the unchallenged identification testimony.

The record shows that several weeks after the killing, Mrs. Wood was shown about fifteen photographs of young black

males and at that time she picked the photograph of defendant Waddell as a photograph of the person who robbed and killed her husband. This evidence was initially brought out by defense counsel and the above summary represents all we find in the record concerning the photographic identification.

[9] We do not extend the right of counsel's presence to out-of-court examinations of photographs which include a suspect, whether he be in custody or at liberty. *State v. Accor, State v. Moore, supra.* Nor do we find anything in this record which indicates that the out-of-court photographic identification was unlawful and impermissibly suggestive. Thus the in-court identification was not tainted by the out-of-court photographic identification.

Our search of the record also discloses that a lineup was conducted on 20 November 1974 and that defendant was one of the persons in the lineup.

It is well settled that lineup procedures which are "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" violate due process and are constitutionally unacceptable. *Simmons v. United States,* 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967; *State v. Smith,* 278 N.C. 476, 180 S.E. 2d 7; *State v. Austin,* 276 N.C. 391, 172 S.E. 2d 507. It is also established by decisions of this Court and the federal courts that an accused must be warned of his right to counsel during such confrontation and unless presence of counsel is understandingly waived testimony concerning the lineup must be excluded in absence of counsel's attendance. Further if there be objection to an in-court identification by a witness who participated in an illegal lineup procedure, such evidence must be excluded unless it be determined on *voir dire* that the in-court identification is of independent origin and therefore not tainted by the illegal lineup. *Gilbert v. California,* 388 U.S. 263, 18 L.Ed. 2d 1178, 87 S.Ct. 1951; *United States v. Wade,* 388 U.S. 218, 18 L.Ed. 2d 1149, 87 S.Ct. 1926; *State v. Smith, supra.*

[10] In the instant case defense counsel again elicited information concerning the lineup and later offered as a defense witness, Marshall McCallum, an attorney who practices in Charlotte, N. C. Mr. McCallum testified that he attended the lineup on 20 November 1974 and that "he was requested to view the lineup by an attorney who was representing Waddell's interest."

He also represented another person who appeared in the lineup. He stated that the lineup which he and Mrs. Wood viewed consisted of six black males of approximately the same age and the same height. They were all dressed in t-shirts, dark pants and green toboggans. Each of the men came towards the viewing partition and made a complete turn so as to expose both sides of his face. During the lineup Mrs. Wood requested that Waddell say "Gimme the bag." She also requested that James Nealy, one of the men in the lineup, be asked to repeat the same phrase. Both men complied and Mrs. Wood thereafter identified Nealy as the man who robbed and killed her husband. This record discloses absolutely no evidence that the lineup as conducted was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Further the uncontradicted evidence shows that an attorney representing defendant's interest was present to view the lineup. Thus there was no illegal lineup to infect the in-court identification.

The fact that Mrs. Wood failed to identify defendant at the lineup, and in fact identified another person as her husband's murderer goes to the weight rather than the competency of the testimony and is a matter for the jury. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21; *Lewis v. United States,* 417 F. 2d 755.

We are of the opinion that had there been a *voir dire* procedure the evidence which appears in this record would have supported a ruling admitting Mrs. Wood's identification testimony into evidence. In our search for possible prejudice in the admission of this evidence, we also note that the evidence of Mrs. Wood's misidentification at the lineup would seem to have been favorable to defendant. Finally if the witness Wood had not testified as to defendant's identity, there was other sufficient substantial evidence as to every element of the crime charged to repel defendant's motions for judgment as of nonsuit.

[11] Mrs. Wood testified that her husband was robbed and was killed by a shotgun wielded by a black man at about 6:30 p.m. on 12 July 1974. She generally described this man and the clothes he was wearing. Mrs. Wood stated that her husband carried money in a "white cloth bag with . . . two tie strings that came together." The witness Byers testified that defendant and Eugene Johnson came to her house shortly after 6:30 p.m.

on 12 July 1974. Defendant was carrying a white drawstring money bag containing coins and currency. Johnson was carrying a shotgun. While defendant was in her home and while she was unplaiting his hair, he removed a pistol from his pocket. She identified this pistol at trial and the witness Wood identified the same pistol as the pistol her husband was carrying on the day that her husband was killed and robbed. The same pistol was found in the apartment where defendant was apprehended and arrested. Witness Byers further testified that she heard Johnson ask Waddell, "Man, why did you shoot him?" Waddell responded "I seen him go for his gun." Defendant testified and admitted that he was in the vicinity in which the crime occurred at approximately the time of the crime. He further admitted that he was in the home occupied by the witness Byers on the same date shortly after 6:30 p.m.

Thus, applying the well recognized and often repeated rules governing the granting or denial of motions for judgment as of nonsuit, we hold that the trial judge properly denied defendant's motions for judgment as of nonsuit.

The Attorney General filed a "caveat" to his brief in which, acting as an officer of the Court, he calls to our attention, without citation of authority, several matters which he suggest we should consider *ex mero motu.*

The State suggests that the trial judge should have, without request by defense counsel, instructed on the law of alibi.

[12] We formerly held that when a defendant offered evidence of alibi it was incumbent upon the trial judge to charge as to the legal effect of such evidence without a request by defendant for such instructions. *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175. However, since the decision in *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (filed 12 July 1973), the trial judge is not required to instruct on alibi unless defendant specifically requests such instruction. Further, unless there is evidence that the accused was at some other specified place at the time the crime was committed, the evidence would not require a charge on alibi even had there been a request for such charge. Neither does a mere denial that he was at the scene of the crime require the charge. In such case, the general charge that the jury should acquit the defendant unless it is satisfied beyond a reasonable doubt that the defendant committed the crime is sufficient. *State v. Green,* 268 N.C. 690, 151 S.E. 2d 606. Here a cursory

reading of the record would show that the crime was committed at the corner of Trade and Cedar Streets in the City of Charlotte on 12 July 1974 at approximately 6:30 p.m. Defendant Larry Waddell testified that he was on the corner of Trade and Cedar Streets on 12 July 1974 at around 6:30 p.m. Thus there was insufficient evidence to require the instruction on alibi even had there been a special request for it.

[13] The State also points to the failure of the trial judge, without request of defense counsel, to give a cautionary instruction that evidence concerning defendant having been declared an outlaw should not be considered as evidence of guilt. We doubt that such an instruction would have been beneficial to defendant. It is altogether possible that the instruction by the trial judge would have magnified rather than diminished the harmful effect of the evidence which had repeatedly been elicited by defense counsel.

Finally one of the matters to which the State directs our attention is whether the trial judge should have assumed greater responsibility in the control of the trial. We join in the State's concern that the trial judge, the prosecutor, the appellate courts as well as defense counsel should strive to give every accused a fair trial. However, it must be borne in mind that criminal trials are adversary in nature and to require a trial judge to unduly intrude into counsel's plan of trial, to constantly interpose objections or to guess whether counsel desires *voir dire* hearings when counsel remains silent would prolong *ad finitum* trials and final judgments in criminal cases. Such requirements would weight the scales of justice to the criminal and retard fair and speedy trials. The State, as well as defendant, is entitled to a fair trial.

[14] Defendant's contention that judgment should be arrested because the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected by this Court in many recent decisions. We do not deem it necessary to again set forth the exhaustive reasoning of these cases. *State v. Robbins,* 287 N.C. 483, 214 S.E. 2d 756; *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262; *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844; *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6; *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Waddell,* 282 N.C. 431, 194 S.E. 2d 19.

Our careful search of this entire record discloses no error warranting a new trial.

No error.

STATE OF NORTH CAROLINA v. TED LEMUEL CARTER

No. 54

(Filed 17 December 1975)

1. **Bill of Discovery § 1— criminal prosecution — list of State's witnesses**

Absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him, and neither former G.S. 15-155.4 nor new G.S. 15A-903 requires this.

2. **Criminal Law § 87; Witnesses § 1— witnesses not on list furnished defendant — photographs not furnished defendant**

In a first degree murder case wherein the State was ordered to make available to defendant a list of all prospective witnesses for the State and any tangible evidence to be used against him, the trial court did not err in allowing two witnesses whose names had not been disclosed to defendant to testify and in admitting photographs which had not been furnished to defendant where there was no evidence of bad faith on the part of the State, the name of one witness was on file with the clerk as a subpoenaed witness, the name of the second witness appeared on a firearms report furnished defendant, and the photographs were competent only for illustrative purposes.

3. **Criminal Law § 26— recess of trial until following week — unavailability of witness — double jeopardy**

Defendant was not placed in double jeopardy when his murder trial, which had begun on 6 January, was recessed on 8 January until the next week, the second week of the same session, because of the unexpected inability of a scheduled witness to be present due to his physical condition.

4. **Criminal Law § 76— admissibility of confession — time findings entered in record**

Defendant was not prejudiced by failure of the court to enter its findings and conclusions on the admissibility of defendant's in-custody statement at the time the *voir dire* hearing was held where the *voir dire* hearing was held shortly before the trial was recessed on 8 January, the trial judge announced that he would permit the State to offer the statement into evidence and stated that he would give the reporter his findings and conclusions in writing and put them in the record at the proper time, and the findings and conclusions were placed in the record on the date the trial resumed, 15 January.

5. **Criminal Law § 75— admissibility of in-custody statement**

Defendant's contention that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered his in-custody statement involuntary is without merit where the court found upon competent evidence that defendant was not interrogated on the evening he was arrested because he was drunk, defendant was not intoxicated from liquor or drugs on the following day when he was interrogated, defendant was twice allowed to buy food during the day of his interrogation and was furnished cigarettes, food and coffee throughout the evening, defendant was questioned in all for a total of only two hours, and defendant signed a written waiver of his rights.

6. **Criminal Law § 90— introduction of defendant's statement by State — showing facts are different**

Introduction by the State of an exculpatory statement made by the defendant does not preclude the State from showing that the facts concerning the crime were different.

7. **Homicide § 21— first degree murder during robbery — introduction of defendant's exculpatory statement — sufficiency of State's evidence**

The State's evidence was sufficient for the jury in this prosecution for first degree murder committed in perpetration of armed robbery of a store proprietor, notwithstanding the State introduced defendant's in-custody statement that he did not intend to rob or kill the store proprietor, that he had no gun, that defendant's companion shot the proprietor after the proprietor had pulled a gun during an argument over payment for cigarettes, and that defendant's companion took money and checks from the store, where other evidence tended to show that defendant had borrowed the murder weapon before the crime, defendant had possession of and hid the murder weapon and the victim's gun shortly after the crime, defendant thereafter attempted to sell the murder weapon, defendant asked a third person a few days before the shooting to help him rob two other stores but the third person refused, shortly after the shooting defendant and his companion were in possession of several hundred dollars and checks which had been cashed at the victim's store, and defendant told his girl friend that he and his companion had killed and robbed the victim.

APPEAL by defendant under G.S. 7A-27(a) from *Ervin, J.*, at the 6 January 1975 Session of GASTON Superior Court.

Defendant was tried and convicted of the first degree murder and armed robbery of Benjamin Stroupe. The mandatory death sentence was imposed for the murder conviction. No sentence was imposed on the robbery conviction.

Evidence introduced by the State tends to show the following: On 30 July 1974 defendant, David "Monkey" Chandler (Chandler) and defendant's girl friend "Cherokee" visited the

home of Milous Holland where defendant borrowed Holland's .32-caliber pistol, purportedly for protection in a poker game. On 2 August 1974, defendant and Chandler were at the Smyre Gang Clubhouse located near Spencer Mountain when Harold Davis arrived around 8:00 a.m. Davis loaned his 1973 red Vega with a white stripe down the side, license number BJZ-388, to defendant and Chandler who left around 8:30 a.m. with defendant driving and returned shortly after noon.

On 2 August 1974, J. H. "Pop" Jordan was operating a store near McAdenville. He opened the store at 10:00 a.m. that day. A few minutes later a red car with a white stripe down the side stopped out front and the two occupants of the car, Chandler and defendant, came in. Chandler wanted to sell Jordan a .22-caliber rifle but Jordan did not need it. Chandler and defendant stayed for a while, leaving around noon.

Around noon on 2 August 1974, Homer Wright was in the vicinity of Ben Stroupe's store in Ranlo. While waiting for the light to change at the intersection where Stroupe's store is located, he had occasion to see defendant and another man walk to the front door of the store and observed that they were unable to enter. As the light changed and he drove on, he saw a red car parked at the corner of the store. He noted three numbers on the license plate—388.

On 2 August 1974, Mrs. Patricia Bingham was stopped at the intersection beside Ben Stroupe's store at about 12:15 p.m. when she saw two males, one being the defendant, come out of the side door of Stroupe's store and speed away in a red Vega with a white stripe.

Around 2:30 or 3:00 p.m. on 2 August 1974, Roy Franklin McGinnis arrived at the Smyre Gang Clubhouse. Defendant and Chandler were already there, holding a large number of one dollar bills which they wanted to exchange for larger bills. At the time, defendant was also playing with a pistol. McGinnis then drove Chandler to various stores and banks where Chandler attempted to cash payroll checks that had already been endorsed with different signatures. Two of these checks had been cashed by Ben Stroupe the night before the killing.

Various law enforcement officers testified that Ben Stroupe's body was found in a pile of newspapers in the store and that death occurred from two .32-caliber bullet wounds in the chest.

Late in the afternoon of 2 August 1974, Paul Bledsoe was at the Smyre Clubhouse where he saw defendant with a .32-caliber pistol that would not fire. Shortly thereafter, defendant was seen hiding the pistol inside an old washing machine behind the clubhouse. Bledsoe retrieved this pistol and later turned it over to the authorities. The pistol was identified as that owned by Ben Stroupe.

Later in the evening of 2 August 1974, defendant was at the home of Donald Terry where he sold Terry a .32-caliber handgun with three cartridges in it, two fired and one unfired. Terry had planned to sell the pistol, but after reading of Mr. Stroupe's death turned it over to the authorities in Ranlo. This pistol was later identified as the murder weapon.

On 4 August 1974, defendant made a statement to J. G. Berrier, an agent of the State Bureau of Investigation, as follows:

> "About four A.M. to 4:30 A.M. on Friday, August 2, 1974, I took some MDA by injecting it into myself with a needle and syringe. About twenty minutes before leaving the Smyre Gang Clubhouse at 7:30 that same morning, I snorted some acid. I had drunk beer all night on the preceding Thursday night. Arthur David Chandler, known to me as 'Monkey', and I left the Smyre Gang Clubhouse in a borrowed red Chevrolet Vega belonging to Harold Thomas Davis. 'Monkey' and I first traveled to 'Monkey's' home and obtained a .22 caliber rifle, a pack of cigarettes, and a coat. We next drove to the home of a friend, Chris Christopher who lives in Lowell; but he was not at home. 'Monkey' and I next traveled to Pop's, an establishment located in McAdenville. We arrived at Pop's about nine o'clock a.m. and remained there for about two to two-and-a-half hours playing the pinball machine and some poker. 'Monkey' and I left Pop's and went to Ben Stroupe's store to get a PENTHOUSE magazine. When we arrived at Ben's place, I parked the car at the side entrance to the store and walked to the front door but could not get in that door. Ben Stroupe came to the side door, unlocked it, and let us inside. 'Monkey' and I had walked to the front of the store, but all we saw there were comic books. We asked Ben where the girlie books were located, and he showed us their location. I asked to buy a pack of Kool cigarettes, and Ben went behind the counter to get them. Ben handed me the Kools, and I paid

him. I continued looking at the magazine until 'Monkey' said, "Let's go." Then, Ben asked me to pay for the cigarettes, and I told him that I had already paid him. Ben pulled out a revolver from his right hip pocket, pointed the gun at me, and began cursing and raising hell. 'Monkey' told Ben to put the gun up. 'Monkey' grabbed Ben's gun. I don't know whether 'Monkey' went around or over the counter. I jumped over the counter and landed on top of 'Monkey' and Ben. The gun which was in Ben's hand went off. 'Monkey' got up. Ben got up, pointed the gun at me, pulled the trigger; and it snapped. Ben ran toward the rear room of the store. 'Monkey' took the gun away from Ben who was still wanting to fight. Ben moved out of my line of sight into a rear room. I could see 'Monkey's' back, but that was about all in that room. I heard another shot and just about flipped totally out. I didn't want to look in the back room, but I could see Ben's feet as he lay on the floor. I ran to the car and about left 'Monkey' behind. I did not know that he had taken anything from the store until later when we returned to the clubhouse. 'Monkey' and I pulled away from the store in the red Chevrolet Vega, turning to the right off of Cox Road and onto Highway 7. We pulled up right beside a police car in front of Ben's Place at this time. I was so afraid that I would not even look at the police car. Everything was mass confusion in my mind at this point. We returned to the clubhouse. 'Monkey' and I stayed at the clubhouse about ten minutes and drank some more beer. We decided to go back to Ben's Place to wipe our fingerprints off anything we might have touched inside the store. When we arrived at the store, I could not make myself go inside. 'Monkey' went inside; and after he remained there for several minutes, I blew the car horn twice for him to come outside. He finally came out with about three paper bags. There were a few dollars in each of them. We left Ben's Place and traveled to the American Service Station located across from the Scottish Inn in Gastonia where we bought two dollars worth of gas and a case of Budweiser beer. We left this location and went to the Seven-Eleven Store located on New Hope Road near Stanley and Dallas. We bought another case of beer at this location and then returned to the clubhouse. I don't know what time it was when we returned. 'Monkey' and I stripped out the contents of the bags, which we had

taken from Ben's Place and burned some of the papers which were in them. A man who was at the clubhouse whose name I don't know but who drives an exterminating truck took 'Monkey' to cash the checks which came from Ben's Place. When 'Monkey' returned from cashing the checks, he gave me some money and one check which he was unable to get cashed. I put the money and check in my back pocket. When I went to bed on Friday night, August 2, 1974, I put the money under the mattress under the bed in which I slept. On Saturday morning, August 3, 1974, I gave four hundred dollars in cash to a friend named Bill whose last name I do not know. Bill is also known to me as 'Pack.' I gave Bill the four hundred dollars because his girl friend needed an abortion. After giving the money to Bill, I had some cash left; but I don't know how much. I told my girl friend, Cherokee, after the incident at Ben's Place that 'Monkey' and I had shot Ben Stroupe and robbed him. She became very moody upon learning what we had done."

Defendant took the stand and his testimony, which closely followed the statement given by him to Agent Berrier, tended to show that he and Chandler had gone to Stroupe's to look at girlie magazines, particularly The Penthouse Annual. He bought a pack of cigarettes and as they prepared to leave, Stroupe accused him of not paying for the cigarettes and pointed a gun at them but it did not fire. Defendant did not have a weapon but dived over the counter onto Stroupe at which time the gun Stroupe had been holding hit the floor and fired. Stroupe got up, holding his chest and said he was going into the back room to get another gun. Chandler followed Stroupe and defendant heard another shot, ran out the door and started the car, waiting for Chandler. He did not intend to rob or kill Ben Stroupe and did not know how he ended up with the cash and checks. He did tell his girl friend Cherokee that he and Chandler had robbed and killed Ben Stroupe.

Further facts pertinent to decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General William F. O'Connell for the State.

Jeffrey M. Guller for defendant appellant.

MOORE, Justice.

Defendant first contends that the trial court erred in overruling his motion to strike the testimony of Homer Wright and to suppress the testimony of Fred Hurst, and in allowing the introduction of certain photographs. The record discloses that a district court judge and Superior Court Judge Grist entered orders directing the State to make available to defendant, among other information, a list of all prospective witnesses for the State and any tangible evidence that might be used against him.

The trial judge, upon hearing defendant's motion, found that no photographs had been made available to defendant, that the name of the witness Homer Wright had not been disclosed to defendant but was on file with the clerk of court as a subpoenaed witness, and that the name of witness Fred Hurst had appeared on a firearms report furnished to defendant. Judge Ervin then ruled that the disclosure orders did not clearly indicate that the photographs should be furnished, but if they were included within the scope of the orders they were only competent to *illustrate* the witness's testimony, and that defendant was not prejudiced by their use. Concerning the testimony of Fred Hurst, Judge Ervin ruled that defense counsel's possession of Hurst's signed report provided him with sufficient notice of Hurst's testimony but any additional documents relating to Mr. Hurst should be made available to defendant prior to Mr. Hurst's testimony. The court ruled further that the testimony of Homer Wright was essentially cumulative to the statement of Patricia Bingham which had been provided defendant.

[1, 2] No right of discovery in criminal cases existed at common law. *State v. Davis,* 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334 (1964), *cert. den.* 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). Therefore, absent a statutory requirement, the defendant in a criminal case is not entitled to a list of witnesses who are to testify against him. *State v. Hoffman,* 281 N.C. 727, 190 S.E. 2d 842 (1972). Neither former G.S. 15-155.4 nor new G.S. 15A-903 requires this. Here, however, as in *Hoffman,* an order to supply defendant with certain information had been issued and the State had purported to comply with it. No evidence of bad faith on the part of the State is shown. *See State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975). Thus, the

question presented is whether the omission of the names of Homer Wright and Fred Hurst prejudiced defendant and deprived him of a fair trial. The trial court held not. We agree. Permitting these witnesses to testify and accepting the photographs into evidence were matters within the discretion of the trial judge, not reviewable on appeal in the absence of a showing of an abuse of discretion. *State v. Carey,* 285 N.C. 509, 206 S.E. 2d 222 (1974); *State v. Hoffman, supra. See also State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336 (1972). No such abuse of discretion is shown. This assignment is overruled.

[3] Defendant next assigns as error the refusal of the trial court to grant his motion to dismiss based on double jeopardy. This trial began on 6 January 1975 with a jury being empaneled, pleas entered, and certain testimony heard. On 8 January 1975, it was determined that one of the State's witnesses, Mr. Fred Hurst, was undergoing surgery and would be unable to testify until the next week. It appears that the district attorney was aware at the trial's inception that this witness was having minor surgery but had been assured that he would be available to testify on either 8 or 9 January.

The trial was then recessed until the next week, the second week of the same session, with the jury being recalled on 15 January. Defendant concedes that the jury was well instructed prior to the temporary recess and questioned upon their return concerning any preconceptions or conclusions they might have reached. Defendant did not object at the time the recess was ordered but before resumption of the trial on 15 January, defendant did object on the ground that if the trial were resumed defendant would be placed twice in jeopardy for the same offense. Jeopardy attaches when a defendant in a criminal prosecution is placed on trial (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn to make true deliverance in the case. *State v. Neas,* 278 N.C. 506, 180 S.E. 2d 12 (1971); *State v. Birckhead,* 256 N.C. 494, 124 S.E. 2d 838 (1962); *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954); 2 Strong, N. C. Index 2d, Criminal Law § 26, p. 516. Defendant, in support of this position, relies upon two federal cases and one North Carolina Court of Appeals case. *Downum v. United States,* 372 U.S. 734, 10 L.Ed. 2d 100, 83 S.Ct. 1033 (1963), and *Cornero v. United States,* 48 F. 2d 69 (9th Cir. 1931), each

involved a situation wherein a jury was empaneled but then discharged prior to completion of the first trial and the defendant was then brought to trial at a later date before a newly empaneled and different jury. *State v. Coats,* 17 N.C. App. 407, 194 S.E. 2d 366 (1973), involved a defendant who was charged with drunken driving and brought to trial for the first time in district court. During the trial, the case was continued until a later date in order to give the district attorney time to subpoena an additional witness. At the second trial in the district court, apparently the trial was begun anew with the defendant again entering pleas, etc. These three cases are distinguishable from the case at bar, and the proceedings in them were understandably held to amount to double jeopardy. The simple answer to defendant's contention in present case is that he was not subjected to double jeopardy because he was only subjected to one trial. Here, there was merely a temporary interruption of the trial based upon the unexpected inability of a scheduled witness to be present due to his physical condition. This interruption did not deprive the defendant of his right to a speedy trial, did not cause any arbitrary or oppressive delay and did not handicap the defendant in the presentation of his case. The course and conduct of a trial are matters largely within the discretion of the trial court. *See State v. Cavallaro,* 274 N.C. 480, 164 S.E. 2d 168 (1968); *Shute v. Fisher,* 270 N.C. 247, 154 S.E. 2d 75 (1967); *Cleeland v. Cleeland,* 249 N.C. 16, 105 S.E. 2d 114 (1958). No prejudice to defendant and no abuse of discretion by the court is shown. This assignment is overruled.

[4] The trial court admitted into evidence the statement made by defendant to Agent Berrier concerning the shooting. Defendant contends that its admission was error and, further, that the trial court's findings of fact and conclusions of law were not entered into the record at the proper time. An extensive *voir dire* hearing was conducted immediately prior to the temporary recess on 8 January. The findings of fact and conclusions of law are in the record dated 15 January, the date the trial resumed. It is true, as defendant contends, that in *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), this Court indicated that it was the better practice to make the findings of fact and conclusions of law at some time during the trial, and preferably at the time the statement is tendered and before it is admitted. In this case, prior to entering the order, the trial judge announced that he would permit the State to offer the statement

into evidence and said that he would give the reporter his findings of fact and conclusions of law in writing and put them into the record at the proper time. We find nothing wrong with this procedure and see no prejudice to defendant.

[5] Defendant strenuously contends, however, that his lack of sleep and food and his heavy use of drugs and alcohol shortly before his periods of interrogation rendered any statement involuntary.

After an extensive *voir dire* hearing, the trial court found, in part, that on Friday evening, 2 August 1974, defendant was drunk and was not interrogated at that time because Chief Trull did not believe that he was in condition to be questioned; that on Saturday morning, between 9:00 and 9:30 a.m., 3 August, defendant was in good shape and was not under the influence of intoxicating liquors or drugs; that defendant was not in custody at the time and was allowed to go across the street where he bought some crackers, cookies and a quart of chocolate milk; that on Saturday afternoon defendant was taken to a burger barn where he got some hot dogs and french fries, later took a nap for about one hour, and that throughout the evening he was supplied with cigarettes, food and coffee by the officers; that when the defendant was first questioned, Agent Berrier read him his rights verbatim from a printed form, that he gave defendant a copy of this form and that after his rights were read to him defendant read and signed the waiver of rights; that beginning about 9:00 or 9:30 p.m. and before questioning, Agent Berrier again read defendant his rights and defendant again signed a waiver of rights; that defendant was questioned in all for a total of two hours; that the defendant is twenty-five years old; that he completed the eleventh grade in high school, dropping out his senior year, but that he subsequently obtained a high school diploma by taking the GED examination, and that he also successfully completed a correspondence course in drafting and plan reading and qualified as a union carpenter by passing a written examination; and that he affirmatively and knowingly waived his right to have an attorney present during questioning. These findings of fact were amply supported by competent evidence, and so supported are binding on appeal. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Pruitt,* 286 N.C. 442, 212 S.E. 2d 92 (1975); *State v. Bishop; State v. Baskin; State v. Thompson; State v. McCain,* 272 N.C. 283,

158 S.E. 2d 511 (1968). Based upon the findings of fact, the court concluded that defendant was fully advised of his rights in accordance with the *Miranda* warnings, and that the statements made by the defendant were freely, understandingly and voluntarily made and were not induced by any coercion, duress, threats, undue influence or promises of leniency. We agree with the trial judge's conclusions that the pretrial statement was freely, understandingly and voluntarily made and was therefore properly admitted into evidence.

[6, 7] Defendant next assigns as error the denial of his motion for judgment as of nonsuit. Specifically, he contends that he comes within the purview of the rule stated in *State v. Bolin*, 281 N.C. 415, 189 S.E. 2d 235 (1972), that "'[w]hen the State introduces in evidence exculpatory statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements.' *State v. Carter*, 254 N.C. 475, 479, 119 S.E. 2d 461, 464 (1961), and cases cited. [Citations omitted.]" However, it is equally well established that the introduction by the State of an exculpatory statement made by the defendant does not preclude the State from showing that the facts concerning the crime were different. *State v. Bolin, supra; State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Bright*, 237 N.C. 475, 75 S.E. 2d 407 (1953). On motion for judgment as of nonsuit the evidence must be considered in the light most favorable to the State and the State must be given the benefit of every reasonable intendment thereon and every reasonable inference to be drawn therefrom. Contradictions and discrepancies even in the State's evidence are matters for the jury and do not warrant nonsuit. *State v. Bolin, supra; State v. Murphy*, 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Cutler*, 271 N.C. 379, 156 S.E. 2d 679 (1967).

When the evidence in this case is so considered, the jury could find the following facts despite certain statements to the contrary by defendant:

(1) Defendant borrowed the murder weapon on Tuesday, 30 July 1974.

(2) Defendant had possession of the murder weapon and the victim's weapon on the afternoon of 2 August 1974 when he was seen hiding them in an old washing machine behind the clubhouse.

(3) Defendant sent his girl friend Cherokee to retrieve the murder weapon from its hiding place in order to sell it to Donald Terry. Terry, upon cleaning the pistol, found that it had been fired twice.

(4) Defendant had asked one Bill Pack a few days before the shooting to help him rob "Pop's" and another store in McAdenville but Pack refused.

(5) Defendant and Chandler were in possession of several hundred dollars on the afternoon of 2 August 1974 and several payroll checks that had already been endorsed, at least two of which were identified as having been cashed at Stroupe's Place the night before the shooting.

(6) Defendant admitted telling his girl friend Cherokee that he and Chandler had "killed and robbed Ben Stroupe."

We find the evidence presented by the State sufficient to carry the case to the jury on the murder charge contained in the bill of indictment. Defendant's motions for judgment as of nonsuit were properly denied.

Defendant's final contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible has been rejected by this Court in many recent decisions, including *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975); *State v. Stegmann*, 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Honeycutt*, 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard*, 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (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 those decisions.

Our careful search of this entire record discloses no error warranting a new trial.

No error.

STATE OF NORTH CAROLINA v. HAROLD DAVID POOLE

No. 62

(Filed 17 December 1975)

1. **Criminal Law § 34— kidnapping case — evidence of commission of rape — admissibility**

The trial court in a kidnapping case did not err in allowing the kidnap victim's testimony that defendant committed the crime of rape in addition to the crime of kidnapping, since the purpose for which defendant carried his victim into the woods was obviously relevant to the charge of kidnapping, among other things bearing directly upon the motive for kidnapping her, and the rape and kidnap were a part of the same transaction and were so connected in time or circumstance that one could not be fully shown without proving the other.

2. **Criminal Law § 86— cross-examination of defendant — prior crimes — inquiry proper**

A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, but he may be asked if he in fact committed the crime; therefore, the trial court in a kidnapping case did not err in allowing the district attorney to cross-examine defendant regarding other alleged kidnappings when he had not been convicted of such crimes.

3. **Criminal Law §§ 114, 117— jury instruction — testimony of interested witnesses scrutinized — use of word "his" — no expression of opinion**

The trial court's admonition to the jury to scrutinize the testimony of any interested witness and the court's use of the pronoun "his" in referring to the testimony of such witness did not constitute an expression of opinion upon the credibility of defendant, since the court used the term "his" to refer to all the witnesses who testified, both male and female, and since the court's admonition to scrutinize included not only the defendant but also the testimony "of any witness" and such instruction was proper.

4. **Criminal Law § 114— jury instructions — use of word "rape" — curative instruction — no error**

The trial court's instruction to the jury that, "The evidence of the State further tended to show that before the defendant raped Phyllis McGill she pretended to faint; . . . " did not amount to an expression on the judge's part that such fact had been established, since the language complained of was used by the judge while recapitulating the State's evidence, the jury was instructed elsewhere in the charge that what the evidence actually did show was a question of fact for the jury, and the trial judge gave the jury a full and adequate curative instruction regarding the use of the word "rape."

DEFENDANT appeals from judgment of *Long, J.*, 28 April 1975 Session, MOORE Superior Court.

Defendant was tried upon a bill of indictment charging that on 11 March 1975 in Moore County he unlawfully, willfully, feloniously and forcibly kidnapped Phyllis Cooper McGill.

Phyllis Cooper McGill testified that she lived in Raleigh. On 11 March 1975 she had a dental appointment in Robbins, North Carolina, and left Raleigh on that date to keep the appointment. After passing through Carthage and while proceeding toward Robbins, she noticed a green Plymouth following her. She thought it was a policeman. The green Plymouth followed her rather closely for three or four miles and its driver turned on a red flashing light. Confirmed in the notion that it was an officer, she pulled over, cut off her engine and began searching through her pocketbook for her driver's license. Defendant got out of the green Plymouth, walked to Mrs. McGill's car and told her the right tire was coming off her car. She opened the door to investigate, then, sensing something was wrong since he was not in uniform, slammed the door and tried to start her car. At this point defendant grabbed her hands, opened the car door, pushed Mrs. McGill over and seated himself under the wheel. He told her to calm down and be quiet. He told her the Moore County police were after him and he wanted her to take him to his mother's home in Montgomery County where he would let her go. He started the car, drove it about five hundred yards but seemed to be stripping the gears. Mrs. McGill screamed that he was tearing up the car, whereupon he told her to drive. She got under the wheel and drove as he directed. They went through the back streets of Robbins and drove five or six miles over back roads into Montgomery County. Leaving the paved roads, they went down a dirt road for about five miles. Upon reaching a secluded area in the woods he commanded her to stop and took the keys from her car. Then, at his command, she walked deeper into the woods, stopping from time to time along the way. Eventually they sat down and defendant said: "You know what is going to happen now don't you?" She told him she had a pretty good idea.

At this point Mrs. McGill pretended to faint. Defendant grabbed her around the neck and said if she did not do as he directed he would have to kill her. He removed her clothing and had sexual relations with her three or four times. He told her he would have to kill her to prevent her from reporting the incident. She feared for her life and reassured him that

she wouldn't notify the authorities. It suddenly began to rain and defendant seemed unable to find his way out of the woods. She took him by the hand, told him he was going the wrong way, and directed their course out of the woods and back to her car. On the way back to his car they talked quite a bit and defendant "acted like he was real sorry it had happened." He left Mrs. McGill's car at the point where his green Plymouth was parked. She thereupon drove to the home of her parents who lived nearby in Moore County and told them what had happened. Officers were called and defendant was later apprehended. She had never seen him prior to that afternoon.

Deputy Sheriff Ernest Hooker investigated the case. He testified he had known defendant six or eight months, was familiar with the 1969 green four-door Plymouth he operated, and found a red light on the front seat of it on the day following this offense.

Defendant testified as a witness in his own behalf. He said that on 11 March 1975 at about 2 p.m. he was in his Plymouth at a street intersection in Carthage. He saw Mrs. McGill smile and wave at him as she drove away from the intersection in a red MG. He followed her to the point where they stopped, a distance of several miles. He attempted to pass her several times but she would speed up—"It seemed she wanted to play a game." He stated he had a red light in his car and blinked it each time he started to pass her—"I was just playing with it the whole time." Finally, while about 150 yards behind her, he blinked the light and she pulled off the highway and stopped. Defendant pulled to the shoulder of the road, parked his car, and went to her car where they had a friendly conversation in which he indicated he wanted a date with her. She said, "We'll make it some other day." He replied, "Well, let's go uptown and get a hamburger or something." She replied, "No, I'd rather not go to town and get anything to eat, we can go somewhere and have a feast without buying anything to eat."

Defendant testified they left in her car with him driving. Since he was not accustomed to a gearshift, she asked to drive, got out on the passenger side and walked around behind the car and got into the driver's seat. She inquired about a wooded area and stated she did not want to go through Robbins because she was known there. Defendant testified he directed her along the back roads to the point where they parked the car

and walked into the woods. There, defendant testified she undressed, insisted on having sexual relations with him, but never succeeded by reason of his impotency. He testified he was like a dead person and kept thinking of his wife from whom he was separated and his great love for her. He said it started raining and they began walking back to the car in the nude but, due to the briars and twigs, put on their clothing. When they arrived at her car, he gave her the keys and showed her the nearest way back. They talked in a friendly, casual way and she wanted to see him again. He followed her in his car all the way back to Carthage and she waved good-bye as she turned and drove down the Cameron road. Defendant said: "I did not at any time try to force her or trick her into going any place with me. I did not at any time try to force her or trick her into having intercourse."

The jury convicted defendant of kidnapping and he was sentenced to life imprisonment. He appealed to the Supreme Court alleging errors discussed in the opinion.

W. Lamont Brown, attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; Thomas B. Wood, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1] Defendant's first assignment of error is based on the admission of Mrs. McGill's testimony that defendant committed the crime of rape in addition to the crime of kidnapping.

It is a general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. *State v. Long,* 280 N.C. 633, 187 S.E. 2d 47 (1972). But it is equally well established that this rule does not apply when the two crimes are parts of the same transaction and are so connected in time or circumstance that one cannot be fully shown without proving the other. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972): *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364 (1954).

Stansbury formulates the rule in this fashion: "Evidence of other offenses is inadmissible if its only relevancy is to show the character of the accused or his disposition to commit an offense of the nature of the one charged; but if it tends to

prove any other relevant fact it will not be excluded merely because it also shows him to have been guilty of an independent crime." 1 Stansbury, North Carolina Evidence, § 91 (Brandis rev. 1973).

The purpose for which defendant carried Mrs. McGill into the woods of Montgomery County is obviously relevant to the charge of kidnapping. Among other things, it bears directly upon the motive for kidnapping her. The rape and kidnap are part of the same transaction and are so connected in time or circumstance that one cannot be fully shown without proving the other. *State v. Caddell,* 287 N.C. 266, 215 S.E. 2d 348 (1975). This assignment is without merit and is overruled.

[2] The record shows that, over objection, the district attorney asked defendant if he did not forcibly kidnap Judy Sheffield on the same day as this offense. Defendant denied it. He was asked if he had not forcibly kidnapped Veronica Clendenin on 14 March 1975. Defendant said he had been accused of it but didn't do it. He was asked if on the night of 14 March 1975 he kidnapped two men in Richmond County and took them to a fire tower in Montgomery County. Defendant answered in the negative but stated he was in the fire tower and called the sheriff's department himself. He said no charges had been brought against him in connection with the incident.

Defendant contends the court erred in allowing the district attorney to cross-examine him regarding other alleged kidnappings when he had not been convicted of such crimes. This constitutes his second assignment of error.

Defendant's contention that cross-examination concerning criminal conduct is limited to inquiry about prior convictions is unsound. We held in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971), that "[i]t is permissible, for purposes of impeachment, to cross-examine a witness, including a defendant in a criminal case, by asking disparaging questions concerning collateral matters relating to his criminal or degrading conduct. [Citations omitted.] Such questions relate to matters *within the knowledge of the witness,* not to accusations of any kind made by others."

It has long been the rule in this jurisdiction that where a defendant in a criminal case testifies in his own behalf, specific acts of misconduct may be brought out on cross-examination to impeach his testimony. *State v. Griffin,* 201 N.C. 541,

160 S.E. 826 (1931); *State v. Colson,* 194 N.C. 206, 139 S.E. 230 (1927); *State v. Davidson,* 67 N.C. 119 (1872); *State v. Patterson,* 24 N.C. 346 (1842); 1 Stansbury, North Carolina Evidence, § 111 (Brandis rev. 1973). Such cross-examination for impeachment purposes is not limited to conviction of crimes. "Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination." *State v. Sims,* 213 N.C. 590, 197 S.E. 176 (1938). So it comes to this: A defendant may not be asked on cross-examination for impeachment purposes if he has been accused, arrested or indicted for a particular crime, *State v. Williams, supra,* but he may be asked if he in fact committed the crime. *State v. Mack,* 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972). Defendant's second assignment of error is overruled.

[3] Defendant's third assignment of error is addressed to the following excerpt from the charge: "Now, you may find that a witness is interested in the outcome of this trial. In deciding whether you will believe or disbelieve the testimony of any such witness, you may take his interest into account. If after doing so you believe his testimony in whole or in part, you should then treat what you believe the same as any other believable evidence in the case." Defendant argues that since the female prosecutor and the male defendant were the only important witnesses in the case, "this charge has the effect of making the jury scrutinize and hold the male defendant's testimony up to a higher standard to determine whether he was telling the truth. The use of the masculine pronoun 'his' could also have led the jury to believe that the judge was expressing his opinion that the testimony of the male defendant should be more carefully scrutinized than that of other witnesses." We now examine the charge in light of these contentions.

Immediately preceding the portion of the charge to which exception is taken, the judge instructed the jury as follows:

> "Now, as the jurors in this case you are the sole judges of the credibility of the witnesses. You must decide for yourself whether you believe or disbelieve the testimony of any witness. You may believe all or any part or none of what a witness has had to say while on the stand.
>
> In determining whether you will believe any witness, you should apply the same tests of truthfulness which you

apply in your everyday affairs. These tests may include the opportunity of the witness to see or hear or know or remember the facts or occurrences about which he has testified, or she has testified; the manner and appearance of the witness, any interest, bias or prejudice the witness may have displayed, the apparent understanding and fairness of the witness, and whether the testimony of the witness is reasonable and whether that testimony is consistent with other believable evidence in the case.

Now, you are likewise the sole judges of the weight to be given the evidence. If you believe that certain evidence is believable, you must then determine the importance of that evidence in the light of all other believable evidence in the case."

Three witnesses, two male and one female, testified in this case. When the charge is considered contextually it is perfectly apparent that the court used the term "his" to refer to all the witnesses who testified, both male and female. We think the jury so understood it. Isolated portions of a charge will not be held prejudicial when the charge as a whole is correct. *State v. Cook,* 263 N.C. 730, 140 S.E. 2d 305 (1965); *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, *cert. denied* 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884 (1964). Merely showing that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred is insufficient to show prejudicial error. *State v. Gatling,* 275 N.C. 625, 170 S.E. 2d 593 (1969); *State v. Jones,* 67 N.C. 285 (1872).

The charge complained of does not constitute an expression of opinion upon the credibility of defendant in violation of G.S. 1-180. The admonition to scrutinize included not only the defendant but also the testimony "of any witness." Instructions couched in substantially similar language are fully supported by our decisions. "There is no hard and fast form of expression, or consecrated formula, required, but the jury should be instructed that, as to the testimony of relatives or parties interested in the case and defendants, that the jury should scrutinize their testimony in the light of that fact; but if, after such scrutiny, the jury should believe that the witness has told the truth, they should give him as full credit as if he were disinterested." *State v. Green,* 187 N.C. 466, 122 S.E. 178 (1924).

Accord, State v. Griffin, 280 N.C. 142, 185 S.E. 2d 149 (1971); *State v. Barrow,* 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Choplin,* 268 N.C. 461, 150 S.E. 2d 851 (1966); *State v. Turner,* 253 N.C. 37, 116 S.E. 2d 194 (1960); *State v. McKinnon,* 223 N.C. 160, 25 S.E. 2d 606 (1943). This assignment is overruled.

[4] Defendant's final assignment is based upon the following excerpt from the charge: "The evidence of the State further tended to show that before the defendant raped Phyllis McGill she pretended to faint; . . ." Defendant contends the language used amounted to an expression of opinion on the part of the judge, in violation of G.S. 1-180, that defendant raped Mrs. McGill.

The record discloses that the language complained of was used by the judge while recapitulating the State's evidence. Defendant voiced no objection at that time. When the charge was completed and as the jury retired to the jury room, the statement was brought to the attention of the court and the jury was recalled. The court thereupon instructed the jury as follows:

> "Members of the jury, after you retired, or just as you retired, I had a conference with the attorneys and it did appear that in one place during the course of my instructions to you that I may have used a term which you could misinterpret. During my restatement of the evidence, or my summary of the evidence, I used at one point that the evidence of the State tended to show that the defendant had sexual relations with the State's witness, Phyllis McGill, against her will. I also used the term 'and that before the rape.' I did not in any way mean to indicate to you that I felt that there was a rape in the case, but only that the State's evidence tended to show that before the sexual relation is against the will of the witness, Phyllis McGill, then certain things happened, and I wanted to make sure that you fully understood that I was not in any way attempting to suggest to you that there was a rape, but only that the State's evidence tended to show that there was sexual relations against the will of the State's witness, only if you believe the State's evidence would you so find."

If the portion of the charge challenged by this assignment be, in fact, erroneous, which is not conceded, the final instruction given to the jury effectively cured the error. The jury

could not have been misled by any notion that use of the word "rape" by the judge indicated an expression on the judge's part that such fact had been established. In addition to the full and adequate curative instruction regarding the use of the word "rape," the jury was instructed elsewhere in the charge that "what the evidence does actually show is a question of fact for the jury's determination." When the charge is considered as a whole, we find it free from prejudicial error. There is no merit to this assignment.

Defendant has been accorded a fair trial. No prejudicial error having been shown, the verdict and judgment must be upheld.

No error.

STATE OF NORTH CAROLINA v. RAYMOND EUGENE DULL, JR.

No. 98

(Filed 17 December 1975)

1. **Kidnapping § 1; Rape § 5— first degree rape — use of knife — kidnapping — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a prosecution for first degree rape and kidnapping where it tended to show that defendant got into his victim's automobile and grabbed her by the hair with his left hand and held an open knife to her throat with his right hand, the victim was afraid, defendant instructed his victim to drive away, he later ripped off the victim's clothes, suggested intercourse, and told the victim he would kill her if she did not cooperate, defendant raped his victim and then discussed her own murder with her, defendant let his victim go, and the knife used in the rape was later found in the living quarters of defendant; and it was not necessary that defendant continue to display the deadly weapon in a threatening manner until the moment of rape, rather, once the defendant had exhibited the knife and threatened the life of the victim with it, the knife continued in use as long as it was accessible to defendant. G.S. 14-21(a)(2).

2. **Rape § 6— second degree rape — jury instructions — no error**

Defendant cannot complain of any error in the trial court's instruction on second degree rape concerning use of a deadly weapon as an element of second degree rape since such an instruction would be beneficial to defendant, by its verdict the jury found that a deadly weapon was used, and any confusion in the jury's mind was cleared up by the court's additional instructions on first and second degree rape.

3. Constitutional Law 36; Rape § 7— first degree rape — death penalty — constitutionality

Imposition of the death penalty upon a conviction of first degree rape was not cruel and unusual punishment.

APPEAL by defendant from *Seay, J.*, at the 26 May 1975 Session of IREDELL Superior Court.

By separate indictments, proper in form, defendant was charged with the first-degree rape and kidnapping of Marcia Joanette Barnes on 11 January 1975. The jury found him guilty as charged in each bill of indictment. He was sentenced to death for first-degree rape and to life imprisonment for kidnapping.

The State's evidence, in summary, was as follows: Marcia Joanette Barnes testified that she is eighteen years of age and lives in Statesville, North Carolina. On 11 January 1975 she was on a weekend visit with her parents from Appalachian State University where she was a freshman. About 5:40 p.m. Marcia borrowed her mother's 1974 Caprice Chevrolet automobile and went to the Signal Hill Mall in Statesville to shop. This took less than an hour. When she got in her car to return home and started backing out, she observed someone behind her car and stopped for fear of hitting him. The person Marcia had seen, whom she later identified as the defendant, jumped in the car on the passenger's side, pulled her head back with his left hand, and put an open knife at her throat with his right hand. She had never seen him before and was told to do as he said and she would not get hurt. While he held a knife at her throat, he directed her to drive the car toward Interstate 77. Sometime before they reached Interstate 77, the defendant put the knife away. Later he inquired about her age and she told him she was eighteen years old. After traveling a short distance on Interstate 77, the defendant directed her to stop the vehicle, which she did. He grabbed her, ripped off her blouse and bra, held her by her throat against the car window, and told her that if she did not do what he said, she "would not live to be nineteen." He suggested sexual intercourse in a vulgar manner. During this time, Marcia did not recall seeing the knife. She was required to lie down on the front seat and put her head on his leg while he fondled her body. The defendant then moved over to the driver's side and Marcia was required to move over and lie down on the seat. Thereupon, the defendant drove off, and after several turns he stopped the car on a dirt road.

It was then that the defendant made her get in the back seat. Shortly, the defendant removed his clothes and got in the back seat himself. He told her to take off her clothes, but she refused; so he removed them. Marcia did not run because she did not know where to run and was afraid for her life. She thought he was going to kill her because he had a knife and had choked her. She begged him to take her home, but the defendant made her lie down on the seat and with some difficulty raped her. After dressing, the defendant told her to get out of the car and she did. It was then that he discussed with Marcia her own murder. She tried to convince him he would be in more trouble if he killed her, but the defendant replied it would make no difference as the penalty for rape was the same as for murder. Marcia convinced the defendant she would not tell on him, and he carried her back to the Signal Hill Mall parking lot. He told her he was sorry and she told him to get out, which he did. She went home, arriving about 7:00 p.m. and reported everything that had happened to her parents. The police were called and they arrived at 7:20 p.m. A medical examination was made about 7:45 p.m. which revealed her female organs had been bruised and penetrated on that date with live moving sperm being present. Marcia was so upset that the doctor could not talk to her and he gave her a sedative.

Detective Sergeant K. E. Shawver testified as to the statement the victim gave him later that night. In substance, she told the officer the defendant put the knife to her throat, choked her, and later told her she would not live to be nineteen if she did not cooperate with him. The statement substantially corroborated Marcia's testimony.

After making an investigation at the Signal Hill Mall, Sergeant Shawver and three other officers went to the trailer park home of the defendant and took him into custody. When they arrived the defendant was in the bathroom where he had superficially cut his wrist and was bleeding. The knife, which was identified as looking like the one used in the alleged rape and kidnapping, was found in the bathroom at defendant's feet.

The defendant testified in his own behalf and this tended to show the following: He had known the prosecuting witness prior to 11 January 1975, having met and spoken to her on two other occasions. However, he could not say positively when or where this took place. He had never been out with her. On this night he met the victim coming out of Belk's in the Mall and

talked to her. He suggested they ride around for a while and talk and she agreed. They went to the car where she gave him the keys. After a few moments in the car he told her they were going to ride around. They went to the places she had indicated, but he did not force her to take her clothes off and he did not rape her. They parked in a field about one hour and had sexual relations twice, but he did not force her in any way. He admitted that the pocket knife found in his home looked like the one he had in his possession that night, but said he never removed it from his pocket while with Marcia. He used obscene language, kissed her and fondled her. She was reluctant at first, but, after they had smoked some marijuana, her morals relaxed and she did not object too much. The prosecuting witness never asked him to carry her back to the Mall.

Defendant was cross-examined by the district attorney and said he had no explanation for cutting his wrist and did not remember it; that in addition to smoking marijuana, he took some Donaral pills; that he gave a statement to the police after he had been advised of his constitutional rights. Several of the things in the statement he did not recall. When shown the statement, which he admitted writing and signing, he did not remember saying that the victim was crying and he did not remember saying that she asked him if he was going to kill her. He said that if he put this down, it was because he was scared. He did not remember that he told them that he ripped off her blouse or that when they got back to the Mall she said she wanted to forget what happened. Neither did he remember telling the police that he told her he would never forget and felt like some kind of monster. In sum, he remembered very little about what he told police on the night he was arrested.

Attorney General Rufus L. Edmisten by Deputy Attorney General Millard R. Rich, Jr. and Associate Attorney James Wallace, Jr., for the State.

Jay F. Frank for defendant appellant.

COPELAND, Justice.

[1] In the first two assignments of error the defendant contends that the court erred in denying his motion for nonsuit made at the close of the State's case and at the close of all the evidence as to both rape and kidnapping. In essence he says the State failed to prove the essential element of procuring sub-

mission by the use of a deadly weapon as to the rape charge, or the use of force in the kidnapping charge.

The defendant was tried and convicted for first-degree rape under the provisions of G.S. 14-21(a)(2) (Chapter 1201, Session Laws of 1973, effective 8 April 1974), which reads as follows:

> "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."

Rape is defined as the carnal knowledge of a female person by force and against her will. *State v. Crawford,* 260 N.C. 548, 133 S.E. 2d 232 (1963); *State v. Thompson,* 227 N.C. 19, 40 S.E. 2d 620 (1946); 6 Strong, N. C. Index 2d, Rape, § 1; G.S. 14-21.

The distinguishing features between the former law and that provided in G.S. 14-21 are that rape is now divided into two degrees, and that G.S. 14-21(a)(2) now requires that the "force" be such that "the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or . . . . " Under the former law, the "force" that was necessary to constitute an offense did not need to be actual physical force. Constructive force was sufficient, and the female submission under fear or duress took the place of actual physical force. *State v. Thompson, supra; State v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113 (1946). This is the same "force" now required to convict for second-degree rape. G.S. 14-21(b).

Under the old law, where all the evidence tended to show that the defendant had sexual intercourse with the prosecutrix without her consent and she submitted when she was helpless to protect herself because the submission was induced by fear of death or serious bodily harm, then motion for nonsuit was held to be properly denied. *State v. Williams,* 275 N.C. 77, 165 S.E. 2d 481 (1969). "A woman who consents out of fear of personal violence does not consent at all. Even though no physical force is actually used, if the potential force is shown by the man to the woman so as to paralyze by fear her will to resist, or if she ceased resistance through fear of great harm, the consummation of unlawful intercourse by the man is rape." 65 Am. Jur. 2d, Rape, § 11 at 767.

In our case there is ample and credible evidence that the defendant got in the automobile and grabbed the prosecutrix by the hair with his left hand and held the open knife to her throat with his right hand. She was afraid. The defendant told her to do what he said and she would not get hurt. The engine of the automobile was already running and, at his direction, she drove the vehicle out of the parking lot.

She testified: "When I was parked on the side of the road, he grabbed me and ripped my blouse—ripped off my bra, and I was trying to resist him. He grabbed me by the throat and held me up against the driver's side of the window and told me if I didn't do what he said, that I wouldn't live to be nineteen." The defendant was in possession of a knife and threatened her with it, telling her that if she did not cooperate, it would lead to her death. The defendant said or did nothing prior to having sexual intercourse with her to indicate that he no longer had the knife in his possession or that he no longer intended to use the knife if she did not cooperate. All of this showed that the prosecutrix was in a situation where she feared for her life and the slightest objection might very well have been fatal. After the alleged rape, the defendant required her to get out of the car and then discussed with her, her own murder. By her pleas she was able to save her life. The knife itself was later found in the living quarters of the defendant, who identified it as looking like his knife.

If the evidence of the State as to the rape charge is to be believed, it is clear that the requirements of G.S. 14-21(a)(2) were met and that the submission of the prosecutrix was procured by the use of the open knife that the defendant placed at her throat when he first encountered her. The law does not require a vain thing and certainly it does not require that the defendant must continue to display the deadly weapon in a threatening manner until the moment of the rape. The defendant told the prosecutrix she would not live to be nineteen if she did not cooperate with him. She had every reason to believe that he would carry out his threat to kill her. Once the defendant had exhibited the knife and threatened the life of the prosecutrix with it, the knife continued in use as long as it was accessible to him.

As to the evidence on the charge of kidnapping, the element of force was shown not only by the use of the knife, but also by other physical force that continued from the moment de-

fendant entered the victim's car until he returned her to the Mall.

There is a wealth of authority in this State on the subject of nonsuit. Generally speaking, in a motion for nonsuit the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference therefrom. *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44 (1967); *State v. Cade,* 268 N.C. 438, 150 S.E. 2d 756 (1966); *State v. Spears,* 268 N.C. 303, 150 S.E. 2d 499 (1966); *State v. Bridgers,* 267 N.C. 121, 147 S.E. 2d 555 (1966). There was ample evidence to submit this case to the jury on first-degree rape and kidnapping and these assignments are overruled.

[2] Next, the defendant argues that the court was in error in failing to give a clear definition of second-degree rape, and that the court confused the jury by mentioning the use of a deadly weapon in its definition of second-degree rape.

The particular instruction that the defendant complains about is as follows:

> "Second-degree rape differs from first-degree rape in that it is not necessary for the State to prove that the defendant was more than sixteen years of age, or that he overcame Marcia Barnes' resistance or procured her submission by the use of a deadly weapon. So I charge that if you find from the evidence beyond a reasonable doubt that on or about January 11, 1975, in Iredell County, Raymond Eugene Dull, Jr. did by the use of force—pulling her head back by her hair, *threatening her with a knife,* choking her, using his hands on her body—did forcibly have sexual intercourse with Marcia Barnes; that he did so without her consent and against her will, it would be your duty to return a verdict of guilty of second-degree rape; . . . " (Emphasis supplied.)

The defendant maintains that the trial judge by mentioning the use of a knife while charging the jury on second-degree rape confused the jury as to the true elements of second-degree rape. Defendant contends that he may well have been found guilty of second-degree rape if the judge had charged more clearly. However, it seems clear to us that if the jury was led to believe that the use of the knife was an element of second-degree rape, then this would have been beneficial to the defendant and he could not complain. At any rate, the jury by its

verdict found that a deadly weapon was used and that the rape was accomplished when the defendant overcame the resistance of the prosecutrix by the use of the knife. Moreover, after the jury had deliberated for some time, it returned to the courtroom and requested further instructions as to first-degree rape. The court then gave a proper charge as to first-degree rape and also re-instructed the jury on second-degree rape and particularly told them it was not necessary that her submission be secured by the use of a deadly weapon in second-degree rape. If there was any confusion in the jury's mind, this certainly cleared it up.

Assuming *arguendo* that there was technical error, we feel that it was harmless error beyond a reasonable doubt. The evidence at the trial overwhelmingly pointed to defendant's guilt. *Harrington v. California,* 395 U.S. 250, 23 L.Ed. 2d 284, 89 S.Ct. 1726 (1969); *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967).

Next, the defendant contends that the court erred in denying the motions to set aside the verdict as being against the greater weight of the evidence, for judgment notwithstanding the verdict, and for a new trial.

A motion to set aside the verdict as being against the greater weight of the evidence is addressed to the discretion of the trial court, and the court's refusal to grant the motion is not reviewable on appeal. *State v. Bridgers, supra; State v. Mitchner,* 256 N.C. 620, 124 S.E. 2d 831 (1962); *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). *See also* 3 Strong N. C. Index 2d, Criminal Law, § 132. A motion for a new trial does not properly present the question of the sufficiency of the evidence to justify the submission of the case to the jury. *State v. Gaston,* 236 N.C. 499, 73 S.E. 2d 311 (1952); *State v. Caper,* 215 N.C. 670, 2 S.E. 2d 864 (1939); 3 Strong, N. C. Index 2d, *supra.* This is more properly raised by a motion for nonsuit, which has been discussed earlier in this opinion. 3 Strong, N. C. Index 2d, *supra.* Certainly the trial court did not abuse its discretion for the State's evidence was overpowering. The assignment is overruled.

[3] Finally, defendant contends the court erred in sentencing him to death, saying this was cruel and unusual punishment.

Our Court has consistently rejected this argument. No new issue has been raised here. We do not deem it necessary to set forth again the reasoning of these cases. *State v. Robbins,* 287 N.C. 483, 214 S.E. 2d 756 (1975); *State v. Vinson,* 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *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). The assignment is overruled.

In our careful review of this entire record we find

No error.

HENRY J. KLEIN, ADMINISTRATOR FOR NATALIE LISIEWICZ KLEIN, SUBSTITUTE PLAINTIFF v. AVEMCO INSURANCE COMPANY

No. 70

(Filed 17 December 1975)

1. **Insurance § 147— airplane insurance — payment of past due premium installment — cancellation**

Where the parties had agreed that the yearly premium for an airplane insurance policy would be paid in ten consecutive monthly installments, the insurer had a right to cancel the policy for nonpayment of premium, the insured failed to make a monthly payment on time, and the insurer sent insured a notice that the policy would automatically terminate if the entire unpaid balance of the yearly premium were not paid by a certain date, payment by the insured of the past due monthly installment did not keep the policy in effect after the date specified in the notice, and the policy was effectively cancelled on that date.

2. **Insurance § 147— airplane insurance — acceptance of late payments — no waiver of right to cancel**

Defendant insurer did not waive its right to cancel an airplane insurance policy on 22 July by its past acceptance of late premium payments or by its acceptance of premium installment payments mailed by the insured on 10 July and 28 July where the insurer notified the insured on 11 July that the policy would terminate on 22 July for nonpayment of a premium installment unless the entire yearly premium

balance was paid before that date, late premium payments in the past had complied with conditions of cancellation notices, the payment on 10 July was for a premium already earned, and a portion of the premium payment on 28 July had already been earned.

3. **Insurance § 147— airplane insurance — cancellation — tender of unearned premium**

Tender or refund of the unearned portion of a premium on an airplane insurance policy was not a condition precedent to cancellation of the policy.

ON *certiorari* to review the decision of the Court of Appeals, 26 N.C. App. 452, 216 S.E. 2d 479, (opinion by *Morris, J.*, concurred in by *Brock, C.J.* and *Hedrick, J.)* sustaining the summary judgment for defendant granted by *Barnette, J.*, at the 9 December 1974 Session, WAKE County District Court.

Plaintiff filed a complaint on 1 November 1973 alleging that the defendant issued a policy of insurance covering plaintiff's airplane and that the policy was in effect on 28 July 1973 when the airplane crashed and was damaged in an amount exceeding $5,000 and that after proper demand the defendant refused to compensate the plaintiff for damage to the said airplane.

Defendant's answer denied that the policy was in effect on 28 July 1973 and asked that the cause of action be dismissed. Later the defendant filed a motion for summary judgment alleging there was no genuine issue as to any material fact and that the defendant was entitled to a judgment as a matter of law. In support of the motion, defendant submitted an affidavit of William B. Shoemaker, its Supervisor of Accounts Receivable. The affidavit indicated that on 11 July 1973 defendant sent to the plaintiff a notice stating that her policy would be cancelled on 22 July 1973 unless a premium payment of $191.50 was received by that date; that on 16 July 1973 defendant received a payment of $38.30, but no other payments were received before 22 July 1973 and the policy was cancelled.

Plaintiff died while the action was pending, and on motion her administrator was substituted as plaintiff.

In reply to defendant's motion for summary judgment, plaintiff filed an affidavit, a deposition and several exhibits. These tended to show that the airplane had been insured with the defendant for a number of years and that the current policy was renewed on 16 January 1973 for a period of one year at a to-

tal annual premium of $383.00 to be paid in ten equal monthly installments of $38.30 each, beginning 16 January 1973; that most of the monthly payments were not made on time; that in March and May, 1973, the defendant sent to the plaintiff cancellation notices threatening to cancel the policy unless the premiums were paid immediately; that, on those occasions after the payments were made, the defendant sent to the plaintiff reinstatement notices; that by June, 1973, plaintiff had paid five monthly installments and there was remaining a total of five installments totaling $191.50 to be paid; that on 11 July 1973 defendant sent plaintiff a cancellation notice stating that the policy would be cancelled on 22 July 1973 if $191.50, the "full unpaid balance due," was not paid by that date; that plaintiff sent a sixth monthly installment of $38.30 on 10 July 1973; that she paid a seventh installment of $38.30 on 27 July 1973; and that the airplane crash occurred about 11:30 a.m. on 28 July 1973.

The affidavit of defendant's employee, Shoemaker, further showed that the payment of $38.30 which the plaintiff said was made on 27 July 1973 was not received by the defendant until 30 July 1973. Attached to the affidavit as an exhibit is a copy of the envelope in which the payment was received on 30 July 1973. This indicated that the envelope was postmarked at 1:00 p.m., 28 July 1973. The check received on 30 July 1973 was duly cashed by the defendant. The affidavit of the defendant's employee indicated that premiums of $150.00 were credited to the policy and that the unearned premium less the balance of payments due in the amount of $114.90 resulted in a refund of $35.10 which was mailed to plaintiff on 5 September 1973. This check was not cashed by the plaintiff.

Vaughan S. Winborne for plantiff appellant.

Smith, Anderson, Blount & Mitchell by C. Ernest Simons, Jr. for defendant appellee.

COPELAND, Justice.

[1] Plaintiff first contends that since the plaintiff had paid $268.10 (seven-tenths of the total annual premium) the policy should remain in effect for seven-tenths of the year or 255 days, which according to plaintiff's calculation would mean the policy would continue in force until 28 September 1973, some two months past the date of loss. Further, plaintiff contends under his theory that, even if you disregard the last payment,

the policy would remain in effect for six-tenths of the year, or 219 days, until 23 August 1973. We do not agree with the plaintiff's method of calculation because it is contrary to the terms of the insurance contract.

"It is elemental law that payment of the premium is requisite to keep the policy of insurance in force. If the premium is not paid in the manner prescribed in the policy, the policy is forfeited. *Partial payment, even when accepted as a partial payment, will not keep the policy alive even for such fractional part of the year as the part payment bears to the whole payment.* [Citation omitted.]" (Emphasis supplied.) *Clifton v. Insurance Co.*, 168 N.C. 499, 500, 84 S.E. 817, 818 (1915).

So the first question for us to decide is as follows: Was the policy of insurance effectively cancelled by defendant prior to the date of the loss?

If the Court were to follow the interpretation of the policy advanced by the plaintiff, an insurer would never have in his possession unearned premiums subject to the cancellation because the company would be obligated to provide coverage throughout the prorated period for which premiums were paid. We believe that position is untenable.

Justice Higgins, speaking for our Court in *Walsh v. Insurance Co.*, 265 N.C. 634, 639, 144 S.E. 2d 817, 820 (1965), said: "[W]here 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. [Citations omitted.]" In our case, the plaintiff and defendant had agreed that the premium would be paid in ten consecutive monthly installments and, as a result, they are bound by the terms of their agreement. Since they have so agreed, the parties shall be bound accordingly. *Duke v. Insurance Co.*, 286 N.C. 244, 210 S.E. 2d 187 (1974).

It has long been our policy to construe insurance policies liberally in favor of the insured, but this rule will not permit us to write into the contract terms beyond its meaning. We cannot rewrite it and make a new contract for the parties. *Duke v. Insurance Co., supra,* 4 Strong, N. C. Index 2d, Insurance, § 6, p. 461.

The facts in *Allen v. Insurance Co.*, 215 N.C. 70, 1 S.E. 2d 94 (1939), are instructive. That case involved a suit to recover

on a policy of accident and health insurance. Under the terms of the policy, premiums were due on the first of each month with a seven day grace period, with a further provision that acceptance of the premiums by the company after that time should reinstate the policy only as to accidental injuries thereafter sustained and such sickness as might begin more than ten days after such acceptance. It was held that under the terms of the contract the policy lapsed as of the due date of the premiums upon failure to pay the premium prior to the expiration of the grace period and that tender of payment on the 20th day of the month did not put the policy in force as to illness beginning on the seventh day of the month. The net effect was that the acceptance of the premiums had the effect under the contract of reinstating the policy prospectively only.

As Chief Justice Clark stated in speaking for the Court in *Hay v. Association*, 143 N.C. 256, 259, 55 S.E. 623, 624 (1906): "It is true it is found in this case that prior to 1905 the defendant had, on some occasions, accepted payment by the insured of assessments after the date at which they should have been paid. It is not found how often nor after how long a default these indulgencies were granted. But these were mere personal favors and cannot be construed into a standing waiver of the terms of the contract. They did not constitute a 'course of dealing' which amounted to an express agreement that premiums need not be paid promptly . . . . " Later Chief Justice Clark pointed out: "But insurance is a business proposition, and no company could survive if the insured could default while in good health, but retain a right to pay up when impaired health gives warning." *Id.* at 259, 55 S.E. at 625.

It might be noted in our case that each time the defendant sent a cancellation notice to the plaintiff it clearly set forth the date that the policy would be cancelled if payment were not made. Except for the final notice requiring a payment of $191.50 on 22 July 1973, the plaintiff always paid past due premiums prior to the effective cancellation date and defendant, in turn, sent a reinstatement notice to the plaintiff. Thus, when the June payment was not paid when due, the defendant, having an absolute right to cancel the policy on ten days' notice, sent plaintiff a cancellation notice requiring the payment of $191.50 by cashier's check or money order by 22 July 1973 and providing that coverage would automatically terminate if the payment were not made by that date. The payment which the plaintiff said he mailed

on 10 July 1973 was received by the defendant on 16 July 1973 in the amount of $38.30, but this only took care of the premium due 16 June 1973. The plaintiff did not by this comply with the terms of the cancellation notice mailed on 11 July 1973. For whatever reason, the plaintiff chose not to comply with the conditions. Thus, by the terms of the policy and the notice mailed 11 July 1973, the policy was duly cancelled on 22 July 1973, prior to the date of the loss on 28 July 1973. The above contention of the plaintiff that "unearned premiums" in the hands of the insured prevent the defendant from cancelling the policy for nonpayment is without merit and is overruled.

Next the plaintiff contends that the defendant by its conduct waived the plaintiff's forfeiture and that the defendant is estopped from claiming cancellation of the policy.

Our Court in *Manufacturing Co. v. Building Co.*, 177 N.C. 103, 107, 97 S.E. 718, 720 (1919), said: "Waiver must be manifested in some unequivocal manner, and to operate as such it must in all cases be designed, or one party must have so acted as to induce the other to believe that he intended to waive, when he will be forbidden to assert the contrary." (Quoted in *Realty Co. v. Spiegel, Inc.*, 246 N.C. 458, 98 S.E. 2d 871 (1957)).

Waiver sometimes has the characteristics of estoppel and sometimes of contract, but it is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up. "There can be no waiver unless it is intended by one party and so understood by the other, or unless one party has acted so as to mislead the other." 7 Strong, N. C. Index 2d, Waiver, § 2, p. 527.

Also, our Court, speaking through Justice Stacy (later Chief Justice) said: " 'A course of action on the part of the insurance company which leads the party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' [Citations omitted.]" *Paul v. Ins. Co.*, 183 N.C. 159, 162, 110 S.E. 847, 849 (1922).

[2] Here the plaintiff contends that the defendant waived its right to cancel the policy by (1) allowing plaintiff to become delinquent in premium payments; (2) accepting the premium payment mailed by the plaintiff on 10 July 1973 and received by the defendant on 16 July 1973; and (3) accepting the premium mailed on 27 July 1973, postmarked 1 p.m., 28 July 1973, and received 30 July 1973.

An analysis of this case indicates the defendant did not in any way lead the plaintiff to believe that the policy would be kept in force other than upon the condition provided in the cancellation notice. The notice, effective 22 July 1973, was certainly clear and unambiguous. It plainly informed the plaintiff that further delinquency would not be tolerated beyond the terms of the notice. Since notice of cancellation was given on 11 July 1973 to be effective on 22 July 1973, the requirement of the insurance contract that there be ten days' notice for cancellation was fully satisfied. There had been cancellation notices in the past, but plaintiff could not complain of being led into a false sense of security as to them because on each of these occasions the plaintiff had complied with the condition of the cancellation notice requiring payment. The payment sent by the plaintiff on 10 July 1973 and received by the defendant on 16 July 1973 was for the premium due 16 June 1973; so at the time of receipt the defendant had earned the full amount of that premium and was entitled to retain it. With regard to the $38.30 check sent by the plaintiff on 27 July 1973 and received by the defendant on 30 July 1973, the defendant had earned $3.20 of that payment for the interim period between 16 July 1973 and the effective cancellation date of 22 July 1973. Thus, it was proper for the defendant to cash that check and refund to plaintiff the remaining $35.10. Under Paragraph 20 of the policy, "Cancellation for Non-Payment of Installment Premium," it is provided: "Upon the failure of the named insured to pay any installment of the premium, the insurance shall cease and terminate, provided at least ten (10) days notice is mailed by the company to the named insured at the address shown in this policy stating when thereafter such cancellation shall become effective. Such cancellation shall be deemed to have been made at the request of the named insured and shall be on a short rate basis." The short rate basis table is a part of the insurance contract. Thus, it was entirely correct for the defendant to use this table in arriving at the "unearned premium" refund of

$35.10. The procedure used conformed to the language of the insurance contract.

In conclusion, under these circumstances the plaintiff has failed to bring himself within the guidelines of our Court pertaining to waiver and estoppel, and this assignment of error is overruled.

[3] We next separately consider the related contention that tender or refund of the unearned portion of the premium was a condition precedent to cancellation of the policy.

In this connection it is well for us to look again at the insurance contract for guidance. Paragraph 19 of the contract provides, among other things, "[B]ut payment or tender of unearned premium is not a condition of cancellation." We have already observed that in Paragraph 20 it is provided that when cancellation is made for non-payment of premium, it "shall be deemed to have been made at the request of the named insured and shall be on a short rate basis."

Thus, the language of the insurance contract requires an answer favorable to the defendant. Our research fails to find any North Carolina decision directly in point, but in other jurisdictions where they were dealing with provisions similar to those in our case, the rule is that refund or tender of unearned premium is not a condition precedent to cancellation for non-payment of premium. Annot., 16 A.L.R. 2d, 1200-1208. *See also* cases cited therein.

Furthermore, as we have stated, the facts of this case clearly negate estoppel or waiver. The policy was effectively cancelled on 22 July 1973, some six days prior to the occurrence of the loss at a time when there were no unearned premiums. Moreover, since the plaintiff was indebted to the defendant in the sum of $3.20 under the terms of the insurance contract, under no theory of the law could the check for $38.30 mailed on 27 July 1973 and postmarked a 1:00 p.m. on 28 July 1973, breathe life into an insurance contract that had been cancelled six days before. It was not enough to insert "July Payment" at the bottom of the check. Certainly the defendant had a right to cancel the policy when the premiums were not paid when due, and by the same token it had a right to state the conditions under which the policy could be kept in force. The assignment of error is overruled.

Rule 56(c) of Chapter 1A-1 of the General Statutes provides in part as follows: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* . . . . " (Emphasis supplied.) The district court operating under the provisions of Rule 56 determined that there was no *genuine issue as to any material fact between the parties* in this case. For all the reasons above indicated, we conclude that the decision of the district court is correct and that the decision of the North Carolina Court of Appeals should be

Affirmed.

JACK D. SMITH v. FORD MOTOR COMPANY, THOMAS M. KEESEE, SR., JAMES K. DOBBS AND CLOVERDALE FORD, INC.

No. 67

(Filed 29 January 1976)

1. **Corporations § 25— contract made before incorporation — subsequent adoption of contract**

Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be express or implied, and thereby become liable for its performance.

2. **Master and Servant § 10— contract of employment — definite term not fixed — contract terminable at will**

Where the contract of employment between plaintiff and defendant Cloverdale Ford, Inc. contained no provision whatever as to the duration of such employment, Cloverdale committed no breach of its contract when it terminated plaintiff's employment, even if there was no "just cause" for such termination, since a contract of employment which does not fix a definite term is terminable at the will of either party; therefore, plaintiff's complaint did not state a claim against Cloverdale upon which relief could be granted, and there was no error in dismissing the action as to Cloverdale.

3. **Master and Servant § 13— interference with employment contract — failure of complaint to state claim for relief**

The trial court did not err in dismissing plaintiff's action for compensatory and punitive damages against individual defendants where plaintiff's complaint negated his contention that the motive of

individual defendants in causing defendant Cloverdale Ford, Inc. to terminate the plaintiff's employment was to deprive plaintiff of any ownership interest in Cloverdale or any option to increase such ownership.

4. **Master and Servant § 13— employment contract terminable at will — interference by third person**

If A, knowing B is employed by C under a contract terminable at will by C, maliciously causes C to discharge B, which C would not otherwise have done, by threatening, otherwise, to terminate A's own contract with C, which contract is terminable at will by A, the sole motive for A's action being A's resentment of B's personal affiliation with an organization disapproved by A, which affiliation does not impair C's performance of its contract with A, B can maintain in the courts of this State an action against A for damages.

5. **Contracts § 32; Master and Servant § 13— contract of employment — outsider and non-outsider defined**

The term "outsider" appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof; conversely, one who is a non-outsider is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter.

6. **Contracts § 32; Master and Servant § 13— non-outsider to contract — malicious procurement of termination — no immunity to suit**

A non-outsider to a contract is not immune to suit for the malicious procurement of the termination of a contract when such action has no relation whatever to that legitimate business interest which is the source of the defendant's non-outsider status, and in such case, the defendant is in the same position as an outsider; that is, the defendant's status as an outsider or a non-outsider is pertinent only to the question of justification for his action.

7. **Master and Servant § 13— interference with employment contract — exertion of economic pressure — qualified privilege**

To exert economic pressure upon an employer for the purpose of procuring the termination by him of his employment of another is a qualified privilege even though, as between the actor and employer, the actor has an absolute right to do that which produces such pressure upon the employer; and the actor is liable in damages to the employee for so procuring such termination of the employment if the actor so acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of the actor.

8. **Master and Servant § 13— malicious interference with employment contract — sufficiency of complaint**

The complaint of the plaintiff which alleged the malicious interference by the defendant with the plaintiff's employment relation without justification stated a cause of action, and dismissal of the action was error.

Justice EXUM did not participate in the consideration or decision of this case.

ON *certiorari* to the Court of Appeals to review its decision, reported in 26 N.C. App. 181, 215 S.E. 2d 376, affirming the judgment of *Exum, J.*, at the 28 October 1974 Session of FORSYTH, dismissing the action for failure of the complaint to state a claim upon which relief can be granted.

The action is for compensatory and punitive damages, the complaint containing five alleged causes of action, the material allegations of these being summarized as follows:

First Cause of Action: Prior to 20 January 1971, Hull Dobbs Company operated a Ford dealership in Winston-Salem, the defendants Keesee and Dobbs being stockholders and directors of that company. Due to the poor performance of that dealership, Ford Motor Company (hereinafter called Ford) recommended a change of its name and the bringing in of a new general manager under an agreement allowing him to purchase 100 per cent of the stock of Hull Dobbs Company over a five-year period. The plaintiff then had a profitable position with a Ford dealership in Atlanta. He gave up that position, moved to Winston-Salem and took over the management of the said dealership in Winston-Salem, the name of which was changed to Cloverdale Ford. Due to the plaintiff's efforts and skill the dealership was immediately changed from a losing to a profitable operation and continued to be such throughout the plaintiff's management of it.

On 18 May 1971, the plaintiff, Keesee, Dobbs and one Davis entered into an agreement for the formation of a North Carolina corporation named Cloverdale Ford, Inc. (hereinafter called Cloverdale). The agreement provided that the plaintiff would be president and manager of Cloverdale at a monthly salary plus 15 per cent of the annual profits. The agreement further provided that the plaintiff and Davis would be the "operators" of the dealership and would own 40 per cent of the stock of Cloverdale. Pursuant to this agreement, the plaintiff purchased and received 19.5 per cent of the Cloverdale stock. The agreement further provided that after five years the holders of the remaining 60 per cent of the stock of Cloverdale would sell it to the corporation, thus making the plaintiff and Davis the sole owners of the outstanding shares of Cloverdale.

During 1972 and 1973, the plaintiff became active in an organization known as the Ford Dealer Alliance, an organization of Ford dealers formed for the purpose of protecting their

interests in transactions with Ford. Participation in this alliance by its dealers has been actively discouraged by Ford. When Ford discovered that the plaintiff was actively engaged in the alliance, Ford wrongfully exerted pressure on the stockholders of Cloverdale to cause the plaintiff to disassociate himself and Cloverdale from the alliance. In consequence of such pressure exerted by Ford, Dobbs demanded that the plaintiff discontinue his relationship with the alliance. The plaintiff agreed to disassociate Cloverdale from the alliance but refused to terminate his own support of the alliance.

When Ford learned of this, it "wrongfully, maliciously, and unlawfully exerted pressure" upon the stockholders and directors of Cloverdale to terminate the plaintiff's employment and his "ownership rights, present and prospective" in Cloverdale. As a direct and natural consequence of such actions by Ford, the directors of Cloverdale voted to terminate the plaintiff's employment as president and general manager of Cloverdale, which they would not have done but for the "wrongful, malicious and unlawful interference on the part of the defendant Ford." Thereby the plaintiff has been damaged through loss of his right to compensation from Cloverdale and his option to acquire full control of it at the end of the agreed five-year period.

Second Cause of Action: The acts and practices alleged in the first cause of action were in contravention of General Statutes 75-1.1 in that they were "unfair and deceptive and constitute a breach" of the ethical standards of dealings between Ford, its dealers and employees of such dealers. (This theory of recovery was abandoned by the plaintiff in the Court of Appeals.)

Third Cause of Action: Pursuant to the scheme of Ford maliciously to interfere with the plaintiff's contract, Keesee and Dobbs joined with and conspired with Ford wrongfully to terminate the plaintiff's employment as president and general manager of Cloverdale. Keesee and Dobbs wilfully and maliciously broke their contract with the plaintiff, doing so with the approval and "affirmative participation" of Ford. In furtherance of such common design, Keesee and Dobbs, after consultation with Ford, demanded that the plaintiff discontinue his activities on behalf of the Ford Dealer Alliance. Keesee, after consultations with representatives of Ford, demanded that the plaintiff resign his position and, upon his refusal to do so,

threatened him with the loss of "productive years in the car business." Keesee and Dobbs, after consultation with Ford, caused the directors of Cloverdale to meet and wrongfully to terminate the employment of the plaintiff as president and general manager of Cloverdale.

Fourth Cause of Action: As a result of the wrongful and malicious acts of Keesee and Dobbs, as alleged in the first three causes of action, the plaintiff's contract of employment was unlawfully broken to his damage.

Fifth Cause of Action: Cloverdale, after its incorporation, adopted and ratified the contract of 18 May 1971, hereinabove mentioned. Through the action of its directors on 24 April 1974, Cloverdale "wrongfully, wilfully and without just cause" terminated the plaintiff's contract of employment to his damage.

The contract of 18 May 1971, which was attached to the complaint as an exhibit and incorporated therein, provided, in summary:

The parties thereto were Keesee, Dobbs, Frank Goodwin (their associate), the plaintiff, Davis and Cloverdale (then a corporation to be formed). The parties agreed to form a corporation (Cloverdale) with a total paid in capital stock of $200,000, of which Keesee, Dobbs and Goodwin agreed to subscribe and pay for 60 per cent, the plaintiff and Davis 40 per cent. The plaintiff was to be employed as president and general manager of the corporation at a monthly salary plus 15 percent of the annual profits before taxes. Keesee, Dobbs and Goodwin granted to Cloverdale an option to purchase all of their stock of Cloverdale at book value 60 months after the corporation commenced business. The parties recognized an option in the plaintiff to purchase the stock of Davis in event of the death of Davis and agreed, in that event, to nominate the plaintiff as the "nominee successor" to the dealership, subject to the approval of Ford. The agreement further provided: "If [the plaintiff], in his position as President and General Manager of the Corporation, shall prove to be unsatisfactory in the opinion of [Keesee, Dobbs and Goodwin] *and* James W. Davis *or* the Ford Motor Company *from the standpoint of profits earned or the manner of operation of the corporation,* the employment of [the plaintiff] as President and Manager may be terminated by the Corporation. Upon such termination [the plaintiff] agrees to sell to James W. Davis the capital stock owned by him at book value of such

stock at the end of the month preceding such termination and for cash." (Emphasis added.)

Keesee, Dobbs and Clovedale each filed a motion to dismiss the action because the complaint failed to state a claim against such defendant upon which relief can be granted.

Ford moved to dismiss the complaint on the same ground and also filed its answer denying each material allegation of the complaint and alleging by way of further answers and defenses the plaintiff proved "unsatisfactory as President and General Manager" and, consequently, there was an absolute right under the contract upon which the plaintiff relies to terminate his employment as president and general manager; at the time the plaintiff's such employment was terminated by Cloverdale, there was in existence a written franchise agreement between Ford and Cloverdale, a copy of which is attached to the answer as an exhibit and incorporated therein, which franchise agreement reserved to Ford the right to cease to do business with any dealer "who is not contributing sufficiently" to the success of Ford, and which franchise agreement provided it should "continue in force and effect from the date of its execution until terminated by either party under the provisions of Paragraph 17 hereof." (The said Paragraph 17 is set forth below.) Ford had a direct and valid business interest in the successful operation of Cloverdale and the absolute contractual right to terminate the franchise agreement between it and Cloverdale in the event that the operation did not meet the requirements of the franchise agreement. Ford's exercise of such contractual rights, or its suggestion that it might become necessary for it to do so, was valid and proper and did not give rise to any of the plaintiff's alleged causes of action.

For the purpose of the hearing of the motions to dismiss, the plaintiff admitted, in response to Ford's request for such admission, that the franchise agreement attached to Ford's answer was a true copy of the agreement between Ford and Cloverdale and that it was signed by the plaintiff as president of Cloverdale. The pertinent portions of that agreement, covering 72 pages of the printed record, are:

> "The Company [Ford] * * * solicits dealers to bring to its attention through their National Dealer Council organization any mutual dealer problems or complaints as they arise.

"Because the Company relies heavily on its dealers for success, it reserves the right to cease doing business with any dealer who is not contributing sufficiently to such success.

"The Company and the Dealer * * * also acknowledge that certain practices are detrimental to their interests, such as deceptive, misleading or confusing advertising, pricing, merchandising or business practices, or misrepresenting the characteristics, quality, condition or origin of any item of sale. * * *

"The Company hereby appoints the Dealer as an authorized dealer at retail in VEHICLES and at retail and wholesale in other COMPANY PRODUCTS and grants the Dealer the privilege of buying COMPANY PRODUCTS from the Company for sale in its DEALERSHIP OPERATIONS (as herein defined). * * *

"This agreement shall continue in force and effect from the date of its execution until terminated by either party under the provisions of paragraph 17 hereof. * * *

"The dealer's performance of his sales responsibility for CARS shall be measured by such reasonable criteria as the Company may develop from time to time, including: * * *

"The Dealer's performance of his sales responsibility for GENUINE PARTS shall be measured by such reasonable criteria as the Company may develop from time to time including: * * *

"The Dealer shall employ and train such numbers and classifications of competent personnel of good character, including, without limitation, sales, parts, services, owner relations and other department managers, salesmen and service technicians, as will enable the Dealer to fulfill all his responsibilities under this agreement. * * *

"Effective operation of the Dealer's business is dependent in large part on the Dealer's management becoming a part of and accepted within his local community accordingly, each person named in subparagraph F(ii) [Smith and Davis] hereof shall * * * reside within the DEALER'S LOCALITY. * * *

"TERMINATION OR NONRENEWAL OF AGREEMENT

"17.(a) BY DEALER. The Dealer may terminate or not renew this agreement at any time at will by giving the Company at least thirty (30) days prior written notice thereof.

"17.(b) BY COMPANY DUE TO EVENTS CONTROLLED BY DEALER. The following represent events which are substantially within the control of the Dealer and over which the Company has no control, and which are so contrary to the intent and purpose of this agreement as to warrant its termination or nonrenewal:

"(1) Any transfer * * * by the Dealer of any interest in * * * this agreement; * * * or any change * * * without the Company's prior written consent, * * * in the * * * operating management of the Dealer * * * .

"(2) Any misrepresentation in applying for this agreement * * * .

"(3) Insolvency of the Dealer * * * .

"(4) Conviction * * * of the Dealer or any person named in paragraph F [the plaintiff or Davis] for any violation of law, or any conduct by any such person unbecoming a reputable businessman, *or* disagreement between or among any persons named in paragraph F, which in the Company's opinion tends to affect adversely the operation or business of the Dealer * * * the Company, or COMPANY PRODUCTS.

"(5) The Dealer shall have engaged, after written warning by the Company, in any advertising or business practice contrary to the provisions * * * of this agreement.

"(6) Failure of the Dealer to fulfill any provision [of certain paragraphs] or to pay the Company any sum due pursuant to any agreement * * * .

"Upon occurrence of any of the foregoing events, the Company may terminate this agreement by giving the Dealer at least fifteen (15) days prior written notice thereof.

"17.(c) BY COMPANY FOR NONPERFORMANCE BY DEALER OF SALES, SERVICE, FACILITIES OR OTHER RESPONSIBILITIES.

* * * [T]he Company shall notify the Dealer in writing of such failure * * * . If the Dealer fails or refuses to cure the same within a reasonable time after such notice, the Company may terminate or not renew this agreement by giving the Dealer at least ninety (90) days prior written notice thereof. * * *

"17.(d) BY COMPANY OR DEALER BECAUSE OF DEATH OR PHYSICAL OR MENTAL INCAPACITY OF ANY PRINCIPAL OWNER. * * *

"17.(e) BY COMPANY OR DEALER FOR FAILURE OF DEALER OR COMPANY TO BE LICENSED. * * *

"17.(f) BY COMPANY AT WILL. If this agreement is not for a stated term specified in paragraph G of this agreement [There was no such stated term specified.] the Company may terminate this agreement at will at any time by giving the Dealer at least one hundred and twenty (120) days prior written notice thereof. * * *

"17.(h) ACTS IN GOOD FAITH.

"(1) The Dealer acknowledges that each of his responsibilities under this agreement is reasonable, proper and fundamental to the purpose of this agreement and that (i) his failure to fulfill any of them would constitute a material breach of this agreement * * *. The Dealer acknowledges that any such failure, occurrence or event constitutes a reasonable, fair, good, due and just cause and provocation for termination or nonrenewal of this agreement by the Company.

"(2) The Dealer agrees that if the Company * * * gives the Dealer notice of termination or nonrenewal * * * because of any such failure, occurrence or event, then such request, advice, notice, termination or nonrenewal shall not be considered to constitute or be evidence of coercion or intimidation, or threat thereof, or to be unreasonable, unfair, undue or unjust, or to be not in good faith."

Nothing in the record or the briefs of the parties suggests any failure by Cloverdale, while the plaintiff served as its president and general manager, to perform in full all of its obligations under the franchise agreement, or that Cloverdale, under the plaintiff's management, was not a successful dealer operation, or that the plaintiff failed in the proper performance of any of

his duties or was in any way unsatisfactory to Cloverdale or unsatisfactory to Ford except in his announced intention to continue his personal affiliation with and activity in the Ford Dealer Alliance, of which organization Ford disapproved. Nothing in the record indicates the nature of the plaintiff's activities in the Ford Dealer Alliance.

Hatfield and Allman by Weston P. Hatfield and R. Bradford Leggett for plaintiff.

Hudson, Petree, Stockton, Stockton & Robinson by J. Robert Elster and W. Thompson Comerford, Jr. for defendant Ford Motor Company.

Womble, Carlyle, Sandridge & Rice by W. P. Sandridge, Jr., for defendants Cloverdale Ford, Inc., Thomas Keesee, Sr., and James K. Dobbs.

LAKE, Justice.

[1] The complaint alleges that, after its incorporation, Cloverdale adopted the contract of 18 May 1971 concerning the plaintiff's employment as its president and general manager. Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be express or implied, and thereby become liable for its performance. *McCrillis v. A & W Enterprises, Inc.*, 270 N.C. 637, 155 S.E. 2d 281 (1967); Robinson, N. C. Corporation Law (2d ed. 1974) §§ 2-4.

[2] Thus, under the allegations of the complaint which, for the purpose of this appeal must be deemed true, Cloverdale became liable as a party to the contract. However, the contract of employment upon which the plaintiff relies, which was made by him a part of his complaint, contains no provision whatever as to the duration of such employment. "Where a contract of employment does not fix a definite term, it is terminable at the will of either party, with or without cause, except in those instances in which the employee is protected from discharge by statute." *Still v. Lance*, 279 N.C. 254, 182 S.E. 2d 403; Strong, N. C. Index 2d, Master and Servant, § 10. There is no such statutory protection applicable to the plaintiff in this case. Consequently, Cloverdale committed no breach of its contract when it terminated the plaintiff's employment even if, as the plaintiff

alleges, there was no "just cause" for such termination. The complaint, therefore, does not state a claim against Cloverdale upon which relief can be granted and there was no error in dismissing the action as to Cloverdale.

As to the defendants Keesee and Dobbs, it is alleged in the complaint that these defendants "joined with and conspired with the defendant Ford Motor Company, to wrongfully terminate the employment of the plaintiff"; that after the plaintiff had converted the dealership into a profitable one, these defendants, realizing that the option granted by the agreement of 18 May 1971 for the purchase of their stock in Cloverdale for its book value would result in a great loss to them, wilfully, wrongfully and maliciously broke their said contract with the plaintiff; that they caused a letter to be written to the plaintiff demanding that he discontinue his activities on behalf of the Ford Dealer Alliance; that they caused a meeting of the board of directors of Cloverdale to be called and thereat they caused a vote to be taken which "wrongfully and unlawfully terminated the employment of the plaintiff."

In his petition to this Court for certiorari and in his brief, the plaintiff contends, "It was clearly alleged in the Complaint that the sole inducement for the termination of [the plaintiff's] employment was to sever his ownership rights in [Cloverdale]." He further states that the termination of the plaintiff's employment by the Board of Directors of Cloverdale "was motivated and consummated for the reason that the defendants Dobbs and Keesee, after seeing how successful this particular dealership was, did not want to be placed in a position wherein they would have to sell their stock at book value, but rather, wanted to create a situation wherein their own ownership rights would be enhanced." Again, the plaintiff asserts that his "stock rights were interlocked with his continuing employment."

A fatal difficulty with the plaintiff's contentions concerning his action against the defendants Keesee and Dobbs is that they are contrary to the provisions of the contract of 18 May 1971, which the plaintiff attached to and made part of his complaint. As noted above, the action of Cloverdale in terminating the plaintiff's employment by it was not a breach of that contract. Furthermore, the termination of his employment by Cloverdale did not terminate any right of the plaintiff to acquire stock in Cloverdale owned by Keesee and Dobbs. The

provision of the contract on which the plaintiff bases his contention in this respect reads:

> "Sixty (60) months after the commencement of business by the corporation, [Keesee, Dobbs and Goodwin] grants an option *to said corporation* [i.e., Cloverdale] to purchase not less than all of the capital stock owned by [Keesee, Davis and Goodwin] at book value for cash, such book value to be determined according to the method outlined in Section 3(b) above. The exercise of this option *by the corporation* shall be evidenced in writing delivered to [Keesee, Davis and Goodwin] at its principal office in Memphis, Tennessee." (Emphasis added.)

This provision of the contract of 18 May 1971 is not a contract of sale but a grant of an option to purchase. The option is not granted to the plaintiff but to Cloverdale. At no time did the plaintiff have a controlling stock interest in Cloverdale or control of its board of directors. On the contrary, the complaint makes it clear that control of Cloverdale was at all times in Keesee, Dobbs and Goodwin. If they did not wish a transfer of their stock to Cloverdale at book value to occur, they could prevent such transfer by the exercise of their control over Cloverdale whether or not the plaintiff remained in its employ. Furthermore, such option is not contingent upon the plaintiff's employment by Cloverdale but upon the mere passage of 60 months from the commencement of business by Cloverdale. The option remains in effect notwithstanding the plaintiff's discharge.

Under the caption "UNSATISFACTORY MANAGEMENT," the contract of 18 May 1971, which the plaintiff made part of the complaint, provides:

> "The parties hereto agree that if [the plaintiff], in his position as President and General Manager of the Corporation [i.e., Cloverdale], shall prove to be unsatisfactory in the opinion of [Keesee, Dobbs and Goodwin] *and* James W. Davis, *or* the Ford Motor Company *from the standpoint of profits earned or the manner of operation of the Corporation,* the employment of [the plaintiff] as President and Manager may be terminated by the Corporation. *Upon such termination* [the plaintiff] agrees to sell to James W. Davis the capital stock owned by him at book value of such stock at the end of the month preceding such termination and for cash." (Emphasis added.)

It will be observed that the provision in the contract for the sale of the plaintiff's stock to Davis is contingent upon "such termination," i.e., a termination for the reason that the plaintiff proved to be "unsatisfactory" to a combination of Keesee, Dobbs, Goodwin and Davis, or to Ford "from the standpoint of profits earned or the manner of operation of the Corporation." It does not appear that this was the reason for the termination of the plaintiff's employment by Cloverdale. On the contrary, the complaint alleges that this was not the cause of such termination.

[3] Thus, the complaint negates the plaintiff's contention that the motive of Keesee and Dobbs in causing Cloverdale to terminate the plaintiff's employment was to deprive the plaintiff of any ownership interest in Cloverdale or any option to increase such ownership interest. Accordingly, we find no error in the judgment of the Superior Court dismissing the action as to the defendants Keesee and Dobbs.

As to Ford the substance of the complaint is: (1) Ford knew the plaintiff had a contract with Cloverdale, a Ford dealer, for employment by it, terminable at the will of Cloverdale; (2) the plaintiff was performing well his duties under that contract and, as a result, Cloverdale was prospering and was a successful dealer in Ford products; (3) but for the "wrongful, malicious and unlawful interference" by Ford therewith, this employment would have been continued by Cloverdale; (4) Ford "wrongfully, maliciously, and unlawfully exerted pressure" upon Cloverdale to terminate the plaintiff's employment; (5) the sole reason for Ford's interference with the employment relation between the plaintiff and Cloverdale was the plaintiff's refusal to discontinue his personal participation in the Ford Dealer Alliance, "a group of Ford dealers who had gathered together for the purpose of protecting their own interest in transactions with the defendant Ford Motor Company"; (6) due to pressure so exerted upon it by Ford, Cloverdale terminated the plaintiff's employment; and (7) thereby, the plaintiff was damaged.

Ford, by its motion to dismiss, says that, even though this be true, the courts of this State cannot give the plaintiff any relief against Ford. The Superior Court and the Court of Appeals so held. We reach a different conclusion.

For the purpose of the motion by Ford to dismiss, we treat the allegations of the complaint as true. *Sutton v. Duke,*

277 N.C. 94, 176 S.E. 2d 161 (1970). We also take into account the provisons of Ford's Franchise Agreement with Cloverdale. Rule 12(b) G.S. 1A-1. Assuming that, pursuant to Rule 12(b), the Superior Court considered Ford's motion to dismiss as a motion for summary judgment, which does not appear from the record, there is nothing in the record to indicate that the parties were given reasonable opportunity to present all material pertinent to such a motion as Rule 12(b) requires. Furthermore, the pleadings present genuine and material issues of fact between the plaintiff and Ford so summary judgment could not properly have been entered on the ground of the absence of such issues. These are for determination by a jury, assuming evidence be offered in support of the plaintiff's allegations. *Sutton v. Duke, supra.*

[4] The question presented to us by this appeal is: If A, knowing B is employed by C under a contract terminable at will by C, maliciously causes C to discharge B, which C would not otherwise have done, by threatening, otherwise, to terminate A's own contract with C, which contract is terminable at will by A, the sole motive for A's action being A's resentment of B's personal affiliation with an organization disapproved by A, which affiliation does not impair C's performance of its contract with A, can B maintain in the courts of this State an action against A for damages? Our conclusion is that he can.

In *Childress v. Abeles,* 240 N.C. 667, 84 S.E. 2d 176 (1954), Justice Parker, later Chief Justice, speaking for this Court, said:

> "[T]he overwhelming weight of authority in this nation is that an action in tort lies against an outsider who knowingly, intentionally and unjustifiably induces one party to a contract to breach it to the damage of the other party.
>
> "To subject the outsider to liability for compensatory damages on account of this tort, the plaintiff must allege and prove these essential elements of the wrong: *First,* that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second,* that the outsider had knowledge of the plaintiff's contract with the third person. *Third,* that the outsider intentionally induced the third person not to perform his contract with the plain-

tiff. *Fourth,* that in so doing the outsider acted without justification. *Fifth,* that the outsider's act caused the plaintiff actual damages." (Citations omitted.)

As we have noted above, there was no breach by Cloverdale of its contract with the plaintiff, but an exercise by Cloverdale of its legal right to terminate that contract. This circumstance does not, however, defeat the plaintiff's right of action against Ford. *Childress v. Abeles, supra,* expressly so states. The wrong for which the courts may give redress includes also the procurement of the termination of a contract which otherwise would have continued in effect. *Truax v. Raich,* 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *United States Fidelity & Guaranty Co. v. Millonas,* 206 Ala. 147, 89 So. 732 (1921); *London Guarantee & Accident Co. v. Horn,* 206 Ill. 493, 69 N.E. 526 (1903); 45 AM. JUR. 2d, Interference, § 24; Annot., 84 ALR 43, 60. As Mr. Justice Hughes, later Chief Justice, said in *Truax v. Raich, supra,* "The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others."

The fact that the plaintiff's contract with Cloverdale contained an express provision that Cloverdale might terminate the plaintiff's employment if the plaintiff "shall prove to be unsatisfactory in the opinion of * * * the Ford Motor Company from the standpoint of profits earned or the manner of operation of the corporation," is not the basis of a defense to Ford in the present action. On the contrary, it clearly indicates that dissatisfaction for the stated reasons was intended by the parties to be the *only* justification for Ford's expressing to Cloverdale its displeasure over the continuation of the plaintiff's employment. This provision did not enlarge Cloverdale's right to terminate the employment for, as we have seen, it was terminable by Cloverdale at will. While Ford was not a party to the contract of 18 May 1971, wherein this provision appears, it is obvious that Ford knew of the contract and of this provision in it. Nowhere in the record is it suggested that Ford was, or had any basis whatever for being, dissatisfied with the plaintiff's performance as president and general manager of Cloverdale "from the standpoint of profits earned or the manner of operation of" Cloverdale. The complaint clearly alleges that Ford brought about the plaintiff's discharge because, and solely because, the plaintiff, in his personal capacity, belonged to the Ford Dealer Alliance and refused to withdraw therefrom.

In *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971), this Court affirmed a directed verdict in favor of the defendant in an action for wrongful and malicious interference with the plaintiff's contract of employment. There, as here, the employer was a dealer in the defendant's products under a franchise agreement which the defendant threatened to terminate if the plaintiff were not discharged. For that reason only, according to the plaintiff's evidence, the plaintiff was discharged. The franchise agreement between the defendant and the employer provided that the defendant could terminate the agreement immediately if the dealer were a corporation, which it was, and if there were a change in its management, which the plaintiff's employment was. The plaintiff's predecessor as manager of the dealer was satisfactory to the defendant. The defendant's primary objection to the plaintiff as the dealer's manager was its fear that the plaintiff, who had previously been located in High Point, would draw so much business from High Point that he would jeopardize the ability of the defendant's dealer in that city to continue in successful operation. After observing that the defendant was not "an outsider," this Court said:

> "Absent *special circumstances*, neither the exercise nor the threat to exercise a legal right may be considered tortious conduct.
>
> " 'Absolute rights, including primarily rights incident to the ownership of property, *rights growing out of contractual relations*, and the right to enter or refuse to enter into contractual relations, may be exercised without liability for interference without reference to one's motive as to any injury directly resulting therefrom. * * * In other words, acts performed with such an intent or purpose as to constitute legal malice and without justification, which otherwise would amount to a wrongful interference with business relations, are not tortious where committed in the exercise of an absolute right.' 45 AM. JUR. 2d Interference, § 23. * * *
>
> "We think the evidence as to *special circumstances*, when considered in the light most favorable to plaintiff, is sufficient to impair the Harvester Company's legal right (option) to terminate (or threaten to terminate) the franchise agreement when there is 'a substantial change in the operation, management or control of the dealership."

It is apparent that in *Kelly v. Harvester Co., supra,* the purpose or motive of the defendant in bringing about the termination of the plaintiff's employment by its dealer was not a malicious desire to injure the plaintiff by reason of his conduct or affliations separate and apart from the operation of the dealership in which he was employed, but was to protect the operation of the defendant's other dealer in High Point, in whose successful operation the defendant had a legitimate and substantial business interest. In the present case, according to the allegations of the complaint, the defendant's purpose and motive was malicious, it being to punish the plaintiff for his refusal to terminate his personal affiliation with the Ford Dealer Alliance. It does not appear, upon the present record, that such affiliation by the plaintiff with the Ford Dealer Alliance would, in any way, jeopardize the successful operation of Cloverdale or of any other Ford dealer or any legitimate business interest of Ford.

[5] The term "outsider" used in these two North Carolina decisions has not been defined by this Court and appears to be peculiar to this jurisdiction. It appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof. Conversely, one who is a non-outsider is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter. Obviously, Ford has a legitimate business interest in the success of Cloverdale, its dealer. The parties to the plaintiff's employment contract recognized this by providing therein that the employment might be terminated by Cloverdale if Ford found the plaintiff to be unsatisfactory "from the standpoint of profits earned or the manner of operation of" Cloverdale.

[6] *Kelly v. Harvester Co., supra,* sustained the right of such a non-outsider to insist upon the discharge of an employee whose continued employment jeopardized its legitimate business interest in the subject matter of the terminated contract. To extend that decision to the present case would confer upon the non-outsider the right to apply economic pressure upon the party to the contract in order to bring about a termination of it for a reason unrelated to that legitimate business interest which is the source of the defendant's non-outsider status. We perceive no reason for conferring upon the non-outsider immunity to suit for the malicious procurement of the termination of a con-

tract when such action has no relation whatever to the source of the non-outsider status. In such case, the defendant is in the same position as an outsider. That is, the defendant's status as an outsider or a non-outsider is pertinent only to the question or justification for his action.

In *Wilson v. McClenny,* 262 N.C. 121, 136 S.E. 2d 569 (1964), the plaintiff having been dismissed as president of a corporation, brought an action against four of its directors for alleged tortious interference by them with the contractual relationship between him and the corporation. In affirming a judgment of nonsuit as to that cause of action this Court, speaking through Justice Sharp, now Chief Justice, said:

> "The distinction between *Childress* [*supra*] and the case *sub judice* is that the defendants here are not *outsiders.* They are all stockholders and directors of [the corporate employer]. As stockholders they had a financial interest in the corporation; as directors they owed it fidelity and the duty to use due care in the management of its business. G.S. § 55-35. As either directors or stockholders, they were privileged purposely to cause the corporation not to renew plaintiff's contract as president if, in securing this action, they did not employ any improper means and if they acted in good faith to protect the interests of the corporation. In other words, because of their financial interest and fiduciary relationship they had a qualified privilege to interfere with contractual relations between the corporation and a third party."

To hold, as was done in *Wilson v. McClenny, supra,* that a non-outsider has a *qualified* right to bring about the termination of another's terminable contract of employment when, in good faith, he believes this to be necessary to protect his own legitimate business interest or to perform his own fiduciary duty to the employer, is a far different thing from holding that a non-outsider is *ipso facto* immune to suit for damages for bringing about the termination of such contract in all cases.

Ford contends that it did nothing to cause the termination of the plaintiff's contract with Cloverdale, except to threaten to terminate its own franchise agreement with Cloverdale if the plaintiff were not discharged, and that its contract with Cloverdale was expressly terminable at will by Ford upon the giving of proper notice. Consequently, Ford says, the complaint

charges Ford with doing nothing except that which Ford had a right to do and its exercise of its own lawful right to terminate its contract with Cloverdale cannot be a tort against the plaintiff.

In 45 AM. JUR. 2d, Interference, § 23, it is said:

"Absolute rights, including primarily rights incident to the ownership of property, rights growing out of contractual relations, and the right to enter or refuse to enter into contractual relations, may be exercised without liability for interference without reference to one's motive as to any injury directly resulting therefrom. This is in contrast to the exercise of common and qualified rights which may be exercised only where there is justification therefor. In other words, acts performed with such an intent or purpose as to constitute legal malice and without justification, which otherwise would amount to a wrongful interference with business relations, are not tortious where committed in the exercise of an absolute right. * * *

"Enforcing or complying with one's own valid contract does not constitute unjustifiable interference with another's contract, nor does the exercise of a legal right to terminate an agreement by a contracting party. An action taken to protect one's contractual right is also ordinarily justification for interference with another's contract. * * *

"There is no liability for inducing the discharge of an employee by the exercise of a contractual right, which, carried into execution, results in the loss of the plaintiff's employment, since the loss of employment is due to the exercise of a legal right, absolute in character, and the motive for the exercise of such right is not a matter open to inquiry."

Of course, had Ford, for a reason not related to the plaintiff, terminated its franchise agreement with Cloverdale, which it had the right to do at will upon giving the specified notice, it would thereby have incurred no liability to Cloverdale or to the plaintiff or other employees, customers or suppliers of Cloverdale who, in consequence of such termination, lost their own employment or business opportunities. In such case, the plaintiff's loss of employment would have been merely the indirect, consequential result of Ford's exercise of its right, absolute as between it and Cloverdale, to terminate its contract. It

is equally obvious that one, such as a customer or potential customer of Cloverdale, may refuse to patronize or discontinue his patronage of a business establishment because of his dissatisfaction, whether warranted or not, with services rendered by an employee of the establishment and may, in good faith, inform the employer of his reason for so doing. If the employer, in an effort to retain the patronage of such dissatisfied customer, discharge such employee, the latter would have no right of action for damages against such customer since his loss of employment would be merely the indirect, consequential result of the customer's exercise of his own right.

We are not inadvertent to decisions in other jurisdictions to the effect that one may, without liability, bring about the discharge of an employee, because of personal differences with the employee about matters unrelated to the business of the employer, by threatening to terminate his own terminable contract with the employer unless the employee is discharged. The leading case so holding is *Raycroft v. Tayntor*, 68 Vt. 219, 35 A. 53 (1896). See also: *Bliss v. Southern Pacific Co.*, 212 Ore. 634, 321 P. 2d 324 (1958). We believe, however, that those cases are not in accord with the greater weight of more recent authority.

Section 766 of the Restatement of Torts (1939) states:

> "Except as stated in Section 698 [not applicable here], one who, without a privilege to do so, induces or otherwise purposely causes a third person not to
>
> (a) perform a contract with another, or
>
> (b) enter into or continue a business relation with another is liable to the other for the harm caused thereby."

Comment g upon this section of the Restatement reads:

> "*Inducement by Refusal to Deal.* A refusal to deal is one means by which a person may induce another to commit a breach of his contract with a third person or to refrain from entering into or continuing a business relation with him. Thus A may induce B to cease dealing with C by threatening not to enter into, or to sever, business relations with B, unless B does so cease. Such a situation frequently presents a nice question of fact. While, under the rule stated in this Section, A may not, without a privilege,

induce B not to deal with C, A is ordinarily free, as stated in § 762, to refuse to deal with B for any reason or no reason. The difficult question of fact presented in this situation is, then, whether A is merely exercising his freedom to select the persons with whom he will do business or is inducing B not to deal with C. * * * If he is merely exercising that freedom, he is not liable to C for the harm caused by B's choice not to lose A's business for the sake of getting C's."

Comment m upon this section of the Restatement reads:

"If the actor does not act for the purpose of advancing the interest for the protection of which the privilege is given, he is not exercising the privilege and is not protected by it. No privilege is given to protect merely the interest in satisfying one's spite or ill will."

Professor Carpenter, writing in 41 Harv. L. Rev. 728, 746 (1928), under the title "Interference With Contract Relations," says:

"The privilege [to interfere] is conditional or qualified; that is, it is lost if exercised for a wrong purpose. In general, a wrong purpose exists where the act is done other than as a reasonable and *bona fide* attempt to protect the interest of the defendant which is involved."

In Oakes, Organized Labor and Industrial Conflicts, § 500 (1927), it is said:

"Because one may refrain from entering into a contract with another, or may exercise a right under a contract with another, without incurring any liability to such other, irrespective of his motive in the matter, he has been said to have an absolute right to do so. This has led some courts to hold that such right is likewise absolute as to third parties. But it does not follow that because he may have an absolute right to refrain from contracting with another, or to exercise a right growing out of a contract with such other, that it is not a qualified right as to third persons injuriously affected thereby."

In *McMaster v. Ford Motor Co.*, 122 S.C. 244, 115 S.E. 244 (1923), it was held there was no liability upon the defendant for ordering its dealers to refuse to install on Ford automobiles

a device manufactured by the plaintiff which would make the automobiles of a wider gauge, or for its conditioning its warranty of Ford automobiles so as to negate such warranty if the plaintiff's device be used thereon. As the Court said, the Ford Motor Company has the right to put its cars on the market in such form and with such parts and attachments as it sees fit and to prevent any alteration or modification thereof so long as it retained any legal interest in the automobiles. In so doing, Ford was clearly acting to protect its good will and its interest in its own product.

In *United States Fidelity and Guaranty Co. v. Millonas, supra,* an insurance company issued to an employer a liability policy which gave the company the unqualified right to cancel it. An injured employee presented a claim for damages against the employer for which the insurance company would be responsible under its policy. To compel the employee to accept a settlement offered by the insurance company, it informed the employer, the policyholder, that it would cancel the policy unless the employee were discharged. He was so discharged and sued the insurance company for damages. In affirming a judgment for the plaintiff, the Alabama Court said:

> "In the instant case, the right of the defendant to cancel the contract of insurance with plaintiff's employer was of course not questioned, and if his discharge had been but the result or consequence of such an exercise of a lawful right, no cause of action would be shown. Such, however, was not the case, as evidence for the plaintiff tends to show that his discharge was procured maliciously and wrongfully by a threat of cancellation, for the purpose of forcing a settlement of his claim favorable to the company and disadvantageous to himself."

In *London Guarantee & Accident Co. v. Horn, supra,* in a similar situation, the Illinois Court said:

> "[C]ertainly a desire to compel the employee to surrender a cause of action *wholly disconnected with the continuance of his employment* does not afford justification for interference by a third party, who desires the satisfaction of the alleged liability. * * *
>
> "[The employer] had the undoubted right to discharge Horn whenever it desired. It could discharge him for reasons the most whimsical or malicious, or for no

reason at all, and no cause of action in his favor would be thereby created; but it by no means follows that while the relations between [the employer] and Horn were pleasant, and while, as the evidence shows, it was the expectation of the company that Horn would continue in its employ 'all the year around,' that the interference of appellant, whereby it secured the employer to exercise a right which was given it by the law, but which, except for the action of appellant, it would not have exercised, is not actionable. * * *

"We therefore conclude, both upon reason and authority, that where a third party induces an employer to discharge his employee who is working under a contract terminable at will, but under which the employment would have continued indefinitely, in accordance with the desire of the employer, except for such interference, and where the only motive moving the third party is a desire to injure the employee and to benefit himself at the expense of the employee by compelling the latter to surrender an alleged cause of action, for the satisfaction of which, in whole or in part, such third party is liable, and where such right of action does not depend upon and is not connected with the continuance of such employment, a cause of action arises in favor of the employee against the third party." (Emphasis added.)

In *Huskie v. Griffin,* 75 N.H. 345, 74 A. 595 (1909), the Court said:

"It has been said, however, in several cases, that a wrongful motive cannot convert a legal act into an illegal one, and many judges have thought this was the end of the law upon the question. They seem to proceed upon a theory of absolute right in the defendant, which is at variance with the holding in many of the same cases that the defendant may be called upon to justify his conduct. Indeed, the authorities are practically unanimous to the effect that the defendant is liable unless he shows a justification. If this is true, it follows as a matter of course that his right is not absolute. It is a qualified one, and the rightfulness of its exercise depends upon all those elements which go to make up a cause for human action. The reasonableness of the act cannot always be satisfactorily determined until something is known of the state of the actor's mind. The

'justification may be found sometimes in the circumstances under which it is done, irrespective of motive, sometimes in the motive alone, and sometimes in the circumstances and motive combined.' * * *

"Since the defendant is called upon to justify—to show reasonable cause for the interference with his neighbor's right—it seems to clearly follow that, where his only reason is his malicious wish to injury the plaintiff, he has no justification."

In *Johnson v. Aetna Life Insurance Co.*, 158 Wis. 56, 147 N.W. 32 (1914), the plaintiff alleged that the defendant insurance company induced his employer to discharge him so that he would not be able to earn money with which to prosecute a suit against the employer and the insurance company for injuries, threatening to cancel the employer's insurance if the employer did not so discharge the plaintiff. The Court held the evidence was insufficient to take the case to the jury but said, "This savors too strongly of oppression to be considered a legitimate reason for a third party interfering with the relations between employer and employee."

Also sustaining the right of the discharged employee to sue the interferer, who brought about his discharge by threat to terminate or refuse to enter into contractual relations with the employer are *Hill Grocery Co. v. Carroll*, 223 Ala. 376, 136 So. 789 (1931), and *Pino v. Transatlantic Marine, Inc.*, 358 Mass. 498, 265 N.E. 2d 583 (1970).

[7] We hold: To exert economic pressure upon an employer for the purpose of procuring the termination by him of his employment of another is a qualified privilege even though, as between the actor and the employer, the actor has an absolute right to do that which produces such pressure upon the employer. The actor is liable in damages to the employee for so procuring such termination of the employment if the actor so acted with malice and for a reason not reasonably related to the protection of a legitimate business interest of the actor. If the reason for such action be the employee's personal participation in an association not approved by the actor, the burden is upon the actor, when sued for damages for so procuring the termination of the employment relation to show that the participation by the employee in such association afforded reasonable basis for the belief that a legitimate business interest of the actor would thereby be damaged or imperiled.

[8] The complaint of the plaintiff in this action alleges the malicious interference by the defendant with the plaintiff's employment relation without such justification. Consequently, it states a cause of action within the rule of *Childress v. Abeles, supra,* and the dismissal of the action as against the Ford Motor Company was error. The matter is, therefore, remanded to the Court of Appeals for the entry by it of a judgment further remanding it to the Superior Court for trial of the plaintiff's alleged cause of action against Ford.,

As to the defendant Cloverdale Ford, Inc., affirmed.

As to the defendants Keesee and Dobbs, affirmed.

As to the defendant Ford Motor company, reversed and remanded.

Justice EXUM did not participate in the consideration or decision of this case.

IN RE: JOSEPH LEE MOORE

No. 72

(Filed 29 January 1976)

1. **Constitutional Law §§ 21, 24— sterilization laws — due process — payment for medical expert**

Statutes authorizing the sterilization of mentally ill or mentally retarded persons, G.S. 35-36 through G.S. 35-50, are not unconstitutional in failing to require the State to pay a medical expert on behalf of the respondent since G.S. 7A-454 allows the court in its discretion to approve a fee for the services of an expert witness who testifies for an indigent person, and no constitutional mandate requires more.

2. **Constitutional Law §§ 21, 24— sterilization laws — due process — cross-examination**

The statutes authorizing the sterilization of mentally ill or mentally retarded persons do not unconstitutionally deny respondent the right of cross-examination since that right is specifically provided by G.S. 35-43, the only requirement to assure such right is that the respondent, his guardian, attorney or some other interested party object in writing to the sterilization, and this requirement is not unduly burdensome because respondent is represented at every stage of the proceeding.

3. **Constitutional Law § 21— sterilization laws — procedural due process**

Statutes authorizing the sterilization of mentally ill or mentally retarded persons, G.S. 35-36 through G.S. 35-50, meet procedural due process requirements.

4. **Constitutional Law §§ 14, 21— sterilization laws — valid exercise of police power**

The sterilization of mentally ill or retarded persons under the safeguards as set out in G.S. 35-36 through G.S. 35-50 is a valid and reasonable exercise of the police power since the State has a compelling interest to prevent the procreaton of children by a mentally ill or retarded person who would probably be unable to care for children and the procreation of children who probably would have serious physical, mental or nervous diseases or deficiencies.

5. **Constitutional Law §§ 20, 21— sterilization laws — equal protection**

The sterilization statutes do not violate the equal protection clauses of the United States Constitution or the North Carolina Constitution since they apply to all mentally ill or retarded persons inside or outside an institution who meet the requirements of the statutes.

6. **Constitutional Law §§ 21, 24— sterilization laws — judicial standard**

The sterilization statutes, G.S. 35-36 through G.S. 35-50, when construed by the Court to require clear, strong and convincing evidence before a sterilization order may be entered, provide a sufficient judicial standard to guide the court in reaching a decision whether to authorize the sterilization of an individual and are not unconstitutionally vague and arbitrary.

7. **Constitutional Law §§ 21, 36— sterilization — no cruel and unusual punishment**

The sterilization of a person pursuant to the provisions of G.S. 35-36 through G.S. 35-50 does not constitute cruel and unusual punishment since no criminal proceeding is involved.

APPEAL by the State from *McConnell, J.*, at the 28 July 1975 Civil Session, FORSYTH Superior Court, heard prior to determination by the Court of Appeals.

On 21 May 1975 a petition was filed in Forsyth County District Court by Gerald M. Thornton, Director, Forsyth County Department of Social Services, requesting that the court enter an order authorizing the sterilization of Joseph Lee Moore, a minor. The petition was accompanied by the consent of the respondent, Joseph Lee Moore, and his mother, Dora I. Moore. A psychological report included in the petition indicated that Joseph is presently functioning at a moderately retarded level of measured intelligence, with a Full Scale I.Q. of under 40 and a Test Age score of 8. The petitioner believed Joseph to be a proper subject for sterilization because it is likely that unless steril-

ized he would procreate a child or children who would probably have serious physical, mental or nervous diseases or deficiencies. The accompanying statement by the examining physician, Dr. Ruth O'Neal, found no known contraindication to the requested surgical procedure.

The respondent, through his guardian ad litem and attorney, in apt time objected to the petition and requested a hearing. This matter was heard on 29 July 1975 before A. Lincoln Sherk, J., in Forsyth District Court, Juvenile Division. The respondent filed a motion to quash and dismiss the petition, alleging that G.S. 35-36, *et seq.*, was unconstitutional. This motion was allowed and notice of appeal was given by the State to Forsyth Superior Court.

The matter was heard *de novo* before McConnell, J., at the 28 July 1975 Civil Session of Forsyth Superior Court. The respondent again made his motions to quash or dismiss the petition. Judge McConnell allowed the motion, finding G.S. 35-36 through G.S. 35-50, inclusive, unconstitutional. The District Attorney for the Twenty-First Judicial District excepted to the judgment and for the State gave notice of appeal to the Court of Appeals. The respondent petitioned the Supreme Court to hear this matter prior to determination by the Court of Appeals. This petition was allowed on 27 August 1975.

Attorney General Rufus L. Edmisten by Associate Attorney Isaac T. Avery, III, for the State, petitioner appellant.

Hatfield and Allman by James W. Armentrout for respondent appellee.

Smith, Patterson, Follin, Curtis & James by Norman B. Smith for North Carolina Civil Liberties Union Legal Foundation, Inc., amicus curiae, for respondent appellee.

MOORE, Justice.

The only question before us on this appeal is the constitutionality of G.S. 35-36 through G.S. 35-50, inclusive.

The respondent attacks these statutes on the grounds that they are violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of Article I, Section 19, of the North Carolina Constitution, both from procedural and substantive standpoints,

that they deny the respondent equal protection of the law, are unconstitutionally vague and arbitrary, and provide for cruel and unusual punishment. The term "law of the land" as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with "due process of law" as used in the Fourteenth Amendment to the Federal Constitution. *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764 (1962).

The right of a state to sterilize retarded or insane persons was first upheld by the United States Supreme Court in *Buck v. Bell,* 274 U.S. 200, 71 L.Ed. 1000, 47 S.Ct. 584 (1927). In that case, in upholding a Virginia sterilization law, the Court held that the state may provide for the sterilization of a feebleminded inmate of a state institution where it is found that she is the probable potential parent of a socially inadequate offspring likewise afflicted, and that she may be sterilized without detriment to her general health, and that her welfare and that of society will be promoted by her sterilization. Since *Buck,* many states have passed sterilization laws. *See* Validity of Statutes Authorizing Asexualization or Sterilization of Criminals or Mental Defectives, Annot., 53 A.L.R. 3d 960 (1973).

Most of these statutes have been declared constitutional. The grounds for declaring some of the statutes unconstitutional were lack of notice and a hearing, *In re Hendrickson,* 12 Wash. 2d 600, 123 P. 2d 322 (1942), *In re Opinion of the Justices,* 230 Ala. 543, 162 So. 123 (1935), *Williams v. Smith,* 190 Ind. 526, 131 N.E. 2 (1921); equal protection because limited to those imprisoned or committed, *Haynes v. Lapeer, Circuit Judge,* 201 Mich. 138, 166 N.W. 938 (1918), *Smith v. Board of Examiners of Feeble-Minded,* 85 N.J.L. 46, 88 A. 963 (1913), *In re Thomson,* 103 Misc. 23, 169 N.Y.S. 638, *aff'd,* 185 App. Div. 902, 171 N.Y.S. 1094 (1918), *Skinner v. Oklahoma,* 316 U.S. 535, 86 L.Ed. 1655, 62 S.Ct. 1110 (1942); or cruel and unusual punishment, *Davis v. Berry,* 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds,* 242 U.S. 468, 61 L.Ed. 441, 37 S.Ct. 208 (1917).

Our research does not disclose any case which holds that a state does not have the right to sterilize an insane or a retarded person if notice and hearing are provided, if it is applied equally to all persons, and if it is not prescribed as a punishment for a crime.

Respondent contends, however, that not all the requirements of procedural due process have been met in this case. A

former sterilization statute was held unconstitutional by this Court on procedural grounds, specifically that notice and a hearing were not provided. *See Brewer v. Valk,* 204 N.C. 186, 167 S.E. 638 (1933). The present statute, effective 1 January 1975, sought to correct the defects found in the former statute. G.S. 35-36 and G.S. 35-37 both provide that "no operation authorized in this section shall be lawful unless and until the provisions of this Article shall first be complied with." G.S. 35-41 provides that at least twenty days prior to a hearing on the petition in the district court, a copy of such petition must be served on the resident of the institution, patient, or noninstitutional individual and on the legal or natural guardian, guardian ad litem, or next of kin of the resident of the institution, patient or noninstitutional individual. G.S. 35-44 provides for a hearing, if requested, before the judge of the district court. G.S. 35-44 also provides for an appeal from the judgment of the district court to the superior court for a trial *de novo* with the right upon the application of either party to be heard before a jury and the further right of appeal to the appellate courts for judicial review.

G.S. 35-45 provides:

> "The person alleged to be subject to the provisions of this section shall have the right to counsel at all stages of the proceedings provided for herein. This person and all others served with the notification provided for in G.S. 35-41 shall be fully informed of the person's entitlement to counsel at the time of this service of notice. This information shall be given in language and in a manner calculated to insure, insofar as such is possible in view of the individual's capability to comprehend it, that the recipient understands the entitlement. Every person subject to be sterilized under this Article after the filing of the petition shall have counsel at every stage of the proceedings. If there is a conflict between the election of the person concerned and that of the other persons being served with notice, determination of the question of representation by counsel shall be made by the court having jurisdiction of the case. The person concerned may, in any instance, be represented by counsel retained by him. In cases of claimed indigency, a request for counsel shall be processed in the manner provided for in Subchapter IX, Chapter 7A, General Statutes of North Carolina."

[1] Despite the above specified safeguards, respondent still asserts that two important procedural rights have been omitted: (1) a provision that the State will provide the funds necessary to obtain a medical expert on behalf of the respondent and (2) the right of cross-examination. It is true that this statute does not require the State to pay a medical expert on behalf of the respondent. However, G.S. 7A-454 allows the court in its discretion to approve a fee for the services of an expert witness who testifies for an indigent person. We know of no constitutional mandate that requires more. *See generally* "Right of Indigent Defendant in Criminal Case to Aid of State by Appointment of Investigator or Expert," Annot., 34 A.L.R. 3d 1256 (1970). *Accord, Smith v. Baldi,* 344 U.S. 561, 97 L.Ed. 549, 73 S.Ct. 391 (1953); *Watson v. Patterson,* 358 F. 2d 297 (10th Cir. 1966); *United States ex rel. Huguley v. Martin,* 325 F. Supp. 489 (N.D. Ga. 1971); *Knapp v. Hardy,* 111 Ariz. 107, 523 P. 2d 1308 (1974); *State v. Bourne,* 283 So. 2d 233 (La. 1973); *Utsler v. State,* 84 S.D. 360, 171 N.W. 2d 739 (1969); *Utsler v. Erickson,* 315 F. Supp. 480 (D.S.D. 1970), *aff'd,* 440 F. 2d 140 (8th Cir. 1971), *cert. den.,* 404 U.S. 956, 30 L.Ed. 2d 272, 92 S.Ct. 319 (1971); *San Miguel v. McCarthy,* 8 Ariz. App. 323, 446 P. 2d 22 (1968); *Houghtaling v. Commonwealth,* 209 Va. 309, 163 S.E. 2d 560 (1968), *cert. den.,* 394 U.S. 1021, 23 L.Ed. 2d 46, 89 S.Ct. 1642 (1969). As aptly stated by the Supreme Court of Arizona in *State v. Crose,* 88 Ariz. 389, 357 P. 2d 136 (1960):

> " . . . [D]efendant contends that the right to have medical experts appointed by the court, at the state's expense, to examine him and assist his defense, is an integral and essential part of his constitutionally-guaranteed right to counsel. He has cited us no authority to support that position, and our own independent investigation has disclosed none. That he has the right to counsel . . . is not in doubt. . . . We know of nothing, however, either by constitution or by statute, requiring the state at its own expense to make available to the defendant, in addition to counsel, the full paraphernalia of defense. . . . We have no doubt that those who make the law could appropriately provide impecunious defendants with such assistance as was sought here, were it deemed practicable and in the public interest to do so. They have not done so. They were under no constitutional compulsion to do so. . . . "

[2] The right of cross-examination is specifically provided by G.S. 35-43: "In the event a hearing is requested, the district attorney . . . shall present the evidence for the petitioner. *The respondent shall be entitled to examine the petitioner's witnesses and shall be entitled to present evidence in his own behalf.*" (Emphasis added.) In order to assure this right, the only requirement is that the respondent, his guardian, attorney or other interested party object in writing to the sterilization. Since respondent is represented at every stage of the proceeding, we do not think this requirement is unduly burdensome.

[3] We hold that the provisions of this statute far exceed the minimum requirements of procedural due process. *Buck v. Bell, supra; Hagins v. Redevelopment Comm.*, 275 N.C. 90, 165 S.E. 2d 490 (1969); *In re Custody of Gupton*, 238 N.C. 303, 77 S.E. 2d 716 (1953); *Brewer v. Valk, supra.*

Respondent further contends that the statutes in question deny him substantive due process. "Due process" has a dual significance, as it pertains to procedure and substantive law. As to procedure, it means notice and an opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a competent and impartial tribunal having jurisdiction of the cause. *State v. Smith*, 265 N.C. 173, 143 S.E. 2d 293 (1965). In substantive law, due process may be characterized as a standard of reasonableness and as such it is a limitation upon the exercise of the police power. "Undoubtedly, the State possesses the police power in its capacity as a sovereign, and in the exercise thereof, the Legislature may enact laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society. [Citations omitted.]" *State v. Ballance*, 229 N.C. 764, 769, 51 S.E. 2d 731, 734 (1949). " . . . 'If a statute is to be sustained as a legitimate exercise of the police power, it must have a rational, real, or substantial relation to the public health, morals, order, or safety, or the general welfare.' . . . " *Surplus Store, Inc. v. Hunter, supra*, at 210, 125 S.E. 2d at 767; *State v. Brown* and *State v. Narron*, 250 N.C. 54, 108 S.E. 2d 74 (1959); *Roller v. Allen*, 245 N.C. 516, 96 S.E. 2d 851 (1957); *State v. Ballance, supra; State v. Whitaker*, 228 N.C. 352, 45 S.E. 2d 860 (1947), *aff'd*, 335 U.S. 525, 93 L.Ed. 212, 69 S.Ct. 251 (1949).

The traditional substantive due process test has been that a statute must have a rational relation to a valid state objective. In a growing series of decisions, the United States Supreme

Court has recognized a right of privacy emanating from the Fourteenth Amendment's concept of personal liberty or encompassed within the penumbra of the Bill of Rights that includes the abortion decision, *Roe v. Wade,* 410 U.S. 113, 35 L.Ed. 2d 147, 93 S.Ct. 705 (1973); certain marital activities, *Loving v. Virginia,* 388 U.S. 1, 18 L.Ed. 2d 1010, 87 S.Ct. 1817 (1967), and *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed. 2d 510, 85 S.Ct. 1678 (1964); and procreation, *Eisenstadt v. Baird,* 405 U.S. 438, 31 L.Ed. 2d 349, 92 S.Ct. 1029 (1972), and *Skinner v. Oklahoma, supra.* In Eisenstadt, the Court specifically recognized " . . . the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . . " However, in *Roe v. Wade, supra,* 410 U.S. at 154-55, Mr. Justice Blackmun, speaking for the Court, said:

> " . . . The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. . . .
>
> "We, therefore, conclude that the right of personal privacy . . . is not unqualified and must be considered against important state interests in regulation.
>
> * * *
>
> "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' [citations omitted], and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake. [Citations omitted.]"

The right to procreate is not absolute but is vulnerable to a certain degree of state regulation. *Roe v. Wade, supra; Buck v. Bell, supra.* The two state interests recognized as paramount to the individual's freedom of choice in *Roe v. Wade, supra,* at least after the first trimester of pregnancy, were the state's concern with the health of the mother and the potential life of the child. The welfare of the parent and the future life and health of the unborn child are also the chief concerns of the

State of North Carolina in authorizing sterilizaiton of individuals under certain circumstances.

The interest of the unborn child is sufficient to warrant sterilization of a retarded individual. "The state's concern for the welfare of its citizenry extends to future generations and when there is overwhelming evidence . . . that a potential parent will be unable to provide a proper environment for a child because of his own mental illness or mental retardation, the state has sufficient interest to order sterilization." *Cook v. State,* 9 Or. App. 224, 495 P. 2d 768 (1972). The people of North Carolina also have a right to prevent the procreation of children who will become a burden on the State.

> "It can hardly be disputed that the right of a woman to bear and the right of a man to beget children is a natural and constitutional right, nor can it be successfully disputed that no citizen has any rights that are superior to the common welfare. Acting for the public good, the state, in the exercise of its police power, may impose reasonable restrictions upon the natural and constitutional rights of its citizens. Measured by its injurious effect upon society, the state may limit a class of citizens in its right to bear or beget children with an inherited tendency to mental deficiency, including feeblemindedness, idiocy, or imbecility. It is the function of the Legislature, and its duty as well, to enact appropriate legislation to protect the public and preserve the race from the known effects of the procreation of mentally deficient children by the mentally deficient. . . . " *In re Cavitt,* 182 Neb. 712, 157 N.W. 2d 171 (1968).

The United States Supreme Court has also held that the welfare of all citizens should take precedence over the rights of individuals to procreate. In *Buck v. Bell, supra,* the Court said: " . . . It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts,* 197 U.S. 11, 49 L.ed. 643, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765. . . ."

Furthermore, the sterilization of a mentally ill or retarded individual at certain times may be in the best interest of that

individual. The mentally ill or retarded individual may not be capable of determining his inability to cope with children. In addition, he may be capable of functioning in society and caring for his own needs but may be unable to handle the additional responsibility of children. This individual also may not be able to practice other forms of birth control and therefore sterilization is the only available remedy. Sterilization itself does not prevent the normal sex drive of the person, it only prevents procreation. Therefore, the State may only be providing for the welfare of the individual when this individual is unable to do so for himself.

[4] We hold that the sterilization of mentally ill or retarded persons under the safeguards as set out in G.S. 35-36 through G.S. 35-50, inclusive, is a valid and reasonable exercise of the police power, *see Buck v. Bell, supra; Brewer v. Valk, supra,* and that these state interests rise to the level of a compelling state interest. *See Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed. 2d 797, 94 S.Ct. 1536 (1974).

The equal protection clauses of the United States and North Carolina Constitutions impose upon lawmaking bodies the requirement that any legislative classification "be based on differences that are reasonably related to the purposes of the Act in which it is found." *Morey v. Doud,* 354 U.S. 457, 465, 1 L.Ed. 2d 1485, 1491, 77 S.Ct. 1344, 1350 (1957); *Reed v. Reed,* 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971); *State v. Greenwood,* 280 N.C. 651, 187 S.E. 2d 8 (1972). Such classifications will be upheld provided the classification is founded upon reasonable distinctions, affects all persons similarly situated or engaged in the same business without discrimination, and has some reasonable relation to the public peace, welfare and safety. *State v Greenwood, supra; Clark's Charlotte, Inc. v. Hunter,* 261 N.C. 222, 134 S.E. 2d 364 (1964). " . . . When a special class of persons . . . is singled out by the Legislature for special treatment, there must be a reasonable relation between the classification and the object of the statute. . . . " *State v. Mems,* 281 N.C. 658, 673, 190 S.E. 2d 164, 174 (1972); *Quaker City Cab. Co. v. Penna.,* 277 U.S. 389, 72 L.Ed. 927, 48 S.Ct. 553 (1928); *Power Co. v. Saunders,* 274 U.S. 490, 71 L.Ed. 1165, 47 S.Ct. 678 (1927).

The object of G.S. 35-36 through G.S. 35-50, inclusive, is to prevent the procreation of children by a mentally ill or retarded individual who because of physical, mental or nervous disease

or deficiency which is not likely to materially improve, would probably be unable to care for a child or children or who would likely, unless sterilized, procreate a child or children who probably would have serious physical, mental or nervous diseases or deficiencies. Considering this object, the classification under these statutes is reasonable.

Sterilization laws in several states have been declared unconstitutional because they affect only a certain class of mentally ill or retarded persons. *Skinner v. Oklahoma, supra; Haynes v. Lapeer, Circuit Judge, supra; In re Thompson, supra; Smith v. Board of Examiners of Feebleminded, supra.* These cases declared laws unconstitutional when the law provided for a group of the feebleminded to be sterilized, such as those institutionalized, and for another group of feebleminded, such as those not institutionalized, not to be sterilized. G.S. 35-36 and G.S. 35-37 provide for the sterilization of all mentally ill or retarded persons inside or outside an institution who meet the requirements of these statutes. We have found no case that holds that sterilization of all mentally ill or retarded persons denies equal protection. Many cases have held otherwise. *Buck v. Bell, supra; Smith v. Command,* 231 Mich. 409, 204 N.W. 140 (1925). As said by Mr. Justice Holmes in *Buck v. Bell, supra:*

> "But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."

[5] Since the North Carolina law applies to all those named in the statute (G.S. 35-43), these statutes, G.S. 35-36 through G.S. 35-50, inclusive, do not violate the equal protection clauses of the United States Constitution or the Constitution of North Carolina.

Respondent next asserts that this legislation provides no adequate judicial standard to guide the court in reaching a

decision whether to authorize the sterilization of an individual. Respondent points to the indefiniteness of the terms found in G.S. 35-43:

> " . . . If the judge of the district court shall find from the evidence that the person alleged to be subject to this section is subject to it and that because of a physical, mental, or nervous disease or deficiency which is not *likely* to materially improve, the person would *probably* be unable to care for a child or children; or, because the person would be *likely,* unless sterilized, to procreate a child or children which *probably* would have serious physical, mental, or nervous diseases or deficiencies, he shall enter an order and judgment authorizing the physician or surgeon named in the petition to perform the operation." (Emphasis added.)

Defendant contends that these indefinite terms render the statute unconstitutionally vague and arbitrary; that there exists no standard at all, except the subjective determination of an individual judge.

It is true that a statute must be held void if it is so loosely and obscurely drawn as to be incapable of enforcement. *State v. Morrison,* 210 N.C. 117, 185 S.E. 674 (1936). But, as stated in *Hobbs v. Moore County,* 267 N.C. 665, 149 S.E. 2d 1 (1966):

> "However, as was said in *State v. Partlow, supra* [91 N.C. 550, 49 A.R. 652 (1884)]. 'It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable.' It is also well established that this Court will not adjudge an act of the General Assembly unconstitutional unless it is clearly so. *Kornegay v. Goldsboro,* 180 N.C. 441, 105 S.E. 187. Where a statute is susceptible of two interpretations, one of which will render it constitutional and the other will render it unconstitutional, the former will be adopted. *City of Randleman v. Hinshaw,* 267 N.C. 136, 147 S.E. 2d 902; *Finance Co. v. Leonard,* 263 N.C. 167, 139 S.E. 2d 356; *Nesbitt v. Gill,* 227 N.C. 174, 41 S.E. 2d 646. If possible, the language of a statute will be interpreted so as to avoid an absurd consequence. *Young v. Whitehall Co.,* 229 N.C. 360, 49 S.E. 2d 797; *State v. Scales,* 172 N.C. 915, 90 S.E. 439. A statute is never to be construed so as to require an impossibility if that result

> can be avoided by another fair and reasonable construction of its terms. *Comrs. v. Prudden,* 180 N.C. 496, 105 S.E. 7. 'A statute or amendment formally passed is presumed and if permissible should be construed so as to have some meaning.' *Mitchell v. R. R.,* 183 N.C. 162, 110 S.E. 859. See also *State v. Humphries,* 210 N.C. 406, 186 S.E. 473. . . . "

See also State v. Miller, 282 N.C. 633, 194 S.E. 2d 353 (1973); *Underwood v. Howland, Comr. of Motor Vehicles,* 274 N.C. 473, 164 S.E. 2d 2 (1968).

> " . . . [I]mpossible standards of statutory clarity are not required by the constitution. When the language of a statute . . . prescribes boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly, constitutional requirements are fully met. *United States v. Petrillo,* 332 U.S. 1, 91 L.ed. 1877, 67 S.Ct. 1538." *In re Burrus,* 275 N.C. 517, 531, 169 S.E. 2d 879, 888 (1969).

Several recent United States Supreme Court opinions have spoken to this issue of unconstitutional vagueness or lack of any judicial standard. In *Parker v. Levy,* 417 U.S. 733, 41 L.Ed. 2d 439, 94 S.Ct. 2547 (1974), the Court upheld the statute providing for court-martial of an officer for "conduct unbecoming an officer and a gentleman," against attack that it was too vague and arbitrary, stating, " '[t]he doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement." . . . ' [Citation omitted.]" The same result was reached in *Arnett v. Kennedy,* 416 U.S. 134, 40 L.Ed. 2d 15, 94 S.Ct. 1633 (1974), where the Court sustained a statute providing for removal of nonprobationary federal employees only "for such cause as will promote the efficiency of the service." The Supreme Court has recognized that " . . . words inevitably contain germs of uncertainty and . . . there may be disputes about the meaning of such terms. . . , " but has reiterated that if they can be sufficiently understood and complied with, the statute will be upheld. *Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed. 2d 830, 93 S.Ct. 2908 (1973). In *Jones v. Penny,* 387 F. Supp. 383 (M.D.N.C. 1974), the court upheld a statutory procedure in North Carolina by which the Commissioner of Motor Vehicles may revoke a driver's license of a person who has been adjudged incompetent or who has been

involuntarily committed to an institution for the treatment of mental illness, alcoholism or drug addiction, "unless the Commissioner is satisfied that such person is competent to operate a motor vehicle with safety to persons or property." The court specifically recognized that the determination to be made by the Commissioner was not a subjective one but an objective one to be arrived at after careful study of the evidence in each case.

[6] In the light of the foregoing principles, we believe that G.S. 35-36 through G.S. 35-50 meet this constitutional standard. The definitions of "mental disease," "mental illness" and "mental defective" are found in G.S. 35-1.1, the same chapter as the sterilization procedure, and are capable of being understood and complied with by the triers of fact with the help of experts in the field. It is conceded that the words "likely" and "probably" necessarily contain germs of uncertainty. However, it is the duty of the court to construe a statute, ambiguous in its meaning, so as to give effect to the legislative intent. *Hobbs v. Moore County, supra.* Here, it is clear that the General Assembly intended to provide the mentally ill and defective with sufficient safeguards to prevent misuse of this potentially dangerous procedure. The statute does not specify the burden of proof that the petitioner must meet before the order authorizing the sterilization can be entered. In keeping with the intent of the General Assembly, clearly expressed throughout the article, that the rights of the individual must be fully protected, we hold that the evidence must be clear, strong and convincing before such an order may be entered. *See McCorkle v. Beatty,* 225 N.C. 178, 33 S.E. 2d 753 (1945) ; 2 Stansbury, N. C. Evidence § 213, p. 161 (Brandis Rev. 1973). So construed, we hold that G.S. 35-36 through G.S. 35-50, inclusive, provide a sufficient judicial standard and are not unconstitutionally vague or arbitrary.

[7] The respondent's next contention that sterilization amounts to cruel and unusual punishment is without basis in law in this case. The cruel and unusual punishment clause of the Constitution refers to those persons convicted of a crime. Since this is not a criminal proceeding, there is no basis for the cruel and unusual argument. The two cases cited in the *amicus curiae* brief, *Davis v. Berry, supra,* and *Mickle v. Henrichs,* 262 F. 687 (D. Nev. 1918), both held that sterilization of criminals as part of a sentence upon conviction was cruel and unusual punishment. That question is not presented in this case and those cases are not pertinent to decision here. *See In re Cavitt, supra;*

State v. Troutman, 50 Idaho 673, 299 P. 668 (1931); *Smith v. Command, supra.*

This unfortunate respondent and his mother both consented to the performance of a vasectomy. While we do not attach much importance to the respondent's consent due to his mental condition, his mother unquestionably is in a position to know what is best for the future of her child. Under the provisions of G.S. 35-36 through G.S. 35-50, inclusive, the rights of respondent and the State will be fully protected at hearing.

We hold, therefore, that the trial court erred in declaring these statutes unconstitutional. The judgment so entered is reversed.

Reversed.

ELIZABETH ANN McCARLEY v. LESLIE HARVEY McCARLEY

No. 90

(Filed 29 January 1976)

1. **Rules of Civil Procedure § 41— affirmative relief sought by defendant — dismissal by plaintiff improper**

Since plaintiff's complaint alleged facts entitling either or both of the parties to the marriage to an absolute divorce, defendant's answer admitting these allegations together with his prayer "that the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other" was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint; therefore, plaintiff could not, without defendant's consent, voluntarily dismiss her claim for relief. G.S. 1A-1, Rule 41(a)(1).

2. **Divorce and Alimony § 16— alimony and alimony pendente lite — application not required in pleadings — application as motion in the cause**

There is nothing in G.S. 50-16.8 which indicates that an application for either alimony or alimony *pendente lite* must be contained in the pleadings or an amendment thereto in an action for absolute divorce; rather, the term "application" as used in this statute means a motion in the cause, the procedure for which is governed by the N. C. Rules of Civil Procedure.

3. **Divorce and Alimony § 16— application for alimony — date for hearing unspecified — motion proper**

Though plaintiff's application for alimony did not specify a date for hearing, plaintiff properly proceeded to apply for alimony under

G.S. 50-16.8 where the motion was served by depositing it in the mail on 6 December 1973, properly addressed to defendant's attorney, at least five days before the already scheduled hearing on 13 December.

4. **Divorce and Alimony § 20— absolute divorce — effect on right to alimony — dependent spouse initiating and obtaining divorce**

An order of permanent alimony, if it had been made upon plaintiff's application for alimony, would have survived an absolute divorce decree notwithstanding the provisions of G.S. 50-11, since the Legislature apparently intended by the enactment of G.S. 50-11 to bar a decree of alimony for the dependent spouse if this spouse both *initiated* an action for *and obtained* a divorce on the ground of the statutory separation period, but in this case plaintiff who was the dependent spouse initiated the action but subsequently disclaimed any desire for the divorce and attempted to take a voluntary dismissal of her action, while defendant pursued the action to its completion and obtained the divorce decree.

5. **Divorce and Alimony § 20— divorce affecting alimony — meaning of divorce**

In the context of G.S. 50-11 a "divorce obtained by the dependent spouse" means a divorce which is pursued to completion by that spouse.

Justice HUSKINS dissenting.

Chief Justice SHARP and Justice BRANCH join in the dissenting opinion.

ON *writ of certiorari* to the North Carolina Court of Appeals to review its decision reported at 24 N.C. App. 373, 210 S.E. 2d 531 (1975) in which it affirmed the judgment of *District Court Judge Robinson* granting an absolute divorce to the parties and his refusal to consider plaintiff's application for alimony.

This case was docketed and argued as No. 116 at the Spring Term 1975.

On July 25, 1973, plaintiff filed action for absolute divorce upon the ground of one year's separation. Defendant answered admitting all allegations of the complaint and prayed also for an absolute divorce. Neither plaintiff nor defendant requested a jury trial.

On November 18, 1973, plaintiff filed a "Notice of (Voluntary) Dismissal." On December 7, 1973, plaintiff filed "Application for Alimony Pursuant to N.C.G.S. Sec. 50-16.8(b)(1)" in which she alleged that she did not seek nor intend to obtain an absolute divorce by virtue of her complaint, that she was the dependent spouse, that the defendant had through excessive

use of alcohol rendered her condition intolerable and life burdensome, and alleged generally other grounds for alimony. This application was served upon the defendant by mailing it to his attorney on December 6, 1973, and was filed on December 7, 1973.

The case was heard in the District Court Division on December 13, 1973, before Judge Robinson. On that day the action was at issue and properly called for trial at a regular District Court Session for the trial of Civil, Non-Jury Alimony, Divorces, motions and pre-trials. Judge Robinson, on defendant's motion, set aside and declared void the plaintiff's Notice of Dismissal. Plaintiff then moved to stay the divorce proceeding on the grounds that another separate and earlier action for alimony *pendente lite,* permanent alimony, and custody of the children filed by her was then pending and that plaintiff had filed an application for alimony in the case at bar which she wanted determined. Plaintiff said she was by order in the earlier action receiving alimony *pendente lite,* but the case had not been heard on its merits. Judge Robinson denied her motion to stay the proceeding. During the course of the hearing plaintiff invited the court to consider her application for alimony. The court refused to do so. The court heard only the testimony of the defendant which tended to establish the marriage and the separation and entered judgment decreeing an absolute divorce.

Lila Bellar and Marshall H. Karro for plaintiff appellant.

Hamel, Cannon & Hamel, P.A. by Thomas R. Cannon, for defendant appellee.

EXUM, Justice.

I

[1] The Court of Appeals held it proper for the trial court to set aside plaintiff's attempted voluntary dismissal under General Statute 1A-1, Rule 41(a)(1) [hereinafter Rule ____]. This much of its decision is correct.

This statement of our practice as it existed before the adoption of present Rule 41 occurs in 2 McIntosh, North Carolina Practice and Procedure § 1645 (2d ed. T. Wilson and J. Wilson 1956):

> While the plaintiff may generally elect to enter a nonsuit, "to pay the costs and walk out of court," in any case

> in which only his cause of action is to be determined, although it might be an advantage to the defendant to have the action proceed and have the controversy finally settled, he is not allowed to do so when the defendant has set up some ground for affirmative relief or some right or advantage of the defendant has supervened, which he has the right to have settled and concluded in the action. If the defendant sets up a counterclaim arising out of the same transaction alleged in the plaintiff's complaint, the plaintiff cannot take a nonsuit without the consent of the defendant; but if it is an independent counterclaim, the plaintiff may elect to be nonsuited and allow the defendant to proceed with his claim.

This rule of procedure has been recognized in domestic cases, *Griffith v. Griffith,* 265 N.C. 521, 144 S.E. 2d 589 (1965); *Scott v. Scott,* 259 N.C. 642, 131 S.E. 2d 478 (1963), and applied in *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957). It appears to have been generally recognized in divorce cases in other jurisdictions which have faced the issue. Annot., "Divorce-Voluntary Dismissal," 16 A.L.R. 3d 291 §§ 8, 12 (1967). We agree with the Court of Appeals' holding that Rule 41(a)(1) "had the effect of changing our former practice only to the extent that the plaintiff desiring to take a voluntary nonsuit [now a voluntary dismissal] must now act before he rests his case, whereas under our former practice he could do so at any time before the verdict. In other respects, however, our former practice was not expressly changed by Rule 41(a)(1) as it finally became effective." 24 N.C. App. at 376, 210 S.E. 2d at 533. *See* W. A. Shuford, North Carolina Civil Practice and Procedure § 41-4 (1975).

In this case plaintiff filed a verified complaint alleging residency of both parties, marriage, one year's separation, names, ages and custody of the children born of the marriage, and prayed for absolute divorce on the ground of one year's separation. Defendant filed a verified answer as follows:

> Now comes the defendant in the above entitled action, and in answer to plaintiff's complaint, alleges and says:
>
> 1. That the allegations as set forth in paragraph 1 of plaintiff's complaint are admitted.
>
> 2. That the allegations set forth in paragraph 2 of plaintiff's complaint are admitted.

3. That the allegations as set forth in paragraph 3 of plaintiff's complaint are admitted.

4. That the allegations as set forth in paragraph 4 of plaintiff's complaint are admitted.

5. That the allegations as set forth in paragraph 5 of plaintiff's complaint are admitted.

WHEREFORE, the defendant having fully answered plaintiff's complaint, joins in the prayer for relief, and prays the Court that the bonds of matrimony heretofore existing by and between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other; further, that the defendant waives right to file any further answer in this cause.

Since the complaint alleged facts entitling either or both of the parties to the marriage to an absolute divorce, we hold that defendant's answer admitting these allegations together with his prayer "that the bonds of matrimony heretofore existing between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other" was, in effect, a counterclaim seeking affirmative relief and arising out of the same transactions alleged in the complaint. Plaintiff, therefore, could not, without defendant's consent, voluntarily dismiss her claim for relief.

The rationale for this rule of practice is simply that it would be manifestly unjust to allow a plaintiff, who comes into court upon solemn allegations which, if true, entitle defendant to some affirmative relief against the plaintiff, to withdraw, *ex parte*, the allegations after defendant has demanded the relief to which they entitle him. Upon demand for such relief defendant's right to have his claim adjudicated in the case "has supervened," 2 McIntosh, *supra*, and plaintiff thereby loses the right to withdraw allegations upon which defendant's claim is based without defendant's consent. Nowhere, it seems to us, does this rationale apply with more force than where plaintiff seeks divorce upon the ground of one year's separation and defendant in his answer likewise prays for a divorce upon the same ground.

By such a prayer defendant clearly seeks affirmative relief, which has been defined as "that for which the defendant might maintain an action entirely independent of plaintiff's claim, and

which he might proceed to establish and recover even if plaintiff abandoned his cause of action . . . . " *Rhein v. Rhein,* 244 Minn. 260, 262, 69 N.W. 2d 657, 659 (1955).

Defendant here, furthermore, if he intended to seek a divorce at all on the ground of a year's separation, was bound to seek it by way of counterclaim in this action. Rule 13(a) requires a pleading to "state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . . . " That defendant's pleading is labelled an "answer" does not preclude its being treated also as a counterclaim. Rule 8(c) states that "[w]hen 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." Rule 7(a), furthermore, provides that a reply must be filed "to a counterclaim denominated as such" implying there will be counterclaims not so denominated. In *Rhein v. Rhein, supra,* it was said, "[f]ailure to label the affirmative allegations as a counterclaim is, of course, not fatal if they sufficiently support a claim for relief."

Neither does defendant's failure to allege affirmatively facts within his pleading preclude the pleading from being treated as a counterclaim. The answer begins, "the defendant . . . alleges and says:" It then admits the allegations of the complaint. Rule 10(c) provides, "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading . . . . " Defendant could have and we hold did, in effect, adopt by reference the allegations in the complaint. To require defendant who solemnly admits the truth of the allegations of the complaint upon which he then bases his prayer for relief to repeat them in his own pleading as a prerequisite to treating his pleading as a counterclaim seeking affirmative relief would surely be a triumph of form over substance.

While defendant's answer is not a model to be followed in asserting a counterclaim for affirmative relief, when construed so "as to do substantial justice," Rule 8(f), it suffices for that purpose. "[P]rovisions relating to procedure . . . for divorce are liberally construed to insure the consideration of divorce cases on their merits." 3 Sutherland, Statutory Construction § 68.06 (Sands, 1974).

The trial court, therefore, properly allowed defendant's motion to set aside plaintiff's notice of voluntary dismissal. There was no error in the ultimate entry of a judgment of absolute divorce based on defendant's pleading and evidence. The decision of the Court of Appeals is affirmed on this aspect of the case.

II

We hold, however, that the Court of Appeals erred in affirming the district court's refusal to consider plaintiff's application for alimony. The Court of Appeals held that plaintiff's application for alimony should have been made, if at all, in the complaint or in an amendment thereto, saying, 24 N.C. App. at 377, 210 S.E. 2d at 533:

> [b]y filing the "Application" for an award of alimony in this proceeding, plaintiff was in effect attempting to amend her complaint so as to assert a completely different cause of action. This she could do only by leave of court or by written consent of the adverse party, G.S. 1A-1, Rule 15 neither of which she sought or obtained.

This ruling was erroneous.

[2] Plaintiff was obviously proceeding under General Statute 50-16.8. (Unless otherwise indicated references to Chapter 50 of the General Statutes will be to the Chapter as it appears in the 1974 Cum. Supp.) This statute provides, in pertinent part:

> (b) Payment of alimony may be ordered:
>
> (1) Upon application of the dependent spouse in an action by such spouse for divorce, either absolute or from bed and board. . . .
>
> * * * *
>
> (d) Payment of alimony pendente lite may be ordered:
>
> (1) Upon application of the dependent spouse in an an action by such spouse for absolute divorce, divorce from bed and board, annulment, or for alimony without divorce. . . .

Nothing in these provisions indicates that an application for either alimony or alimony *pendente lite* must be contained in the pleadings or an amendment thereto in an action for absolute divorce. We construe the term "application" as used in this

statute to mean a motion in the cause, the procedure for which is governed by the N. C. Rules of Civil Procedure. General Statute 50-16.8(a) provides, "[t]he procedure in actions for alimony and actions for alimony pendente lite shall be as in other civil actions except as provided in this section." Rule 7(b)(1) provides that an "*application* to the court for an order shall be by motion. . . ." (Emphasis supplied.) We held in *Zimmerman v. Zimmerman,* 113 N.C. 432, 18 S.E. 334 (1893), a case dealing with what is now referred to in Chapter 50 of our General Statutes as "alimony pendente lite," that "[a]pplication for alimony can be made by a motion in the cause." General Statute 50-16.8(b) and (d) provides for the payment of both alimony and alimony *pendente lite* "upon application." It seems logical to hold that the Legislature intended the word "application" as used in both of these subsections and in Rule 7(b)(1) to have reference to the same kind of procedure.

[3] Plaintiff's application for alimony here obviously complied with Rule 7(b). The application did not, however, specify a date for hearing. See Rule 6(d). This Court, considering this same kind of defect in *Zimmerman v. Zimmerman, supra* at 434-435, 18 S.E. at 334-335, said:

> If, upon such notice, the hearing had been at any other time and place than the regular term of court at which the action was pending, there would be some ground of objection to the order. It would, at least, have been irregular and should have been set aside, on motion; but when the order was made in the cause and at the term of court, and especially at the term at which the cause stood regularly for trial, the defendant is fixed with notice thereof. (Citations omitted.) Notice is required to be given only when the application is heard out of term time.

The motion was served, by depositing it in the mail on December 6, 1973, properly addressed to defendant's attorney, at least five days before the already scheduled hearing on December 13. Rules 5(b), 6(d), and 6(a). The plaintiff, therefore, properly proceeded to apply for alimony under General Statute 50-16.8.

[4] The remaining question is whether an order of permanent alimony, if it had been made upon her application, would have survived the divorce decree notwithstanding the provisions of General Statute 50-11. We conclude that it would have.

General Statute 50-11(a) states that "[a]fter a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine except as hereinafter set out. . . ." One of the rights arising out of the marriage, which ceases and determines is the right to support. This much of the statute is declarative of the common law. R. E. Lee, North Carolina Family Law § 135 (3d Ed. 1963). General Statute 50-11(c), however, provides in pertinent part:

> . . . [*E*]*xcept in case of divorce obtained by the dependent spouse in an action initiated by such spouse on the ground of separation for the statutory period* a decree of absolute divorce shall not impair or destroy the right of a spouse to receive alimony and other rights provided for such spouse under any judgment or decree of a court rendered before *or at the time of* the rendering of the judgment for absolute divorce. (Emphases supplied.)

The words "or at the time of" in the statute were added by the amendments, N. C. Sess. Laws 1967, c. 1152, § 3, to former General Statute 50-11 (1966) to complement the provisions of General Statute 50-16.8(b) which, as we have noted, allow procedurally the questions of divorce and alimony to be determined in a single action. If alimony is found to be appropriate after a hearing on remand, the ensuing judgment or decree awarding it will relate back to the time when the application for alimony should have been considered, which was "before or at the time of the rendering of the judgment for absolute divorce." *Darden v. Darden,* 20 N.C. App. 433, 201 S.E. 2d 538 (1974).

Defendant contends, though, that an award of alimony would be barred by the exception in General Statute 50-11(c) which subsection is itself an exception to the general prohibition of the continuance of alimony after a judgment of divorce contained in General Statute 50-11(a). The Legislature apparently intended by the enactment of General Statute 50-11(c) to bar a decree of alimony for the dependent spouse if this spouse both *initiated* an action for *and obtained* a divorce on the ground of the statutory separation period. It is clear here that this divorce was rendered in an action initiated by the dependent spouse. It is less clear whether it was obtained by her.

We hold under the circumstances of this case that she did not obtain this divorce within the meaning of General Statute

50-11(c). When the divorce action came on for hearing before Judge Robinson the plaintiff had already disclaimed any desire for the divorce. She had attempted to take a voluntary dismissal of her action and stated unequivocally that she did not seek nor intend to obtain an absolute divorce by virtue of her complaint. The only evidence establishing the grounds for divorce came from the defendant who testified in accordance with his counterclaim.

The question, in essence, is whether the Legislature intended to use the transitive verb "obtained" in its active or passive sense. This Court has said, in another context, that "obtained" meant "secured" or "acquired." *Beattie v. Central Carolina Railroad,* 108 N.C. 425, 432, 12 S.E. 913, 915 (1891). While this definition does little to further the precise inquiry here it seems that "obtain" is generally and most often used in the active sense. We believe this is the sense in which the Legislature intended to use it in the statute. Webster's Third New International Dictionary (1971) defines "obtain" first as "to gain or attain possession or disposal of usually by some planned action or method" and "to bring about or call into being." The Oxford English Dictionary (corrected reissue 1961) gives seven definitions for "obtain." The first five seem to require some effort and purpose on the part of the one who obtains, the sixth does not, and the seventh is used in another unrelated sense. The first definition is most instructive: "To come into the possession or enjoyment of (something) by one's own effort, or by request; to procure or gain, as the result of purpose and effort; hence, generally, to acquire, get." This definition was approved in the case of *Re Woods, Woods v. Woods,* [1941] St. R. Qd. 129, 137 (Australia). In *Western Union Telegraph Co. v. Hansen and Rowland,* 166 F. 2d 258, 260-261 (9th Cir. 1948) it was said of "obtain":

> The . . . definitions of the word in a transitive sense given by Webster's—in addition to the primary meaning—do indeed convey the idea of "to hold, to keep, or to possess" . . . but every one of such definitions is qualified by Webster's with the designation "Obsolete," "a Latinism," "Archaic" or "Now Rare."
>
> The *primary* meaning of the transitive verb "to obtain" as given by Webster's Dictionary is as follows: "To get hold of by effort; to gain possession of; to procure; to

> acquire, in any way; as, to *obtain* one's ends, wealth, another's confidence."
>
> Without indulging in a disquisition on the niceties of grammar and semantics, we need say merely that it is not to be supposed that the legislature of Washington intended to use so simple and familiar a word as "obtains" in an obsolete, rare, archaic, or exotic sense.

The strict primary meaning of "obtain" then, is to acquire by one's own efforts. *Contra, Omensky v. Cook,* 172 Ill. App. 507 (Chicago—First District 1912), where it is said that "whatever we thus *seek* and *get* [other than by chance], we *obtain,* whether by our own exertions or those of others."

[5] We hold, consequently, that in the context of this statute a "divorce obtained by the dependent spouse" means a divorce which is pursued to completion by that spouse. To hold otherwise would mean, at times, that the dependent spouse would be unfortunately and irrevocably wedded to an earlier decision to seek divorce made perhaps under the influence of extreme emotion and without sufficient reflection upon the consequences when the spouse later might like to say, "I will forget my complaint, I will leave off my heaviness and comfort myself." Job 9:27. In this case, for example, when the trial court denied plaintiff's motion to stay the proceedings, her application for alimony was her only method of preserving her right, already asserted in an earlier and different action, to claim it. Under the decision of the Court of Appeals the obtaining here by defendant husband of an absolute divorce would preclude the entry of a judgment for permanent alimony in this earlier pending action. *Mitchell v. Mitchell,* 270 N.C. 253, 258, 154 S.E. 2d 71, 75 (1967). The husband, furthermore, in that prior pending action would be entitled on motion, to terminate the payment of alimony *pendente lite* already ordered. *Smith v. Smith,* 12 N.C. App. 378, 183 S.E. 2d 283 (1971).

Plaintiff here then was not precluded by General Statute 50-11(c) from having her application for alimony considered. Any award of alimony based thereon will survive the divorce decree which, in this case, was obtained, not by her, but by the defendant. The case will, therefore, be remanded to the Court of Appeals for remand by that Court to the District Court Division in Mecklenburg County for further proceedings on plaintiff's application for alimony in accordance with this opinion.

Affirmed in part and in part reversed and remanded.

Justice HUSKINS dissenting.

I respectfully dissent from Part I of the majority opinion which upholds the decision of the Court of Appeals that the trial court properly set aside plaintiff's notice of dismissal.

On 24 July 1973 plaintiff wife filed a complaint for absolute divorce alleging residence, marriage of the parties on 14 November 1958, their separation on 13 July 1972, and that they had lived separate and apart since that date. The complaint names the four children born of the marriage. She did not allege that she was a dependent spouse and did not seek alimony in her complaint.

On 9 August 1973 defendant filed answer which reads in pertinent part as follows:

> "Now comes the defendant in the above entitled action, and in answer to plaintiff's complaint, alleges and says:
>
> 1. That the allegations as set forth in paragraph 1 of plaintiff's complaint are admitted.
>
> 2. That the allegations as set forth in paragraph 2 of plaintiff's complaint are admitted.
>
> 3. That the allegations as set forth in paragraph 3 of plaintiff's complaint are admitted.
>
> 4. That the allegations as set forth in paragraph 4 of plaintiff's complaint are admitted.
>
> 5. That the allegations as set forth in paragraph 5 of plaintiff's complaint are admitted.
>
> WHEREFORE, the defendant having fully answered plaintiff's complaint, joins in the prayer for relief, and prays the Court that the bonds of matrimony heretofore existing by and between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other; further, that the defendant waives right to file any further answer in this cause."

On 18 November 1973 plaintiff filed a written "Notice of Dismissal" giving notice that the action "is hereby dismissed without prejudice to any rights of the plaintiff against the de-

fendant" growing out of the marriage. Plaintiff stipulated that the costs should be taxed against her.

The case was apparently calendared for trial, notwithstanding plaintiff's notice of dismissal, and on 7 December 1973 plaintiff filed an application for alimony under G.S. 50-16.2(9). She recited in this application that defendant had filed an answer joining in the prayer for an absolute divorce; that she had entered notice of dismissal and thus did not seek nor intend to obtain an absolute divorce herself; that four children were born of the marriage; that she is a dependent spouse; that defendant is an excessive user of alcohol so as to render her condition intolerable and life burdensome by (a) constantly accusing her of infidelities, (b) berating and criticizing her, (c) cruel and barbarous treatment of her and the children; that she has been a dutiful wife and defendant's conduct has been without any provocation whatsoever; that she has insufficient means whereon to subsist and thus prays for an order requiring defendant to pay subsistence and permanent alimony following the trial, plus counsel fees.

On 13 December 1973 Judge Robinson entered an order declaring plaintiff's notice of dismissal void. The judge then heard the case, a demand for jury trial not having been made by either party, and defendant testified to the residence, marriage, and period of separation sufficient to support a judgment of absolute divorce. The judge refused to consider plaintiff's application for permanent alimony and signed a judgment dissolving the marriage in these words:

> "IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the bonds of matrimony heretofore existing between the plaintiff and the defendant be, and they hereby are dissolved, and the plaintiff and the defendant are granted an absolute divorce from each other."

The Court of Appeals affirmed, and we granted certiorari to review that decision.

It is my view that the trial court erred in allowing defendant's motion to set aside and declare void the plaintiff's notice of dismissal. As I see it, the defendant did not file a "cross-action" or "counterclaim" or by his answer set up any ground for affirmative relief. He simply admitted the allegations in the complaint and prayed that "the bonds of matrimony heretofore existing by and between the plaintiff and defendant be dis-

solved and that the parties hereto be granted a divorce from each other." Such pleading may not be equated with a counterclaim or cross-action in which he himself seeks affirmative relief, *i.e.*, an absolute divorce.

Rule 41(a)(1), Rules of Civil Procedure, provides, in pertinent part, that "an action or any claim therein may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before the plaintiff rests his case." That is exactly what plaintiff did in this case.

Under our former practice, a plaintiff in a civil action against whom no counterclaim was asserted and no affirmative relief demanded had an absolute right to take a voluntary nonsuit and get out of court at any time *before verdict. Insurance Co. v. Walton,* 256 N.C. 345, 123 S.E. 2d 780 (1962); *Mitchell v. Jones,* 272 N.C. 499, 158 S.E. 2d 706 (1968). This rule applied to actions for divorce. *Cox v. Cox,* 246 N.C. 528, 98 S.E. 2d 879 (1957). Under Rule 41(a)(1), plaintiff has the same absolute right to get out of court at any time "before the plaintiff rests his case." *See Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297 (1971); *Collins v. Collins,* 18 N.C. App. 45, 196 S.E. 2d 282 (1973); 1 Lee, N. C. Family Law, § 53 at 41 (Supp. 1974).

In my judgment defendant's answer is simply a general admission of the allegations contained in the complaint and nothing more. The prayer itself contains nothing which may properly be classified as a plea for affirmative relief. Defendant doesn't pray that he be granted an absolute divorce. He merely "joins in the prayer for relief, and prays the Court that the bonds of matrimony heretofore existing by and between the plaintiff and defendant be dissolved, and that the parties hereto be granted a divorce from each other. . . ." To say that defendant's answer contains a counterclaim for affirmative relief which is legally sufficient to support the judgment for absolute divorce entered in the trial court requires more reaching and stretching than I am willing to do and violates all the rules of pleading with which I am familiar. Consequently, my vote is to reverse the Court of Appeals and remand this case to Mecklenburg District Court for entry of an appropriate order declaring void the judgment signed by Judge Robinson dated and filed 13 December 1973. In my opinion no case was then pending in court because plaintiff had legally and effectively filed her written notice of dismissal as authorized by Rule 41(a)(1),

Rules of Civil Procedure. I regard the judgment for divorce as absolutely void.

Of course, if defendant's answer is construed to assert a counterclaim or cross-action wherein affirmative relief is demanded, then I fully concur with the majority view expressed in Part II of the opinion that under G.S. 50-16.8(b) and G.S. 50-11(c) plaintiff's application for permanent alimony in dedefendant's "cross-action" for an absolute divorce was timely and appropriately made before defendant "obtained" his divorce. It is quite apparent that plaintiff did not "obtain" one despite the gratuitous action of the trial court. If the trial court intended to dissolve the marriage on the theory that defendant in his answer affirmatively sought such relief, then her application for alimony should have been passed upon "at the time of the rendering of the judgment for absolute divorce." G.S. 50-11(c).

Chief Justice SHARP and Justice BRANCH join in this dissent.

INSTITUTIONAL FOOD HOUSE, INC. v. J. HOWARD COBLE, SECRETARY OF REVENUE OF THE STATE OF NORTH CAROLINA

No. 71

(Filed 29 January 1976)

1. Taxation § 23— construction of tax statute, exemption

Where the meaning of a tax statute is doubtful, it is construed against the State and in favor of the taxpayer unless a contrary legislative intent appears; conversely, a provision of a tax statute providing an exemption from the tax, otherwise imposed, is strictly construed against the taxpayer and in favor of the State.

2. Taxation § 23— construction of tax exemption

If the intent of the Legislature is discernible from a tax statute, it will prevail regardless of the rule of strict construction against exemptions.

3. Taxation § 31— soft drink tax — "base products"

Under the Soft Drink Tax Act, "base products" are taxable as such only when used to complete a soft drink which, if sold bottled, would be subject to the tax.

4. Taxation § 31— soft drink tax — applicability

By enactment of the Soft Drink Tax Act, the Legislature intended to tax only those "soft drinks," including fruit juice drinks, to which coloring, artificial flavoring or preservative has been added, or which contain less than 35 percent of natural fruit juice, and unless a soft drink is subject to taxation if sold bottled, its ingredients cannot be taxed.

5. Taxation § 31— soft drink tax — frozen concentrated orange juice

Since natural orange juice is exempted from taxation under the Soft Drink Tax Act when sold bottled, frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the Act.

PLAINTIFF appealed from judgment of *Lee, J.*, 1 April 1975 Civil Session, WAKE Superior Court. After the record on appeal was duly docketed in the Court of Appeals, we allowed certiorari and the case was certified to this Court for initial appellate review prior to determination by the Court of Appeals.

The case was tried before Judge Lee without a jury.

Plaintiff is engaged in the sale of food and food products, including canned frozen concentrated orange juice, to restaurants, hospitals, schools, and other commercial customers. These customers are not soft drink bottlers but are engaged in the preparation of food and drink which is served to their customers and patrons. Plaintiff failed to pay taxes found by defendant to be due on the frozen concentrated orange juice. Following an audit, defendant made an assessment against plaintiff for $1,119.98 which plaintiff paid under protest and brought this action to recover same.

Evidence offered by plaintiff—defendant offered none—consists of the stipulations of the parties, including the stipulated testimony of the witness W. W. Brown which is set out in the record as Exhibit A and narrated in the paragraphs which follow.

W. W. Brown is Vice President of Lykes Pasco Packing Company in Dade City, Florida, operator of the largest citrus processing plant in the world and producer of frozen concentrated orange juice which is sold in North Carolina. Some of its frozen concentrated orange juice is packed in institutional size containers and distributed in North Carolina by the plaintiff in this case. Mr. Brown is a graduate of the University of Tennessee with a major in bacteriology and a minor in chem-

istry. He has had five years experience in research and development in the area of food technology with the Minute Maid Company and nineteen years experience in quality control and research and development in the citrus industry. He is a member of the Institute of Food Technologists and of the Association of Food and Drug Officials. Over the years he has participated in numerous professional seminars, conferences, and short courses related to food technology, the processing of juices, or fabrication of drinks.

Mr. Brown testified that fruit juice is the natural juice extracted from fruit; and concentrated fruit juice, such as frozen concentrated orange juice, is the natural juice extracted from fruit from which a substantial portion of the water has been removed. Fruit juice is a natural substance to which nothing has been added, and concentrated fruit juice is the result of extraction of water from that natural substance. Concentrated fruit juice is not fabricated or manufactured from a number of ingredients. In the case of frozen concentrated orange juice, approximately three-fourths of the water is removed to reduce the cost and increase the convenience of storage and shipment. The proper amount of water restored prior to consumption does not result in a product more diluted than the orange juice. Rather, it brings the concentrated juice back to the full strength of natural fruit juice. From the standpoint of restoration, flavoring and chemistry, the juice which results when the water is restored to frozen concentrated orange juice is substantially identical to that of the original juice.

Fruit juice drinks, and concentrates for fruit juice drinks, are fabricated drinks which are only partially composed of a fruit juice concentrate. They are not natural fruit juices. They are not a single natural substance. They are drinks fabricated or manufactured from a number of ingredients. Unlike natural fruit juice, their fruit juice content is highly diluted so that when consumed the strength of its fruit juice ingredient is only a fraction of that of natural fruit juice. Ingredients of concentrates for fruit juice drinks include substantial quantities of water, sugar, syrup, natural flavoring, acidifiers, buffers, stabilizers and emulsifiers and often include coloring, artificial flavoring, and preservatives. When restaurants or other institutional establishments desire to serve a fruit juice drink they do not attempt to prepare it by mixing frozen concentrated orange juice and the many other necessary ingredients. Rather,

they turn to a manufacturer from whom they purchase a prepared concentrate for fruit juice drink containing all of the ingredients in the correct proportions and chemical balance.

After considering the testimony of W. W. Brown and the pretrial stipulations, Judge Lee made findings of fact which track verbatim the stipulations of the parties. Those findings, and conclusions of law based thereon, appear in the following judgment rendered by Judge Lee:

"1. The plaintiff is a corporation organized and existing under and by virtue of the laws of the State of North Carolina with its principal office and place of business in Hickory, North Carolina, and is and was at all times material to this action engaged in the business of buying and selling, among other things, frozen concentrated orange juice.

2. The defendant is the Secretary of Revenue of the State of North Carolina, and as such he is and he and his predecessor in office were at all times material to this action charged with the duty of enforcing the provisions of the North Carolina Soft Drink Tax Act set forth in Article 2B, Subchapter I, Chapter 105 of the General Statutes of North Carolina.

3. On 26 February 1972, plaintiff paid to the defendant's predecessor in office the sum of One Thousand One Hundred Nineteen Dollars and Ninety-Eight Cents ($1,119.98) representing taxes which the defendant's predecessor had assessed against the plaintiff upon the sale by the plaintiff (without having paid any soft drink tax thereon) of quantities of frozen concentrated orange juice to the following purchasers:

Holiday Inn Restaurant, Lenoir, N. C.;

Holiday Inn Restaurant, Morganton, N. C.;

Ann's Restaurant, North Wilkesboro, N. C.;

Holiday Inn Restaurant, Hickory, N. C.;

Oasis Diner, Hickory, N. C.;

Oak Hill School Lunch, Morganton, N. C.;

Maggie Valley Country Club, Maggie Valley, N. C.;

Bethlehem School Lunch, Bethlehem, N. C;

Lattimore School Lunch, Lattimore, N. C.;

Proctor School Lunch, Lattimore, N. C.;

Harris School Lunch, Cliffside, N. C.;

Mom & Pop Ham House, Claremont, N. C.;

Mom & Pop Ham House, Drexel, N. C.;

Dales Restaurant, Statesville, N. C.;

Western Cat. City Kindergarten, Newton, N. C.;

Eastern Cat. City Kindergarten, Catawba, N. C.;

Ridgeview School Lunch, Hickory, N. C.;

Quality Restaurant, Morganton, N. C.;

Patterson School for Boys, Patterson, N. C.;

Catawba Valley Rest Home, Conover, N. C.;

Dula Hospital, Lenoir, N. C.;

Catawba Memorial Hospital, Hickory, N. C.;

Hickory Memorial Hospital, Hickory, N. C.;

Richard Baker Hospital, Hickory, N. C.;

Cleveland Memorial Hospital, Shelby, N. C.;

Margaret Pardee Hospital, Hendersonville, N. C.;

Watauga Hospital, Boone, N. C.;

Alexander Hospital, Taylorsville, N. C.

4. Within thirty days after payment of said assessment of taxes, the plaintiff demanded in writing that defendant's predecessor refund said amount of taxes paid by plaintiff, which demand was denied and no amount of said taxes has been refunded to the plaintiff.

5. The products involved in this action, the sale of which is subject to the aforesaid tax assessment, consisted of canned frozen concentrated orange juice. Such product is derived from pure, natural orange juice by the extraction of approximately three-fourths of the water therefrom,

and is a 'natural fruit juice concentrate' as that term is used in G.S. 105-113.44(9).

6. The restoration of approximately three parts of water to one part of the natural fruit juice concentrate involved in this action results in a 'liquid which results from the reconstitution of natural fruit juice concentrate by the restoration of water to dehydrated natural fruit juice' and such resultant liquid is the same as, and is the equivalent of 'natural fruit juice' as those terms are used in G.S. 105-113.44(9).

7. No tax is imposed under the North Carolina Soft Drink Tax Act on the sale of frozen concentrated orange juice identical to that involved herein when such products are sold or held for sale in closed retail-sized containers by retailers, such as grocery stores and supermarkets, when such products are to be 'used domestically,' which quoted phrase appears in G.S. 105-113.44(18) and which the defendant has interpreted to mean when such products are to be consumed by persons in homes and residences (as distinguished from what the defendant considers to be 'commercial use'). While frozen concentrated orange juice 'used domestically' is physically identical to frozen concentrated orange juice 'used commercially,' the defendant contends that the application of the tax depends upon the use to which the product is put (commercial, as opposed to domestic), on account of the provisions of G.S. 105-113.44(18).

8. Natural fruit juices, including liquids resulting from the reconstitution of orange juice concentrate, by the restoration of water thereto, are sold in North Carolina for use and consumption in households and residences, and for use and consumption in places where food or drink may be obtained for a consideration, such as public school cafeterias and lunch rooms, hospitals, nursing homes and other institutions and restaurants serving the public. The sale of such natural fruit juices is exempt from the North Carolina Soft Drink Tax, whether or not such natural fruit juices are sold for 'commercial' or 'domestic' use and whether or not such natural fruit juices have been reconstituted by the restoration of water to a natural fruit juice concentrate either inside or outside of North Carolina.

9. The defendant would not grant an exemption from the Soft Drink Tax for the orange juice concentrate involved in this action, if an application for such exemption were filed with the defendant pursuant to G.S. 105-113.47, which provides for an exemption from the tax for 'all bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice . . .' The defendant would contend that orange juice concentrate is neither 'natural fruit juice' nor a 'bottled soft drink containing 35% or more of natural fruit juice.'

10. The orange juice concentrate involved in this action is not a 'bottled soft drink' as that term is used in G.S. 105-113.44(3) and G.S. 105-113.45(b) or a 'soft drink powder' as that term is used in G.S. 105-113.44(18) or G.S. 105-113.45(d) or a simple syrup as that term is used in G.S. 105-113.44(16) or G.S. 105-113.45(c), and such concentrate herein involved is taxable under the Soft Drink Tax Act only if the Court concludes that such concentrate is taxable as a 'base product' as that term is used in G.S. 105-113.44(1) or is taxable as a 'soft drink syrup' as that term is used in G.S. 105-113.44(18).

CONCLUSIONS OF LAW

1. Fruit juice, both natural and reconstituted, is a soft drink, exempt from tax pursuant to G.S. 105-113.47.

2. Fruit juice concentrates, including the canned frozen concentrated orange juice which is the subject of this action, are not soft drinks.

3. Fruit juice concentrates, including the canned frozen concentrated orange juice which is the subject of this action, are soft drink base products as defined in G.S. 105-113.44(1).

4. Soft drink base products, other than dry base products taxed as soft drink powders under G.S. 105-113.45(d), are taxed as syrups, pursuant to G.S. 105-113.44(1) and G.S. 105-113.45(c) when used commercially.

5. The canned frozen concentrated orange juice which is the subject of this action was used commercially, not domestically, and was subject to tax pursuant to G.S. 105-113.44(1) and G.S. 105-113.45(c).

6. The General Assembly has, in the Soft Drink Tax Act, classified soft drink products into three categories: bottled soft drinks; soft drink powders; and soft drink syrups and base products taxed as syrups.

7. The General Assembly has further classified such syrups and base products into two classes: products which are used commercially and products which are not used commercially; and it has taxed only those which are used commercially.

8. The foregoing subclassification, based upon use, is based upon a reasonable distinction between the subclasses and is not arbitrary, capricious or unconstitutional.

9. Fruit juice concentrates, including the canned frozen concentrated orange juice which is the subject of this action and which are soft drink base products taxed as syrups, are classified and taxed like all other syrups and base products taxed as syrups.

10. As such, they are taxed uniformly within their class, and there is no unconstitutional discrimination against them.

11. The assessment made by the defendant was lawful and proper in all respects.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff's action be dismissed, that the relief it seeks be denied, and that the costs of this action be taxed against the plaintiff.

This the 15 day of May, 1975."

Plaintiff objected and excepted to the failure of the court to find and conclude, additionally, that the concentrated orange juice involved in this action is not a "soft drink syrup," and is not a product which is "practically and commercially usable for the making of a soft drink," as those words are used in G.S. 105-113.44(8). Plaintiff further took exception to each conclusion of law contained in the judgment "for that such conclusion is not purported [supported] by or justified by the findings of fact and a proper interpretation of the Soft Drink Tax Act." Plaintiff excepted to the signing of the judgment and gave notice of appeal, assigning errors discussed in the opinion.

Smith, Anderson, Blount and Mitchell by John H. Anderson and Michael E. Weddington, attorneys for plaintiff appellant.

Rufus L. Edmisten, Attorney General, and Myron C. Banks, Special Deputy Attorney General, for defendant appellee.

HUSKINS, Justice.

This action presents two questions for decision. The first question is whether the sales of frozen concentrated orange juice herein involved are properly taxable under the provisions of the North Carolina Soft Drink Tax Act, G.S. 105-113.41 et seq. (1969). If this be so, the second question is whether said Act, on its face, or as interpreted and applied by the Secretary of Revenue to these sales, violates the equal protection of the laws guaranteed by Article I, Section 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

The North Carolina Soft Drink Tax Act provides, in pertinent part, as follows:

> "§ 105-113.41. *Short title.*—This Article shall be known and cited as the 'Soft Drink Tax Act.'
>
> § 105-113.42 *Purpose of Article.*—It is the purpose of this Article to provide a source of additional revenue which shall be applied to the general fund of the State.
>
> § 105-113.43. *Liability for tax.*—Every person doing domestic or intrastate business within this State and engaging in the business of selling, manufacturing, purchasing, consigning, using, shipping or distributing, for the purpose of sale within this State, soft drinks of every kind whatsoever, including but not limited to the following articles or things, viz: soda water, ginger ale, Coca-Cola, lime-cola, Pepsi-Cola, near beer, fruit juices, vegetable juices, and all fountain drinks and other beverages and things commonly designated as 'soft drinks' shall, for the privilege of carrying on such business, be subject to the payment of a license tax which shall be measured by and graduated in accordance with the sales of such person within the State, except as may be otherwise provided in this Article.
>
> Every person within the State of North Carolina, importing, receiving or acquiring from without the State, or from any other source, beverages commonly designated as

soft drinks as contemplated by this Article, for use or consumption within North Carolina, shall be subject to payment of the soft drink tax at the rates provided for the sale, offer for sale, or distribution of such soft drinks.

§ 105-113.44. *Definitions.*—As used in this Article, unless the context otherwise requires:

(1) 'Base products' means hot chocolate flavored drink mix, flavored milk shake bases, concentrate products to which milk or other liquid is added to complete a soft drink, and all like items or products as herein defined which will be taxed as syrups.

(2) 'Bottled' means enclosed in any closed or sealed glass, metal, paper or other type of bottle, can, carton or container, regardless of the size of such container.

(3) 'Bottled soft drink' means any complete, finished, ready-to-use, nonalcoholic drink, whether carbonated or not, such as soda water, ginger ale, Nu-Grape, Coca-Cola, lime-cola, Pepsi-Cola, budwine, near beer, fruit juice, vegetable juice, milk drinks when any flavoring or syrup is added, cider, bottled carbonated water and all bottled preparations commonly referred to as soft drinks of whatever kind or description.

* * * *

(9) 'Natural fruit juice' means the natural liquid which results from the pressing of sound ripe fruit, and the liquid which results from the reconstitution of natural fruit juice concentrate by the restoration of water to dehydrated natural fruit juice.

* * * *

(18) 'Soft drink syrups and powders' includes the compound mixture or the basic ingredients, whether dry or liquid, practically and commercially usable in making, mixing or compounding soft drinks by the mixing thereof with carbonated or plain water, ice, fruit juice, milk or any other product suitable to make soft drinks, among such syrups being such products as Coca-Cola syrup,

Chero-Cola syrup. Pepsi-Cola syrup, Dr. Pepper syrup, root beer syrup, Nu-Grape syrup, lemon syrup, vanilla syrup, chocolate syrup, cherry smash syrup, rock candy syrup, simple syrup, chocolate drink powder, malt drink powder, or any other prepared syrups or powders sold or used for the purpose of mixing soft drinks commercially at soda fountains, restaurants or similar places as well as those powder bases prepared for the purpose of domestically mixing soft drinks such as kool-aid, oh boy drink, tip-top, miracle aid and all other similar products. Concentrated natural frozen or unfrozen fruit juices or vegetable juices when used domestically are specifically excluded from this definition.

* * * *

§ 105-113.45. *Taxation rate.*—(a) A soft drink excise tax is hereby levied and imposed on and after midnight, September 30, 1969, upon the sale, use, handling and distribution of all soft drinks, soft drink syrups and powders, base products and other items referred to in this section.

(b) The rate of tax on each bottled soft drink shall be one cent (1¢).

(c) The rate of tax on each gallon of soft drink syrup or simple syrup shall be one dollar ($1.00), and on a fraction of a gallon the rate shall be an amount which represents one dollar ($1.00) multiplied by the same fraction of a gallon. The rate of tax on each ounce or fraction of an ounce of soft drink syrup or simple syrup shall be four fifths of a cent (4/5¢), and no exemption or refund shall be allowed on such syrup even though it may subsequently be diverted to some purpose other than the making of soft drinks.

(d) The rate of tax on dry soft drink powders and base products which are used to make soft drinks without being converted into syrup shall be one cent (1¢) per ounce or fraction thereof of the dry powder or base product weight. However, the tax on dry soft drink powder or base product which is to be converted into syrup shall be the same as that which would be due upon the syrup produced,

if the syrup were being taxed according to the rates set out in subsection (c) above.

(e) The excise tax herein levied on syrups, powders and base products shall not apply to syrups, powders and base products used by persons in the manufacture of bottled soft drinks which are otherwise subject to tax under this Article. The Commissioner [now Secretary] may by administrative rules or regulation, provide for the storage of such syrups, powders and base products when they are not for use in the manufacture of bottled soft drinks.

* * * *

§ 105-113.47. *Natural fruit or vegetable juice or natural liquid milk drinks exempted from tax.*—(a) All bottled soft drinks containing thirty-five percent (35%) or more of natural fruit or vegetable juice and all bottled natural liquid milk drinks containing thirty-five percent (35%) or more of natural liquid milk, are exempt from the excise tax imposed by this Article, except that this exemption shall not apply to any fruit or vegetable juice drink to which has been added any coloring, artificial flavoring or preservative. Sugar, salt or vitamins shall not be construed to be an artificial flavor or preservative."

The threshold question is whether the sales of frozen concentrated orange juice involved in this case are taxable events within the meaning of the Soft Drink Tax Act. The parties have stipulated, and the court has found, that the concentrate involved in these sales is taxable only if it is either a "base product" as that term is defined in G.S. 105-113.44(1), or a "soft drink syrup" as that term is defined in G.S. 105-113.44(18). The trial court heard the case upon stipulations, including the stipulated testimony of plaintiff's witness W. W. Brown, made findings of fact, and concluded as a matter of law that canned frozen concentrated orange juice is a soft drink "base product" as defined in G.S. 105-113.44(1) and therefore taxable. Plaintiff contests the propriety of this conclusion, and we turn to the rules of statutory construction for enlightenment on the question involved.

In construing and interpreting the language of a statute we are guided by the primary rule of construction that the intent of the Legislature controls. *Watson Industries, Inc. v. Shaw, Comr. of Revenue,* 235 N.C. 203, 69 S.E. 2d 505 (1952). If the

language of a statute is clear and unambiguous, judicial construction is unnecessary and its plain and definite meaning controls. *Davis v. North Carolina 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. *Underwood v. Howland, Comr. of Motor Vehicles*, 274 N.C. 473, 164 S.E. 2d 2 (1968); *Young v. Whitehall Co., Inc.*, 229 N.C. 360, 49 S.E. 2d 797 (1948); *State v. Humphries*, 210 N.C. 406, 186 S.E. 473 (1936).

[1, 2] Where the meaning of a tax statute is doubtful, it is construed against the State and in favor of the taxpayer unless a contrary legislative intent appears. *Colonial Pipeline Co. v. Clayton, Comr. of Revenue*, 275 N.C. 215, 166 S.E. 2d 671 (1969); *Sabine v. Gill, Comr. of Revenue*, 229 N.C. 599, 51 S.E. 2d 1 (1948); *Henderson v. Gill, Comr. of Revenue*, 229 N.C. 313, 49 S.E. 2d 754 (1948); *State v. Campbell*, 223 N.C. 828, 28 S.E. 2d 499 (1944). "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen." *Gould v. Gould*, 245 U.S. 151, 62 L.Ed. 211, 38 S.Ct. 53 (1917). Conversely, a provision in a tax statute providing an exemption from the tax, otherwise imposed, is strictly construed against the taxpayer and in favor of the State. *In re Clayton-Marcus Co., Inc.*, 286 N.C. 215, 210 S.E. 2d 199 (1974); *Distributors v. Shaw, Comr. of Revenue*, 247 N.C. 157, 100 S.E. 2d 334 (1957); *Henderson v. Gill, Comr. of Revenue, supra*. Nevertheless, if the intent of the Legislature is discernible from the statute it will prevail regardless of the rule of strict construction against exemptions. *Acheson v. Johnson, State Tax Assessor*, 147 Me. 275, 86 A. 2d 628 (1952).

In the absence of a clear indication to the contrary, words in a statute must be given their ordinary meaning unless they have acquired a technical significance. *Duke Power Co. v. Clayton, Comr. of Revenue*, 274 N.C. 505, 164 S.E. 2d 289 (1968); *Bleacheries, Inc. v. Johnson, Comr. of Revenue*, 266 N.C. 692, 147 S.E. 2d 177 (1966). If the statute itself contains a definition of a word used therein, that definition controls and courts must construe the statute as if the definition had been used in lieu of the word. If the words of the definition itself

are ambiguous, they must be construed pursuant to the general rules of statutory construction. *In re Clayton-Marcus Co., Inc., supra.*

This brings us to the task of applying these rules of statutory construction to the statutes involved in the controversy before us.

The Soft Drink Tax Act establishes a bifurcated scheme of taxation whereby (1) "bottled soft drinks" not otherwise exempt are subjected to a "crown tax" levied upon the sale of each individual bottle of "soft drink," G.S. 105-113.45(b); and (2) "base products," "soft drink syrups," "soft drink powders" and "simple syrups," ingredients used to make "open-cup soft drinks," are subjected to a tax levied upon the sale of individual units of each. G.S. 105-113.45(c) and (d). Since the *ingredients* used to make "open-cup soft drinks" are taxed, there is no provision in the Act for taxing the "open-cup" (as opposed to "bottled") sales of any soft drink. However, the tax is not levied upon syrups, powders and base products which are used to prepare a bottled soft drink which is itself subject to tax under the Soft Drink Tax Act. G.S. 105-113.45(e). Similarly exempt from taxation are those "bottled soft drinks" which contain 35 percent or more of natural fruit juice, provided no coloring, artificial flavoring or preservative has been added. G.S. 105-113.47(a).

Did the Legislature intend, by this statutory scheme, to treat frozen concentrated orange juice as either a "base product" or a "soft drink syrup" and impose the soft drink excise tax upon it? For the reasons which follow, the answer is no.

Neither the sale of natural orange juice nor the sale of bottled fruit juice drinks containing 35 percent or more of natural orange juice is a taxable event under the Act. G.S. 105-113.44(9); G.S. 105-113.47(a). Nor does the tax apply to "base products used by persons in the manufacture of bottled soft drinks which are otherwise subject to tax under this Article." G.S. 105-113.45(e). In light of these statutory provisions, defendant stipulated, and the trial court found as a fact, that sales of natural fruit juice, including liquids resulting from the reconstitution of concentrated orange juice by the restoration of water, are exempt from the tax "whether or not such natural fruit juices are sold for 'commercial' or 'domestic' use." This leads us to conclude that when the Soft Drink Tax Act is read aright and considered as a composite whole, the Legislature intended

to exclude from taxation the sale of all natural fruit juices, however packaged. Taxation of frozen concentrated orange juice as a "base product" is contrary to such intent and largely nullifies the exemption contained in G.S. 105-113.47(a). We think the Legislature did not intend such an incongruous result. Where possible, "the language of a statute will be interpreted so as to avoid an absurd consequence." *Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966); *Young v. Whitehall Co., Inc., supra.*

The definition of "base product" contained in G.S. 105-113.44(1) "may not be lifted out of its context so as to universalize its meaning. A word or phrase or clause or sentence may vary greatly in color and meaning according to the circumstances of its use. . . . It is axiomatic, therefore, that a provision in a statute must be construed as a part of the composite whole and must be accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit. Its meaning must sound a harmonious—not a discordant—note in the general tenor of the law." *Watson Industries, Inc. v. Shaw, Comr. of Revenue, supra.* This is particularly true here in light of the settled rule that tax statutes shall be strictly construed against the State, while the converse rule as to tax exemptions must yield in the face of a legislative intent to the contrary. *See Acheson v. Johnson, State Tax Assessor, supra; In re Clayton-Marcus Co., Inc., supra.* Thus the definition of "base product" contained in G.S. 105-113.44(1) must be construed in the broad context of the Act as a whole, giving effect, as we must, to the necessary implications arising from the fact that natural orange juice, including reconstituted frozen concentrated orange juice, is expressly excluded from taxation under the Act. G.S. 105-113.44(9); G.S. 105-113.45(e); G.S. 105-113.47(a). See the stipulation of the parties embodied verbatim as Finding of Fact No. 8.

[3] So construed, we hold that the term "base product" refers to a product which is used to complete a drink not specifically exempted from the Act. Stated differently, "base products" are taxable as such only when used to complete a soft drink which, if sold bottled, would be subject to the tax. This interpretation of G.S. 105-113.44(1) is consistent and harmonious with G.S. 105-113.45(e), which exempts base products, syrups, and other enumerated soft drink ingredients when used in the manufacture of bottled soft drinks which are otherwise subject to tax

under the Act. It also comports with the statutory scheme for administering the bifurcated system of taxation which characterizes the Act. The effect of this scheme is to tax the sale or distribution of the soft drink itself when practical but tax the sale or distribution of the *ingredients* thereof when this would be impractical. The taxation of "soft drinks" sold "bottled" can most easily and precisely be accomplished by imposing a "crown tax" on each individual bottle and affixing the appropriate tax indicia. Therefore, base products and other defined ingredients used in the preparation of "bottled" soft drinks are not taxed. On the other hand, it would be impractical to levy and collect a tax on each open-cup soft drink sale. Accordingly, base products and other specified ingredients used to complete soft drinks intended for open-cup sales are taxed in lieu of the open-cup drink itself. Since these *same soft drink ingredients* are excluded from taxation when used in the manufacture of "bottled soft drinks" subject to the crown tax, G.S. 105-113.45(e), the clear implication is that sales of these ingredients are taxable only when intended for use in a soft drink which, if sold "bottled," would be subject to the tax.

[4, 5] In summary, then, we hold that by enactment of the Soft Drink Tax Act the Legislature intended to tax only those "soft drinks," including fruit juice drinks, to which coloring, artificial flavoring or preservative has been added, or which contain less than 35 percent of natural fruit juice. The Act imposes a crown tax on the sale of soft drinks when sold in bottles and upon the ingredients thereof when used to make the identical soft drink for sale in open cups. Unless a soft drink is subject to taxation if sold bottled, its ingredients cannot be taxed. Since natural orange juice is exempt from taxation when sold bottled, it follows that frozen concentrated orange juice, as an ingredient of natural orange juice, cannot be taxed under the Act.

Frozen concentrated orange juice is not a fruit juice drink; rather, it is merely one dehydrated form of natural orange juice and, however packaged and however sold, is exempt from taxation unless color, artificial flavoring or preservative has been added to it.

Accordingly, the tax paid by plaintiff under protest upon the sales of frozen concentrated orange juice herein involved was improperly assessed and as to said sum plaintiff is entitled to judgment.

In view of our resolution of the first question posed, we neither reach nor decide the constitutional question presented by this appeal.

The judgment below is reversed and the case remanded to Wake Superior Court for entry of judgment in accordance with this opinion.

Reversed and remanded.

IN RE GREEN

No. 2 PC.

Case below: 27 N.C. App. 555.

Petition by Julian H. Jackson for discretionary review under G.S. 7A-31 denied 6 January 1976. Motion of Julian H. Jackson to dismiss appeal for lack of substantial constitutional question allowed 6 January 1976.

MATHIAS v. BRUMSEY

No. 128 PC.

Case below: 27 N.C. App. 558.

Petition by Plaintiff Taylor for discretionary review under G.S. 7A-31 denied 6 January 1976.

MILLING Co. v. HETTIGER

No. 103 PC.

Case below: 27 N.C. App. 76.

Petition for discretionary review under G.S. 7A-31 denied 6 January 1976.

OESTREICHER v. STORES, INC.

No 126 PC.

Case below: 27 N.C. App. 330.

Petition for discretionary review under G.S. 7A-31 allowed 6 January 1976.

STATE v. CALDWELL

No. 15.

Case below: 27 N.C. App. 323.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 January 1976.

STATE v. DIETZ

No. 127 PC.

Case below: 27 N.C. App. 296.

Petition of Attorney General for discretionary review under G.S. 7A-31 allowed 6 January 1976.

STATE v. GIRLEY

No. 120 PC.

Case below: 27 N.C. App. 388.

Petition of Attorney General for discretionary review under G.S. 7A-31 denied 6 January 1976.

STATE v. JACKSON

No. 145 PC.

Case below: 27 N.C. App. 590.

Petition for discretionary review under G.S. 7A-31 denied 6 January 1976.

STATE v. LEWIS

No. 140 PC.

Case below: 27 N.C. App. 426.

Petition of Attorney General for discretionary review under G.S. 7A-31 denied 6 January 1976.

STATE v. THOMPSON

No. 3 PC.

Case below: 27 N.C. App. 576.

Petition for discretionary review under G.S. 7A-31 denied 6 January 1976.

TAYLOR v. BOGER

No. 125 PC.

Case below: 27 N.C. App. 337.

Petition for discretionary review under G.S. 7A-31 allowed 6 January 1976.

TIDWELL v. BOOKER

No. 137 PC.

Case below: 27 N.C. App. 435.

Petition for discretionary review under G.S. 7A-31 allowed 6 January 1976.

WORTHINGTON v. WORTHINGTON

No. 133 PC.

Case below: 27 N.C. App. 340.

Petition for discretionary review under G.S. 7A-31 denied 6 January 1976.

STATE OF NORTH CAROLINA v. DAVID BENJAMIN SMITH, ALIAS DAVID BENJAMIN McCULLOUGH AND BOBBY ORLANDO FOSTER

No. 6

(Filed 29 January 1976)

1. **Constitutional Law § 30— speedy trial — determining factors**

Interrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay.

2. **Constitutional Law § 30— eleven months between arrest and trial — no denial of speedy trial**

A delay of eleven months between defendant's arrest and trial was not unreasonable and was not due to the neglect or wilfulness of the prosecution where the record indicated that the delay in prosecution was due to congested criminal dockets, good faith efforts to obtain custody of absent codefendants, and understandable difficulty in locating out-of-state witnesses, one of whom was a fugitive from justice.

3. **Constitutional Law § 21; Searches and Seizures § 1— warrantless seizure — contraband in plain view**

The guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand. U. S. Constitution, IV Amendment.

4. **Criminal Law § 84; Searches and Seizures § 1— warrantless seizure of revolver — weapon in plain view in vehicle**

The trial court in a first degree murder prosecution did not err in allowing into evidence a revolver seized without a warrant from the vehicle in which one defendant was the driver and the other defendant was a passenger where a patrolman stopped the car which was being operated in a careless and reckless manner, the patrolman glanced through the window on the driver's side of the vehicle, and he immediately observed the butt of the revolver under the center arm rest of the car.

5. **Criminal Law § 90— impeachment of State's own witness — hostile witness — scope of cross-examination**

In criminal cases in N. C. the district attorney may not impeach a State's witness by evidence that his character is bad or that he has made prior statements inconsistent with or contradictory to his testimony; however, the trial judge in his discretion may allow the prosecutor to cross-examine a hostile or unwilling witness for the purpose of refreshing his recollection or awakening his conscience, thus enabling him to testify correctly, but the trial judge offends the rule that a witness may not be impeached by the party calling him

and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief.

6. **Criminal Law § 90— State's witness — impeachment by district attorney — error**

The trial court erred in allowing the district attorney to ask "leading questions" and to "cross-examine" a witness in an effort to demonstrate to the jury that the witness was lying when he stated he "could not remember" having testified at the first trial to certain events and conversations incriminating the defendants, since the State thereby sought not only to impeach the credibility of its own witness but also attempted to force the witness to give the jury the same account of events he had given at the first trial.

7. **Criminal Law § 90— impeachment of own witness — evidence as to paper writing inadmissible**

The trial court erred in allowing the district attorney to ask a State's witness leading questions which were calculated to impeach the witness and which indirectly placed before the jury a paper writing which purportedly was a statement made by the witness to a police officer several months after the crime.

8. **Criminal Law § 90— hostile witness — surprise — impeachment of own witness**

The rule which allows impeachment where the party calling the witness has been misled and surprised or entrapped to his prejudice was not applicable in the instant case where, sometime prior to calling the witness Thomas, the district attorney had substantial reason to believe that Thomas would repudiate or disavow his prior testimony if called upon to testify, and the prosecutor therefore could not have been genuinely surprised or taken unawares by the testimony of the witness.

APPEAL by defendants from *Falls, J.*, 11 November 1974 Session, MECKLENBURG Superior Court.

This case was first tried on 30 September 1974 and resulted in a mistrial when the jury was unable to agree.

In Case No. 74-CR-1598 defendant David Benjamin Smith is charged with the murder of Arthur William Hawkins, and in Case No. 74-CR-1599 said defendant is charged with the murder of Norman Bruce Wagstaff.

In Case No. 74-CR-1600 defendant Bobby Orlando Foster is charged with the murder of Norman Bruce Wagstaff, and in Case No. 74-CR-1601 this defendant is charged with the murder of Arthur William Hawkins.

All four bills of indictment allege that the murders occurred in Mecklenburg County on 11 August 1973. The four cases were consolidated for trial.

The State's evidence tends to show that in July 1973 defendants Smith, Foster and a man named James Thomas went to the Days Inn Motel at Tuckaseegee Road in Charlotte, riding in a 1971 model black Oldsmobile. They discussed robbing this motel. On 7 August 1973 defendant Foster, together with Edna Katrina Felder, Henry Harris, and Annie Mae Harris registered at this motel and, during the course of their stay, visited the novelty shop near the check-in desk and observed that a guard was on duty with the check-in clerk. Henry Harris inquired whether the guard stayed all night, and the guard said, "Yes, I stay."

On Friday, 10 August 1973, a man named Robert Davis was in the company of Henry Harris and defendants Smith and Foster. These people were also seen together on that date by Belinda Harris.

During the early morning hours of 11 August 1973, defendants Smith and Foster, with Belinda Harris accompanying them, left a discotheque in a black automobile and, after changing cars, went to the Days Inn Motel on Tuckaseegee Road, ostensibly to pick up a girl. Smith and Foster went into the motel, and Belinda Harris remained in the car. She could not see where they went but soon heard two or three or more sounds that she thought were car backfires in the distance. Shortly thereafter defendants returned to the car. They rode around awhile and finally went home about 4 or 5 a.m. that morning.

At 2:45 a.m. on 11 August 1973 one David Wayne Jennings went to the desk at the Days Inn Motel on Tuckaseegee Road where he found two men lying on the floor, one of whom had on the uniform of a security guard. Jennings called the police and Lt. McGraw arrived on the scene about 3 a.m. Officer McGraw determined that Arthur William Hawkins, the security guard, had been shot and was dead. The other man was Norman Bruce Wagstaff, the night clerk. He was gasping for breath and later died as a result of gunshot wounds. Hawkins, the security guard, was wearing a holster but had no gun and no wallet. The record shows that Wagstaff went on duty as night clerk at the front desk between 12:30 and 1:00 a.m. that evening and that Hawkins was on duty as security guard that evening and had a 7-shot Burgo pistol in his holster.

On 12 August 1973 defendants Smith and Foster, accompanied by Belinda Harris, Delton Harris and two small children,

left Charlotte for New York City in a black Oldsmobile. Two guns were in the car: A .32 caliber, white handle, 7-shot revolver and a .38 caliber revolver. On 30 August 1973 Trooper Sinopoli of the New Jersey State Police stopped a 1972 Oldsmobile with North Carolina license plates on the New Jersey Turnpike for a traffic violation. Defendants Smith and Foster were in the car. The trooper found a .32 caliber Burgo, Model 108, Serial No. 112195, 7-shot pistol in the car. One of the bullets taken from the body of one of the victims had been fired from this pistol. This identical pistol, identified by make, model and serial number, was purchased by Arthur William Hawkins from Fox Jewelry and Loan in Jacksonville, Florida, on 15 September 1965.

Defendants offered no evidence. The jury convicted defendant Smith of first degree murder of Norman Bruce Wagstaff in Case No. 74-CR-1599 and first degree murder of Arthur William Hawkins in Case No. 74-CR-1598. Smith was sentenced to death in each case.

The jury convicted defendant Foster of first degree murder of Norman Bruce Wagstaff in Case No. 74-CR-1600 and first degree murder of Arthur William Hawkins in Case No. 74-CR-1601. He was sentenced to death in each case.

From judgments pronounced each defendant appealed to the Supreme Court.

Shelley Blum and Bart William Shuster for defendant appellants.

Rufus L. Edmisten, Attorney General, and Charles M. Hensey, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Defendant Smith moved to dismiss the murder charges against him on the ground that his constitutional right to a speedy trial had been denied. Denial of the motion constitutes his first assignment of error.

In support of his motion Smith filed an affidavit asserting that the trial delay was due to the efforts by the State to strengthen its case; that this delay prejudiced his defense in that his incarceration without privilege of bond made it im-

possible for him to contact witnesses; that it compounded the already difficult task of maintaining contact with elusive, unnamed out-of-state witnesses; and that the passage of time dimmed the memories of his unidentified witnesses, including a possible alibi witness.

In opposition to Smith's motion the State on voir dire offered the testimony of Thomas F. Moore, Jr., District Attorney for the Twenty-sixth Judicial District. Mr. Moore testified that determining when a case is "ripe" for trial involves such factors as the complexity of the case, the availability of witnesses, and the pending case load; that the primary reason for the delay in scheduling this case for trial was the State's desire to try defendants Smith, Foster and Harris together, and the State had great difficulty in obtaining custody of Smith's codefendants who had to be extradited from New York and South Carolina. The district attorney further testified that the criminal case backlog in Mecklenburg County numbered between seven and eight hundred during the time defendant Smith was in custody.

The State also offered the testimony of the Assistant District Attorney, Peter S. Gilchrist. He enumerated other factors bearing upon the delay, to wit: The impossibility, in light of overcrowded calendars, of trying more than one "major crime" at any one term of court; the necessity for continued investigation of the case; and the difficulty in locating important State's witnesses, one of whom was a fugitive from justice and unavailable until one week before trial.

It was stipulated that defendant was arrested on October 9 or 10, 1973, and has been in custody without bond since that date; that defendant was indicted on 7 January 1974, defendant Harris was extradited from South Carolina on 13 August 1974, and defendant Foster from New York on 12 July 1974; that defendant Smith requested a speedy trial orally in early May and in writing on 24 May 1974; that defendant's motion for a speedy trial was filed on 12 July 1974 and an affidavit in support of the motion was filed on 30 July 1974; that Smith's counsel informed the district attorney's office on numerous occasions that the defense might consist of an alibi and that the passage of time would tend to injure Smith's ability to defend himself due to loss of memory. It was further stipulated that there were approximately seventy weeks of criminal trials

in Mecklenburg Superior Court between 7 January and 30 September 1974.

On the basis of the evidence produced on voir dire the trial court ruled that the State's reasons for the delay were reasonable and denied defendant's motion. We think this ruling was correct.

[1] Interrelated factors to be considered in determining whether a defendant has been denied his constitutional right to a speedy trial are: (1) The length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to defendant resulting from the delay. *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972); *State v. Hill,* 287 N.C. 207, 214 S.E. 2d 67 (1975); *State v. Gordon,* 287 N.C. 118, 213 S.E. 2d 708 (1975); *State v. O'Kelly,* 285 N.C. 368, 204 S.E. 2d 672 (1974); *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Brown,* 282 N.C. 117, 191 S.E. 2d 659 (1972); *State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969).

[2] The question whether a defendant has been denied a speedy trial must be answered in light of the facts in the particular case. The instant case involves a delay of eleven months from time of defendant's arrest to commencement of his trial. The length of the delay is not *per se* determinative, and there is no showing that the delay was purposeful or oppressive or by reasonable effort could have been avoided by the State. The right to a speedy trial is necessarily relative, for inherent in every criminal prosecution is the probability of delay. *State v. Neas,* 278 N.C. 506, 180 S.E. 2d 12 (1971). Undue delay which is arbitrary and oppressive or the result of deliberate prosecution efforts "to hamper the defense" violates the constitutional right to a speedy trial. *Barker v. Wingo, supra; State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972).

The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or wilfulness of the prosecution. *State v. Hill, supra; State v. Gordon, supra; State v. Johnson, supra.* In the instant case defendant has failed to carry the burden. To the contrary, the record indicates that the delay in the prosecution of this case was due to congested criminal dockets, good-faith efforts to obtain custody of absent codefendants, and understandable

difficulty in locating out-of-state witnesses, one of whom was a fugitive from justice. Such reasons have been recognized consistently as valid justification for delay. *See Barker v. Wingo, supra; State v. Hill, supra; State v. Gordon, supra; State v. Brown, supra.* We conclude that the length of the delay was not unreasonable and the delay itself was not prejudicial to defendant Smith in preparing and presenting his defense. The first assignment of error is overruled.

[4] The next assignment requiring brief discussion concerns the admission of State's Exhibit 3, a 7-shot .32 caliber Burgo revolver. Defendants contend this weapon was the fruit of an illegal search and seizure which renders it inadmissible under the Fourth and Fourteenth Amendments. We now examine the validity of this contention.

At the request of defendants the court conducted a voir dire regarding the admissibility of the challenged evidence. Trooper Douglas D. Sinopoli of the New Jersey State Police testified that on 30 August 1973, while on patrol on the New Jersey Turnpike, he observed an automobile being driven in a reckless and careless manner. He stopped the vehicle by reason of this violation. Defendant Foster was driving the car and defendant Smith was seated in the front right passenger's seat. Trooper Sinopoli glanced through the window on the driver's side of the vehicle and "immediately observed the butt of a weapon under the center arm rest. . . . The white handle of what I believed to be a weapon . . . under the arm rest." The officer then asked both defendants to step out of the vehicle. They complied with his request and, at the officer's direction, stood in front of their car. Frisking defendants and finding no weapons, the officer ordered them to remain standing in front of their vehicle. He then returned to the car, reached inside, lifted the front center arm rest, and seized a fully loaded .32 caliber pistol. The officer testified: "When I found the revolver I placed both subjects under arrest and advised them of their rights and asked if either had a permit to carry the weapon. Both denied knowledge of the weapon and I arrested both of them." On cross-examination Officer Sinopoli said: "I arrested them for carrying a concealed weapon without a permit, sir. I charged them under the careless driving statute. I also charged them with a narcotics charge. These cases are still pending."

Defendants offered no evidence on the voir dire hearing.

The trial court made findings of fact substantially in accord with the officer's testimony and, on the basis of those findings, concluded as a matter of law that the revolver was admissible in evidence as the product of a proper search of defendants' vehicle "incidental to the arrest of defendant Foster for reckless driving." Defendants' objections and exceptions which form the basis of this assignment question the propriety of this ruling.

We find it unnecessary to determine whether the facts and circumstances of this case warrant the legal conclusion that State's Exhibit 3 was admissible as the fruit of a proper search *incident to a valid arrest.* Pertinent to that question, which we do not reach, see *United States v. Robinson,* 414 U.S. 218, 38 L.Ed. 2d 427, 94 S.Ct. 467 (1973); *Adams v. Williams,* 407 U.S. 143, 32 L.Ed. 2d 612, 92 S.Ct. 1921 (1972); *Coolidge v. New Hampshire,* 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971); *Chambers v. Maroney,* 399 U.S. 42, 26 L.Ed. 2d 419, 90 S.Ct. 1975 (1970); *Chimel v. California,* 395 U.S. 752, 23 L.Ed. 2d 685, 89 S.Ct. 2034 (1969); *Preston v. United States,* 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964); *Carroll v. United States,* 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925); *State v. Roberts,* 276 N.C. 98, 171 S.E. 2d 440 (1970); *State v. Shedd,* 274 N.C. 95, 161 S.E. 2d 477 (1968). *See generally* Comment, "Warrantless Searches and Seizures of Automobiles and the Supreme Court from *Carroll* to *Cardwell:* Inconsistently through the Seamless Web," 53 N.C. L. Rev. 722, 747-53 (1975).

For the reasons which follow, we hold that the .32 caliber Burgo revolver, State's Exhibit 3, was properly admissible in evidence as the fruit of a lawful warrantless "plain view" seizure under circumstances requiring no search.

[3] The Fourth Amendment does not prohibit all searches and seizures but only those which are unreasonable. *Carroll v. United States, supra; Elkins v. United States,* 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960). This constitutional prohibition, however, does not prevent the seizure of contraband material, dangerous instrumentalities, or evidence of crime when they are readily visible and require no search to discover them. *Coolidge v. New Hampshire, supra; Harris v. United States,* 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968); *State v. Crews,* 286 N.C. 41, 209 S.E. 2d 462 (1974); *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Hill,* 278 N.C.

365, 180 S.E. 2d 21 (1971); *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970); *State v. Craddock,* 272 N.C. 160, 158 S.E. 2d 25 (1967); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). Thus where, as here, the circumstances require no search the constitutional immunity never arises. The guarantee against unreasonable searches and seizures does not prohibit a warrantless seizure where the contraband subject matter is fully disclosed and open to the eye and hand. *State v. Colson,* 274 N.C. 295, 163 S.E. 2d 376 (1968), *cert. denied,* 393 U.S. 1087, 21 L.Ed. 2d 780, 89 S.Ct. 876 (1969); *State v. Kinley,* 270 N.C. 296, 154 S.E. 2d 95 (1967); *State v. Coffey,* 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Giles,* 254 N.C. 499, 119 S.E. 2d 394 (1961).

[4] The "plain view" exception to the search warrant requirement was applied in a factual context strikingly similar to the facts in this case in *State v. Dobbins,* 277 N.C. 484, 178 S.E. 2d 449 (1971), where officers, after stopping defendant's vehicle to investigate a possible curfew violation, saw through the car window about two inches of what appeared to be the butt of a shotgun protruding from beneath some papers on the floor of the back seat and thereupon seized the weapon. See also *United States v. Johnson,* 506 F. 2d 674 (8th Cir. 1974), *cert. denied,* ..... U.S. ....., 43 L.Ed. 2d 784, 95 S.Ct. 1579 (1975), in which the plain view doctrine was applied to sustain seizure of a shotgun, the butt of which was observed wedged between back and cushions of rear seat of an automobile stopped for a traffic violation; *United States v. Rollerson,* 491 F. 2d 1209 (5th Cir. 1974), where officers who had stopped defendant's auto seized a rifle, barrel of which was seen protruding from underneath defendant's seat when flashlight was shined into car; *Nunez v. United States,* 370 F. 2d 538 (5th Cir. 1967), where weapon was held properly seized by officers who approached vehicle after it was stopped and saw weapon partially protruding from underneath front seat. The plain view doctrine is firmly established and consistently supported by both state and federal courts. Defendants' constitutional challenge to the admissibility of State's Exhibit 3 is overruled.

This brings us to the question whether the trial court committed prejudicial error in allowing the State to impeach two of its own witnesses. Various exceptions and assignments of error embodied in this question concern the testimony of James Thomas and Robert Davis, witnesses for the State. Defendants

argue that the prosecution was permitted to impeach these witnesses by a series of leading questions relating to their testimony at a previous trial of this case, by certain pretrial conversations between the witness Thomas and the district attorney, and by signed statements given to the police during investigation of the case in November 1973 and January 1974.

With respect to the witness James Thomas, the record reveals that he was serving time for an unrelated crime, had testified for the State at the first trial, and apparently had cooperated with the prosecution in preparation for the second trial until the day he was scheduled to testify. At that time Thomas informed the district attorney that he wanted his prison sentence reduced in exchange for his testimony. When the district attorney informed Thomas that he could only write a letter to the Department of Corrections, Thomas apparently became uncooperative. Nevertheless, the district attorney called Thomas as a witness for the State. When he began testifying contrary to the evidence he had given at the first trial, the district attorney, in the absence of the jury, informed the court of Thomas's prior proposition to barter his testimony for a reduction in his prison sentence and requested that Thomas be declared a hostile witness and that the prosecution be permitted to ask leading questions and to cross-examine him. Although the record is unclear, the court apparently found Thomas to be a hostile witness and authorized the district attorney to lead and to cross-examine him. The jury returned to the courtroom and the following exchange occurred:

[By Mr. Gilchrist, Assistant District Attorney:]

"Directing your attention to the month of July, 1973, did you have an occasion to go to the Days Inn Motel on Tuckaseegee Road?

MR. SHUSTER [defense attorney]: OBJECTION.

THE COURT: OVERRULED.

DEFENDANT FOSTER'S EXCEPTION NO. 28.

A. Yes. I went to the Days Inn Motel on Tuckaseegee Road with Smith and Foster. No one else was with me at that time. We went in Foster's car, a '71 black Oldsmobile. I don't remember our purpose in going to the Days Inn Motel on Tuckaseegee Road at that time.

* * * *

Q. Now, I'll ask you whether or not you have previously testified under oath that you went to the Days Inn Motel on Tuckaseegee during the month of July, 1973 with Smith, Foster, and Harris for the purpose of checking out the motel for a possible robbery?

ALL DEFENDANTS OBJECTED. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 28.

DEFENDANT FOSTER'S EXCEPTION NO. 30.

A. I don't remember.

* * * *

Q. State whether or not you testified that Foster told Harris in your presence that they could go in and get a room and check the traffic in and out of the office, see how many people were coming in and out?

ALL DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 33.

DEFENDANT FOSTER'S EXCEPTION NO. 34.

A. I don't remember.

Q. State whether or not during that conversation Harris said, 'We will go in and we will kill them all if we have to so that there won't be any witnesses?'

ALL DEFENDANTS OBJECT.

THE COURT: Are you asking him if he testified to that?

Q. State whether or not you testified to that effect?

A. I don't remember.

OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 34.

DEFENDANT FOSTER'S EXCEPTION NO. 35.

* * * *

Q. I'll ask you whether or not on a previous occasion you have testified under oath that approximately a month before August 10, 1973, at a meeting at the Days Inn Motel

on Tuckaseegee between yourself, David Benjamin Smith and Bobby Foster and Henry Lee Harris, you testified that the defendant Bobby Foster told you, 'I know a good place we can rob'?

ALL DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 36.

DEFENDANT FOSTER'S EXCEPTION NO. 37.

A. After you read it to me, yes, sir, I remembered it.

Q. I'll ask you whether at that same meeting, the defendant Benny Smith said, 'Let's go check it out'?

MR. SHUSTER: OBJECTION. OVERRULED.

DEFENDANT FOSTER'S EXCEPTION NO. 38.

A. Yes, you read that too.

THE COURT: He is asking you if you testified to that?

A. I don't remember.

Q. I'll ask you whether or not you testified the defendant Henry Harris said, 'Let's go in'?

ALL DEFENDANTS OBJECT.

DEFENDANT SMITH'S EXCEPTION NO. 37.

DEFENDANT FOSTER'S EXCEPTION NO. 39.

A. I don't remember.

Q. I'll ask you whether or not you testified that the defendant Foster said, 'We'll kill them all so there will be no witnesses'?

ALL DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 38.

DEFENDANT FOSTER'S EXCEPTION NO. 40.

A. I don't remember.

Q. I'll ask you whether or not you testified that you would participate in the robbery?

A. I don't remember.

* * * *

Q. I'll ask you whether or not you stated under oath that approximately a week after your first trip to the Days Inn Motel in July of 1973, that you returned to the Days Inn Motel with Bobby Foster and Benny Smith?

MR. BLUM [defense attorney]: OBJECTION. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 40.

A. I don't remember.

Q. I'll ask you whether or not you testified under oath that at the second time you returned to the Days Inn Motel on Tuckaseegee that you returned in Bobby Foster's black 1971 Oldsmobile?

A. I don't remember.

Q. I'll ask you whether or not the second time you returned to the Days Inn Motel on Tuckaseegee Bobby Foster told you, 'It doesn't look too hard'?

ALL DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 41.

DEFENDANT FOSTER'S EXCEPTION NO. 42.

A. I don't remember.

* * * *

Q. I'll ask you whether or not you testified under oath on a previous occasion that the defendant Henry Lee Smith (sic) told you that they were going to do that job at the motel tonight?

BOTH DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 42.

DEFENDANT FOSTER'S EXCEPTION NO. 45.

A. I don't remember.

Q. I'll ask you whether or not you saw Bobby Foster and Benny Smith on the night of August 10th at Howard's Grill on North Brevard Street?

A. I don't remember.

Q. I'll ask you whether or not you previously testified under oath that on the night of August 10th, 1973, you saw Bobby Smith, excuse me, Bobby Foster, Benny Smith and Henry Lee Harris, all three, at Howard's Grill on the night of August 10th?

MR. SHUSTER: OBJECTION. Been over that. OVERRULED.

DEFENDANT FOSTER'S EXCEPTION NO. 46.

A. I don't remember.

Q. I'll ask you whether you saw Bobby Foster, Benny Smith and Henry Lee Harris in the early morning hours at the home of Henry Harris at approximately dawn on the morning of August 11, 1973?

MR. SHUSTER: OBJECTION. OVERRULED.

DEFENDANT FOSTER'S EXCEPTION NO. 47.

A. I don't remember.

Q. I'll ask you whether or not you previously testified under oath that on the morning of August 11th, at approximately dawn that you did in fact see Henry Lee Harris, Bobby Foster, and Benny Smith at the home of Henry Lee Harris?

ALL DEFENDANTS OBJECT. OVERRULED.

DEFENDANT SMITH'S EXCEPTION NO. 43.

DEFENDANT FOSTER'S EXCEPTION NO. 48.

A. I don't remember."

[5] Although not without criticism, it remains the rule *in criminal cases* in North Carolina that the district attorney may not impeach a State's witness by evidence that his character is bad or that he has made prior statements inconsistent with or contradictory to his testimony. *State v. Pope*, 287 N.C. 505, 215 S.E. 2d 139 (1975); *State v. Anderson*, 283 N.C. 218, 195 S.E. 2d 561 (1973); *State v. Tilley*, 239 N.C. 245, 79 S.E. 2d 473 (1954). *See* 1 Stansbury's North Carolina Evidence § 40 (Brandis rev. 1973). However, the trial judge in his discretion may allow the prosecutor to cross-examine a hostile or unwilling witness for the purpose of refreshing his recollection or awakening his conscience, thus enabling him to testify cor-

rectly. "In so doing, the trial judge may permit the party to call the attention of the witness directly to statements made by the witness on other occasions. *S. v. Noland* [204 N.C. 329, 168 S.E. 413 (1933)]; *S. v. Taylor* [88 N.C. 694 (1883)]. But the trial judge offends the rule that a witness may not be impeached by the party calling him and so commits error if he allows a party to cross-examine his own witness solely for the purpose of proving him to be unworthy of belief." *State v. Tilley, supra; accord, State v. Pope, supra; State v. Anderson, supra. See also* McCormick on Evidence § 38 (1972).

[6] In this case it is quite apparent that the district attorney, by his "leading questions" and "cross-examination," was seeking to demonstrate to the jury that the witness Thomas was lying when he stated he "could not remember" having testified at the first trial to certain events and conversations incriminating these defendants. The inescapable conclusion to be drawn from the record is that the State was seeking not only to impeach the credibility of its own witness but was also attempting to force the witness to give the jury the same account of events he had given at the first trial. Failing this, the prosecutor intended to accomplish his efforts at impeachment by placing the previous testimony of this witness before the jury. *See State v. Anderson, supra.*

"A question asked and unanswered is not evidence of any fact. Likewise, a question in which counsel assumes or insinuates a fact not in evidence, and which receives a negative answer, is not evidence of any kind." *State v. Anderson, supra; accord, State v. Trimble,* 327 Mo. 773, 39 S.W. 2d 372 (1931). The able trial judge, obviously aware of this rule, stated that he intended to instruct the jury to that effect. The point evidently was "lost in the shuffle," however, for no such instruction was given and the jury "cannot be counted on to understand this." *State v. Anderson, supra.*

[7] During the examination of James Thomas, the district attorney questioned him with reference to a paper writing marked State's Exhibit 10 which purportedly was a statement made by Thomas to a police officer in November 1973. This statement apparently consisted of responses to the identical questions which were being asked at trial regarding the involvement of defendants in the crimes charged in this case. Defendants objected to the interrogation of Thomas concerning his previous written statement and, with the jury absent, argued

that such examination was tantamount to the State's impeachment of its own witness. In overruling the objections the court replied that the statement previously made by Thomas was "no more impeaching than the leading questions that he has been permitted to ask." That is precisely the point defendants now urge, and we think the point is well taken.

The district attorney's "leading questions" were calculated not only to impeach his own witness but also to prove the contents and the truth of the prior inconsistent testimony of the witness at the first trial. The obvious effect of these questions was to demonstrate to the jury that a written record existed which corroborated verbatim the "testimony" contained in the district attorney's questions. The anti-impeachment rule makes Exhibit 10 incompetent as evidence, and the district attorney's questions which indirectly but unmistakably placed it before the jury were prejudicial. Such interrogation of the witness Thomas violated the "rule of law which forbids a prosecuting attorney to place before the jury by argument, insinuating questions, or other means, incompetent and prejudicial matters not legally admissible in evidence." *State v. Phillips,* 240 N.C. 516, 82 S.E. 2d 762 (1954) ; *accord, State v. Anderson, supra.*

[8] Nothing in *State v. Pope,* 287 N.C. 505, 215 S.E. 2d 139 (1975), relied on by the State, requires a different result. In that case we recognized for the first time an exception to the anti-impeachment rule which "allows impeachment 'where the party calling the witness has been misled and surprised or entrapped to his prejudice.' [Citations omitted.]" *State v. Pope, supra,* at 512. *Pope* points out that surprise does not mean mere disappointment but means *taken unawares.* "Where the prosecuting attorney knows at the time the witness is called that he has retracted or disavowed his statement, or has reason to believe that he will do so if called upon to testify, he will not be permitted to impeach the witness. He must first show that he has been genuinely 'surprised or taken unawares' by testimony which differed in material aspects from the witness' prior statement, which he had no reason to assume the witness would repudiate." *State v. Pope, supra,* at 514.

In the instant case there can be no doubt that, *sometime prior to calling the witness Thomas,* the district attorney had substantial reason to believe that Thomas would repudiate or disavow his prior testimony if called upon to testify. This being so, the prosecutor could not have been genuinely surprised or

taken unawares by the testimony of Thomas. To the contrary, he had every reason to believe that Thomas would retract his previous testimony or feign a loss of memory. Under these circumstances, the district attorney should have marked Thomas off the list of the State's witnesses. *State v. Anderson, supra.*

Robert Davis was called as a witness for the State and examined in a fashion substantially similar to the examination of the witness James Thomas. However, if Davis, *prior to taking the stand,* ever evinced any reluctance to testify for the State, or ever became uncooperative, or otherwise placed the district attorney on notice that he had suffered a loss of memory or had decided to disassociate himself from the prosecution of these defendants, the record fails to show it. Thus the district attorney may or may not have been surprised or taken unawares so as to entitle him, with the permission of the court, to impeach Davis. *See State v. Pope,* 287 N.C. 505, 215 S.E. 2d 139 (1975). We therefore omit the district attorney's examination of Davis and base our decision on what transpired during the examination of James Thomas.

The trial court erred in allowing the district attorney to impeach his own witness and, in so doing, to place before the jury incompetent and prejudicial matters not legally admissible in evidence. This error requires a new trial. Remaining assignments need not be discussed since they are unlikely to recur upon retrial.

New trial.

STATE OF NORTH CAROLINA v. JAMES A. BUSH

No. 95

(Filed 29 January 1976)

1. Constitutional Law § 36; Homicide § 31— first degree murder — death penalty — constitutionality

Imposition of the death penalty upon a conviction of first degree murder was not unconstitutional, and defendant was not denied due process because the district attorney had the absolute discretion to charge and prosecute for a capital offense or to bring the accused to trial upon a lesser included offense.

2. **Criminal Law § 169— evidence admitted over objection — subsequent evidence admitted without objection — no prejudice**

The trial court in a first degree murder prosecution did not err in allowing deceased's wife to testify that her husband usually carried a little money in his pocket, since other evidence which was admitted without objection was sufficient to support an inference that a robbery had been committed.

3. **Criminal Law §§ 71, 85, 169— officer's testimony — shorthand statement of fact — character evidence — exclusion not prejudicial**

Testimony by a police officer which would have shown that the officer's investigation tended to corroborate portions of defendant's statement to the officer was a shorthand statement of fact and should not have been rejected on the ground that it invaded the province of the jury; however, the exclusion of such testimony was not prejudicial since defendant failed to present properly this character evidence and since the officer had already testified to facts which tended to support the conclusion defendant sought to elicit.

4. **Homicide § 21— death by stabbing — unlawfulness and malice — sufficiency of evidence**

Evidence in a first degree murder prosecution was sufficient to permit the jury to find that the killing was unlawful and was done with malice where such evidence tended to show that defendant killed deceased by the intentional use of a deadly weapon, a knife.

5. **Homicide § 21— first degree murder — premeditation and deliberation — sufficiency of evidence**

Evidence in a first degree murder prosecution was sufficient to permit the jury to find that after premeditation and deliberation defendant formed a fixed purpose to kill and did kill his victim where such evidence tended to show that defendant stole a car and thereafter drove it into a ditch in the vicinity of the trailer home occupied by deceased and his wife, defendant then went to the trailer home where deceased allowed him to use the phone and later gave him a glass of water, defendant attacked deceased with a knife upon little or no provocation, defendant then robbed deceased's body, ransacked the dwelling, left the body of deceased in his own blood, and thereafter returned to rob and tie up the wife of the deceased.

6. **Homicide § 21— murder in perpetration of robbery — sufficiency of evidence**

Evidence was sufficient to permit the jury to find that defendant killed his victim while in the perpetration of a robbery, and it was not error for the trial court to submit the charge of murder in the first degree on the "felony-murder" theory.

7. **Criminal Law § 114— jury charge on defendant's contentions — no expression of opinion**

The trial court did not express an opinion in its jury charge by stating that defendant contended he committed no unlawful homicide and that defendant contended he should be acquitted of manslaughter on the grounds of self-defense, since the trial court's statement was

consistent with defendant's own testimony; moreover, the challenged statement was favorable to defendant since it presented to the jury a possible complete defense.

Chief Justice SHARP concurs in the result.

APPEAL by defendant, James A. Bush, pursuant to G.S. 7A-27(a) from *Fountain, J.*, 19 May 1975 Session ONSLOW Superior Court.

Defendant was tried upon a bill of indictment which charged that "James A. Bush late of the County of Onslow on the 18th day of November 1974, with force and arms, at and in the said County, feloniously, wilfully, and of his malice aforethought, did kill and murder Kirby W. Marshburn . . . . "

The State's evidence tended to show the following:

Eva A. Marshburn, wife of the deceased, testified that on 18 November 1974, after completing her work in Jacksonville, North Carolina, at about 9:10 p.m. she drove to her house trailer located near Highway 258 about eleven miles from Jacksonville. Upon entering the hall of her trailer she observed that two bedrooms had been ransacked. The contents of dresser drawers in each bedroom had been emptied on the bed and personal items were scattered about the rooms. She had left the rooms in an orderly condition except for one unmade bed. Mrs. Marshburn proceeded to the living room and there she observed her husband in the kitchen lying facedown in a pool of blood. A blood-stained knife with a bent blade lay on the floor near her husband's body. She recognized the knife as being one of her set of steak knives. Her husband's wallet was also lying between his body and a kitchen cabinet. Upon turning to reach for the telephone, she saw defendant who said, "You're next." Defendant told her that he would have to kill her because she had seen his face and he knew that she would turn him in. He then demanded money and upon his agreement to leave, she emptied her pocketbook which contained something over three dollars and gave it to him. Defendant then cut the telephone line and tied the witness to a chair with some drapery cord taken from the curtains. Mrs. Marshburn asked defendant why he killed her husband and he replied, "He wouldn't do anything I asked him to do, so I had to kill him." After telling the witness that he was going to take her car, defendant left the trailer but returned in a few minutes and inquired about a gun and some ammunition. The witness directed him to the gun and

defendant then left in the Marshburn car. Mrs. Marshburn was able to free herself and find help.

Robert E. Lee of the Onslow Sheriff's Department testified that he went to the Marshburn home on the night of 18 November 1974 where he observed the body of Mr. Marshburn lying on the kitchen floor in a pool of blood. He found a knife and a wallet near the body. The officer described the premises as having been "ramshackled."

Gwendolyn Cruz testified that she drove her 1974 Grand Prix automobile to work at the Area I Club on the afternoon of 18 November. She placed her keys on the bar behind which she worked. The witness observed defendant at the bar at about 4:30 p.m. and saw him leave at about 6:00 p.m. She later discovered that her automobile keys were missing and that her automobile had been stolen.

Johnnie Burris testified that on the night of 18 November 1974, at about 8:15 p.m., he saw defendant standing beside a Grand Prix automobile which was in a ditch on the side of Highway 258, approximately one mile from Kirby Marshburn's house. He offered to give defendant some assistance but defendant told him that he didn't want a wrecker and that he would get the car out later. Burris stated that while he was there another man stopped and offered defendant a ride to Highway 17 but defendant declined this offer. There was another dwelling immediately across the road. It was later ascertained by police officers that the Grand Prix automobile belonged to Mr. and Mrs. Thurman Cruz.

Michael Papenfuse testified that on 18 November 1974, between 9:40 and 9:45 p.m., he saw defendant go into the Bang Bang Club. A short time thereafter he observed defendant leave in an automobile which he thought was a Ford.

Deputy Sheriff J. L. Jones of the Onslow Sheriff's Department, at about 11:30 on the same night, found a 1970 Ford, later identified as the Marshburn's car, approximately a quarter mile from the main gate of Camp Lejeune.

On the night of 19 November 1974 Officer Jarman of the Onslow Sheriff's Department located defendant at Camp Lejeune. He advised defendant of his constitutional rights and questioned him concerning the events of the previous night. Defendant stated that he had taken the Cruz automobile and

driven it into a ditch and he thereafter walked to the Marshburn trailer home where Mr. Marshburn allowed him to use the telephone and also gave him a glass of water. Defendant said that while they were in the kitchen, Mr. Marshburn, for no apparent reason, pushed him into the kitchen counter and that he grabbed a knife from a counter and stabbed Mr. Marshburn several times. Mr. Marshburn fell to the floor and defendant was attempting to drive away in the Marshburn truck when Mrs. Marshburn arrived. He followed Mrs. Marshburn into the trailer, took some money from her and tied her into a chair. He left in Mrs. Marshburn's automobile. Defendant signed a statement after it was reduced to writing.

The State offered into evidence several articles of defendant's blood-stained clothing. The blood stains were found to be of the same type as that of deceased. Defendant's boots were introduced into evidence and the tread on the boots was similar to the bloody boot prints found on the floor of the Marshburn trailer.

Dr. Walter Gable, an expert in pathology, testified that he examined Mr. Marshburn's body on the morning of 19 November 1974. His examination revealed lacerations on the neck and face and four stab wounds in the front of the victim's body. He testified that in his opinion Mr. Marshburn died as a result of a stab wound which penetrated the sternum and terminated in the victim's heart. He further stated that the steak knife found near Mr. Marshburn's body could have been the instrument which inflicted the fatal wound.

Defendant testifying in his own behalf stated that he went to the Area I Service Club at about 4:30 p.m. on 18 November where he drank beer until 7:15 p.m. He then took the Cruz automobile and was driving toward Richlands on Highway 258 when he lost control of the car and drove it into a ditch. He later walked to the Marshburn trailer home where he asked Mr. Marshburn if he could use the telephone. He had some conversation with Mr. Marshburn during which Mr. Marshburn said "something about a colored boy down the road owned a wrecker." Defendant then asked Mr. Marshburn what color the boy was. At this point he said that Mr. Marshburn pushed him toward the kitchen counter and told him to leave. He picked up a knife from the counter and stabbed Mr. Marshburn a number of times. Defendant said he had no intention of stealing anything at the time he stabbed Mr. Marshburn and that he

immediately tried to leave the premises in the Marshburn truck. There were no keys in the truck and he returned to the trailer and ransacked the bedroom in an unsuccessful search for the keys. He then searched the body and found the keys in Mr. Marshburn's pants pocket. As he prepared to leave in the truck, Mrs. Marshburn arrived and he followed her into the house, took money from her, cut the telephone line, and tied Mrs. Marshburn into a chair. He also took a rifle and some ammunition before driving away in the Marshburn automobile. On cross-examination defendant testified that two people did offer him assistance at the place where he had driven the Cruz automobile into a ditch. He also admitted that he passed a pay telephone booth on the way to the Marshburn trailer and he had some change in his pocket at that time. He explained that he did not use the telephone because it was too near the stolen automobile and he was afraid that he would be accused of burglary because of its proximity to a store. He further said that he thought there was another dwelling between the Marshburn residence and the stolen automobile.

The jury returned a verdict of guilty of murder in the first degree. Defendant appealed from a judgment imposing the death sentence.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lester V. Chalmers, Jr., and Assistant Attorney General William B. Ray, for the State.

William J. Morgan and Grady Mercer, Jr., for the defendant.

BRANCH, Justice.

[1] Defendant's first assignment of error is as follows:

> I. WAS THE ENTRY OF THE JUDGMENT AND SENTENCE OF DEATH UNCONSTITUTIONAL IN VIOLATION OF THE RIGHTS GUARANTEED THE DEFENDANT UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES?

The questions presented by this assignment of error were considered and answered by this Court in the case of *State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607. There Chief Justice Sharp, in part, wrote:

> G.S. 14-17, as rewritten on 8 April 1974 by the enactment of N. C. Sess. Laws, ch. 1201, § 1 provides that mur-

der in the first degree "shall be punished with death." Defendants contend, however, that capital punishment "under the laws of North Carolina [would] violate U. S. Const. amend. VIII and amend. XIV, § 1, and N. C. Const. art. 1, §§ 19, 27." In the last three years this Court has several times rejected these contentions. They have been thoroughly considered and further discussion would be merely repetitious. *See 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. Fowler,* 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975).

Defendant's specific argument that he was denied due process because the District Attorney had the absolute discretion to charge and prosecute for a capital offense or to bring an accused to trial upon a lesser included offense has also been considered and rejected by this Court in a number of cases. See *State v. Young,* 287 N.C. 377, 214 S.E. 2d 763; *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214; *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721.

[2] Defendant next contends that the trial judge erred by allowing the witness, Eva A. Marshburn, to respond to a question of the District Attorney about a matter which was not within her knowledge.

The District Attorney asked Mrs. Marshburn if her husband usually carried money in his pocket and she replied, "Usually not a whole lot, but just a little." Defendant takes the position that this evidence prejudiced defendant "by allowing speculation of a robbery to creep into evidence."

A murder committed in the perpetration *or attempted perpetration* of robbery is murder in the first degree. G.S. 14-17; *State v. Bailey,* 254 N.C. 380, 119 S.E. 2d 165; *State v. Biggs,* 224 N.C. 722, 32 S.E. 2d 352.

We must concede that the evidence was of little relevance since it is not necessary for property to be actually taken in order to support a conviction of murder in the first degree when the homicide occurs during an attempted robbery. However, in light of the evidence admitted without objection to the effect

that the witness found her husband's body lying in a pool of blood beside a knife and his wallet and that the dwelling had been "ransacked" we can find little prejudice in the admission of this evidence. The evidence admitted without objection was sufficient to support an inference that a robbery had been committed. This assignment of error is overruled.

[3] Defendant assigns as error Judge Fountain's ruling sustaining the State's objection to Deputy Woodward's testimony which would have shown that the officer's investigation tended to corroborate portions of defendant's statement to the officer.

The State takes the position that the proffered evidence was conclusory in nature and invaded the province of the jury.

Officer Woodward testified as to a statement made to him by defendant. The officer's testimony, in essence, corroborated the testimony later given by defendant. On cross-examination, Officer Woodward, in part, stated:

> The defendant proved to be very cooperative . . . . At the barracks he showed us where he had placed the car keys and he also voluntarily showed us where he had put the clothes that he had worn. He gave us permission to go in his locker and cooperated totally with us after his initial denial.
>
> We checked out his remarks concerning going to a bar and that resulted in Mr. Papenfuse being located. The little details about getting cigarettes checked out to be truthful.

This assignment of error is based upon the following question and ruling:

> Q. Mr. Woodward, so far as you have been able to personally check in attempt to verify things that were told you by the defendant, have you found these things to be accurate and truthful insofar as you have been able to ascertain?
>
> MR. ANDREWS: Objection.
>
> COURT: Sustained.

Had the officer been permitted to answer he would have stated:

> A. Yes, sir, everything that he has told me that took place we have confirmed except the car keys to Mrs. Marshburn's vehicle. We were unable to find those. . . .

Our research reveals some cases which tend to support the State's position.

In *State v. Summerlin,* 232 N.C. 333, 60 S.E. 2d 322, the defendants were charged with a criminal conspiracy to commit robbery and with aiding and abetting in robbery. Three of the defendants entered pleas of guilty to the conspiracy charge and another defendant entered a plea of guilty to the charge of aiding and abetting. Two of the defendants, Stroud and Summerlin, entered pleas of not guilty to both charges. The jury returned verdicts of guilty as charged as to Stroud and Summerlin. Defendant Summerlin appealed. One of the co-conspirators testified for the State. A police officer, without objection, also gave inculpatory testimony against Summerlin. Summerlin admitted that he received some of the stolen property and tried to dispose of it. Thereafter the Sheriff of Wayne County testified concerning the arrest of the defendant Chappell. He stated that Chappell then told him about his part in the robbery. The Solicitor then inquired, "What did he tell you?" The Sheriff, over objection, replied, "Just what you have just heard, practically verbatim." In deciding this assignment of error, the Court stated:

> The defendant contends the answer was a conclusion on the part of the witness, and violated the general hearsay rule, and invaded the province of the jury, citing *S. v. McLaughlin,* 126 N.C. 1080, 35 S.E. 1037, and Stansbury, N. C. Evidence, Sec. 126.
>
> If the solicitor had pursued his inquiry no further as to what Chappell told him, this exception would be well taken. However, the answer of the witness was not accepted and he was requested by the solicitor to repeat as nearly as he could the conversation between him and Chappell. The Sheriff then testified in detail, without objection, as to what Chappell had told him. The exception will not be upheld.

The defendant was convicted of rape in the case of *State v. McLaughlin,* 126 N.C. 1080, 35 S.E. 1037. There defense counsel examined the committing Justice of Peace who recited the evidence given by prosecutrix at the preliminary hearing. On cross-examination, the solicitor asked the witness, "if the testimony of Harriet McMillan, the prosecutrix in this case was substantially the same as it was on the hearing before him in the

justice's court." Over objection the witness said "she testified to about the same on both trials." Holding the admission of this evidence to be error, this Court stated:

> . . . The general rule of law is that the jury (or the judge, as the case may be) are the triers of matters of dispute, and form their conclusions from the facts before them, and not upon the opinions of others on the subject. So that the facts and not opinions are to be listened to by the jury.
>
> * * *
>
> Whether the two statements by the prosecutrix were substantially the same, is a fact to be determined by the jury, and not the witness. That would in effect make the witness the jury as to that fact. It was competent for the witness to state what the prosecutrix said on the former trial, and the jury would then determine whether the two statements were the same or not.

The rule that opinion evidence is not admissible because it invades the province of the jury has been criticized in several treatises on evidence because: (1) The reasons justifying its use are unconvincing, (2) its meaning is obscure, and (3) the many exceptions to the rule severely restrict its application. Stansbury's North Carolina Evidence (Brandis Rev.) § 126. See also Professor Morgan's review of King & Pillinger, Opinion Evidence in Illinois, in 29 Va. L. Rev. 970 (1943). Some of the exceptions to the rule are considered in 1 Stansbury's North Carolina Evidence (Brandis Rev.) § 125:

> Opinion evidence is always admissible when the facts on which the opinion or conclusion is based cannot be so described that the jury will understand them sufficiently to be able to draw their own inferences. Even when it might be *possible* to describe the facts in detail, it may still be *impracticable* to do so because of the limitations of customary speech, or the relative unimportance of the subject testified about, or the difficulty of analyzing the thought processes by which the witness reaches his conclusion, or *because the inference drawn is such a natural and well understood one that it would be a waste of time for him to elaborate the facts,* or perhaps for some other reason.
>
> It is neither possible nor desirable to lay down a hard and fast rule to cover the infinite variety of situations that may arise, but the admissibility of opinion evidence

under the circumstances suggested above is thoroughly established. The idea is variously expressed by saying that "instantaneous conclusions of the mind," or "natural and instinctive inferences," *or the "evidence of common observers testifying to the results of their observation" are admissible,* or by characterizing the witness's *statement as a "shorthand statement of the fact"* or as "the statement of a physical fact rather than the expression of a theoretical opinion." [Emphasis ours.]

It would have been a waste of time for the officer to testify as to how each fact in defendant's statement was confirmed by his independent investigation. The answer would have only summarized the results of the witness's observation of physical facts. In our opinion the challenged answer was a shorthand statement of fact and should not have been rejected on the ground that it invaded the province of the jury.

Defendant concedes in his brief that the purpose of the proffered evidence was to bolster defendant's credibility by showing this specific instance of truthfulness. Thus the trial judge's ruling might well have been based on defendant's failure to properly present this character evidence.

In North Carolina the rule is that when a character witness is called he must first state that he knows the general reputation of the party about whom he proposes to testify. If he does not know the general reputation of the person in question, the witness may not properly testify as to the reputation and character of that person. If he states that he is familiar with the party's general reputation he may state whether it is good or bad and then on his own volition he may state whether it is good for certain virtues or bad for certain vices. *State v. Hicks,* 200 N.C. 539, 157 S.E. 851; *State v. Nance,* 195 N.C. 47, 141 S.E. 468 (dictum). It is improper, however, to allow a witness to testify about specific acts without first establishing that the witness knows the party's general reputation. *State v. Ellis,* 243 N.C. 142, 90 S.E. 2d 225; *State v. Coley,* 114 N.C. 879, 19 S.E. 705.

Here defendant did not show that the witness knew defendant's general reputation but merely sought to prove his own character by attempting to show a single specific act of truthfulness. Even had the trial judge ruled incorrectly, no substantial prejudice to defendant arose from the rejection of this

evidence since the witness had already testified to facts which tended to support the conclusion defendant sought to elicit. In fact, all of the State's evidence tended to show that the portions of defendant's statement which were subject to confirmation by independent investigation were true.

For the reasons stated, this assignment of error is overruled.

By his assignments of error 4, 6, 7, 8 and 9, defendant presents the question of whether the trial judge erred in refusing to grant his motion for judgment as of nonsuit on the charge of first-degree murder.

Defendant was charged with murder in the first degree by a bill of indictment drawn under the provisions of G.S. 15-144. Such indictment will support a verdict of murder in the first degree if the jury finds beyond a reasonable doubt that an accused killed with malice and after premeditation and deliberation or in the perpetration or attempted perpetration of any arson, rape, robbery, burglary or other felony the commission of which creates any substantial foreseeable human risk and actually results in loss of life. G.S. 14-17; *State v. Thompson,* 280 N.C. 202, 185 S.E. 2d 666; *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435.

We first consider whether the State presented such substantial evidence as would permit the jury to find that defendant unlawfully, with malice and after premeditation and deliberation killed deceased.

[4] The intentional use of a deadly weapon proximately causing death gives rise to presumptions that (1) the killing was unlawful, and (2) the killing was done with malice. This is second-degree murder. *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575; *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558; *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Gordon,* 241 N.C. 356, 85 S.E. 2d 322. Here all the evidence shows that defendant killed deceased by the intentional use of a deadly weapon and the only question before us at this point is whether the killing was done after premeditation and deliberation.

Premeditation means thought beforehand for some length of time.

Deliberation means that the action was done in a cool state of blood. Deliberation does not require reflection or brooding

for an apparent length of time, but rather an intention to kill executed by defendant in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose and not under the influence of a violent passion, suddenly aroused by just cause or legal provocation. *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65, cert. denied 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133; *State v. Benson,* 183 N.C. 795, 111 S.E. 869.

Premeditation and deliberation must usually be inferred from various circumstances. Among these circumstances are: (1) want of provocation on the part of the deceased, (2) the conduct of an accused before and after the killing and (3) that the killing was done in a vicious and brutal manner. *State v. Fountain, supra; State v. Duboise, supra; State v. Reams, supra; State v. Faust,* 254 N.C. 101, 118 S.E. 2d 769.

Upon motion for judgment as of nonsuit in a criminal prosecution, the questions before the Court are whether there is substantial evidence of each essential element of the crime charged, and whether the accused was the perpetrator of the charged offense. In determining these questions, the evidence before the Court must be considered in the light most favorable to the State and the State is entitled to the benefit of every reasonable inference which may be drawn from the evidence. Any contradictions and discrepancies in the evidence are resolved in favor of the State for the purpose of the motion. Incompetent evidence admitted is considered as if it were competent. *State v. Vestal,* 278 N.C. 561, 180 S.E. 2d 755, cert. denied 414 U.S. 874, 38 L.Ed. 2d 114, 94 S.Ct. 157; *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469; *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679; *State v. Faust, supra.*

[5] The evidence in this case, when considered according to the well-established rules above set forth, discloses that on the night of 18 November 1974 defendant, a twenty-year-old Marine, stole an automobile and thereafter drove it into a ditch in the vicinity of the trailer home occupied by deceased and his wife. Defendant then went to the home then occupied by sixty-five-year-old Kirby W. Marshburn who allowed defendant to use his telephone and later gave defendant a glass of water. Thereafter because deceased "wouldn't do what he was told to do" defendant attacked him with a knife inflicting lacerations in the eye, two separate open wounds in the neck, four stab wounds in the front of the body and the fatal stab which passed

through the sternum and pierced deceased's heart. Defendant then searched the body of Mr. Marshburn, removed his wallet and the keys for the Marshburn truck, ransacked the dwelling and left deceased lying in a pool of his own blood. As defendant prepared to leave in the Marshburn truck, he observed Mrs. Marshburn as she entered the dwelling. He returned, robbed her, took the keys to the automobile, took a gun and some ammunition, tied Mrs. Marshburn up and departed in the Marshburn automobile.

The actions of defendant in obtaining entrance into the Marshburn home in the nighttime and there savagely and brutally attacking his benefactor with a knife with little or no provocation were circumstances which permitted an inference of premeditation and deliberation. Defendant's conduct after the killing in robbing deceased's body, ransacking the dwelling and leaving the body of deceased lying in his own blood and thereafter returning to rob and tie up the wife of the deceased are also circumstances which permit the inference that the killing was done with premeditation and deliberation.

We hold that there was sufficient substantial evidence to permit, but not require, the jury to find that after premeditation and deliberation defendant formed a fixed purpose to kill and did kill Kirby W. Marshburn.

[6] Defendant also contends that the trial judge erred by submitting the charge of murder in the first degree on the "felony-murder" theory.

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, burglary *or other felony,* shall be deemed to be murder in the first degree . . . .

The case of *State v. Thompson, supra,* clearly states principles pertinent to decision of the question before us. There Chief Justice Bobbitt, speaking for the Court, stated:

> . . . A murder committed in the perpetration or attempt to perpetrate any felony within the purview of G.S. 14-17 is murder in the first degree, irrespective of premeditation or

deliberation or malice aforethought. *State v. Maynard,* 247 N.C. 462, 469, 101 S.E. 2d 340, 345 (1958), and cases cited.

* * *

. . . An interrelationship between the felony and the homicide is prerequisite to the application of the felony-murder doctrine. 40 C.J.S. *Homicide* § 21(b), at 870; Perkins, *op. cit.* at 35. A killing is committed in the perpetration or attempted perpetration of a felony within the purview of a felony-murder statute "when there is no break in the chain of events leading from the initial felony to the act causing death, so that the homicide is linked to or part of the series of incidents, forming one continuous transaction." . . .

Defendant contends that he did not intend to rob until *after* he had killed Mr. Marshburn and that he went to the Marshburn trailer home in order to use telephone. However, the evidence pertinent to this contention, when taken in the light most favorable to the State, shows that on the night of 18 November 1974 defendant drove a stolen automobile into a ditch in the vicinity of the trailer home of deceased. There was a dwelling across the road from the place where defendant had driven the stolen automobile into a ditch. Two persons offered to obtain help for defendant but he refused their offer. Defendant did not attempt to find a telephone at the nearby dwelling. Neither did he attempt to use an available outside pay telephone located at a service station which he passed on the way to the Marshburn dwelling. Defendant had change in his pocket. Upon arrival at the Marshburn dwelling, Mr. Marshburn permitted defendant to use the telephone and gave him a drink of water. Thereafter defendant killed the deceased as hereinabove recounted because "he wouldn't do what he was told to do." He then robbed Mr. Marshburn's body, ransacked the house, took the keys to the Marshburn truck from deceased's body and prepared to leave in the Marshburn truck. At this point, Mrs. Marshburn returned and found her husband's body lying in the pool of blood. His pocketbook was lying nearby. Defendant then returned to the Marshburn home, robbed Mrs. Marshburn of her money, took other property including the keys to the Marshburn automobile and then departed in the Marshburn automobile.

All of defendant's actions during the late afternoon and night of 18 November 1974 apparently were guided and controlled by an intent to steal and rob.

In our opinion, this evidence was sufficient to permit, but not require, a jury to find that defendant killed Kirby W. Marshburn while in the perpetration of a robbery.

The trial judge correctly overruled defendant's motions for judgment as of nonsuit.

[7] Finally defendant argues that the trial judge committed prejudicial error by expressing an opinion in violation of G.S. 1-180 which was not supported by the evidence.

In the questioned portion of the charge Judge Fountain stated that defendant contended that "he did not commit murder in the first degree, or any other unlawful homicide" and " . . . defendant contends from the evidence that you should acquit him of that [manslaughter] on the grounds of self-defense."

Defense counsel did not bring the alleged misstatement to the trial judge's attention. The trial judge's statement of defendant's contentions seems to be logically consistent with defendant's own testimony. On direct examination, defendant testified:

> . . . I stabbed him to get him away from me. I had backed up as far as I could back up and the only way I knew out of the trailer was through the door that I entered. I was afraid for my safety at that time and I now realize that I probably used more force than was necessary. . . .
>
> * * *
>
> . . . At that time I thought I had a reason for picking up the knife as I was looking out for myself and my safety. . . . I did think it was necessary to pick up a knife and stab him at that time.

Usually the contentions of the parties are apparent from the evidence presented at trial. When the contentions are not so apparent or counsel's contentions differ from the evidence he produced at trial, this Court does not require the trial judge to be clairvoyant. For this reason, we have consistently held that any misstatements of counsel's contentions must be brought to the trial judge's attention before the jury retires for delibera-

tion so that he has an opportunity for correction. *State v. Gaines,* 283 N.C. 33, 194 S.E. 2d 839; *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28; *State v. Goines, supra; State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477; *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878; *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876. Defendant seeks to avoid application of this rule by urging that the alleged misstatement of defendant's contentions constituted an expression of opinion.

A similar assignment of error was considered by this Court in the recent case of *State v. Griffin,* 288 N.C. 437, 219 S.E. 2d 48 (1975). In *Griffin,* the defendant, relying on an insanity defense, contended that he had admitted a shooting and it was consequently improper for the trial judge to state that defendant contended that he was not guilty of first-degree murder or any lesser included offense. We there held that the trial judge's statement of defense counsel's contentions were not improper since a plea of not guilty places the burden on the State of proving all elements of the crime charged in the indictment, including the elements of lesser included offenses. See also *State v. Lewis,* 274 N.C. 438, 164 S.E. 2d 177, and *State v. Cooper,* 256 N.C. 372, 124 S.E. 2d 91. The trial judge's statement of contention was not an expression of opinion. Further, the challenged statement appears to be favorable to defendant since it presented to the jury a possible complete defense.

Our careful examination of this record reveals that defendant was given a fair trial free from prejudicial error.

No error.

Chief Justice SHARP concurs in the result.

THE GAS HOUSE, INC. v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 74

(Filed 29 January 1976)

1. Contracts § 10— limitation of liability clause — part of contract

A Limitation of Liability Clause was a part of the contract between the parties for publication of an advertisement in the Yellow

Pages of defendant's telephone directory where plaintiff's application, signed by its president and accepted by defendant, expressly states on its face that it is "under the terms and conditions on the reverse side hereof," the Limitation of Liability Clause was the sixth of seven short paragraphs under the caption "Terms and Conditions" on the reverse side, and nothing in the record suggests that plaintiff's president was prevented or distracted from an examination of the "Terms and Conditions," or that they were misrepresented to him or that he was misled in any way concerning them by defendant's representative.

2. Contracts § 10; Telephone and Telegraph Companies § 4— mistakes in Yellow Pages — contract limiting liability — validity

A contract provision limiting a telephone company's liability for errors or omissions in an advertisement in the Yellow Pages of a telephone directory to the cost of the advertisement is not unreasonable and contrary to public policy.

APPEAL by defendant from the decision of the Court of Appeals, reported in 26 N.C. App. 672, 217 S.E. 2d 101, reversing summary judgment for the defendant by *Collier, J.*, at the 20 January 1975 Session of GUILFORD, *Parker, J.*, dissenting. Also, heard on certiorari upon the petition of the plaintiff.

The complaint alleges:

First Cause of Action: For a number of years an advertisement of the plaintiff's business was published in the "Yellow Pages" of the defendant's telephone directory for the City of Greensboro, under the classification "Gas—Liquefied Petroleum —Bottled & Bulk," which is the proper classification for the plaintiff's business. Plaintiff and defendant contracted for a republication of the plaintiff's advertisement in the 1974 directory under the same classification. The defendant broke its contract with the plaintiff by publishing such advertisement in the 1974 directory under the classification "Gas—Industrial & Medical Cylinder & Bulk," which is not the proper classification for the plaintiff's business, the plaintiff not selling any industrial or medical gases. By reason of the defendant's breach of such contract, the plaintiff has been damaged, through loss of profits, in the amount of $100,000.

Second Cause of Action: The plaintiff having in previous years advertised in the defendant's "Yellow Pages," as above alleged, ordered from the defendant a republication in the 1974 directory of the plaintiff's advertisement under the classification "Gas—Liquefied Petroleum—Bottled & Bulk." The defendant accepted this order. The defendant carelessly and negligently published the plaintiff's advertisement in the "Yellow Pages"

under the classification "Gas—Industrial & Medical—Cylinder & Bulk." The plaintiff does not sell any industrial and medical gases. As the sole, direct and proximate result of the defendant's negligence, plaintiff has been damaged by the loss of profits in the amount of $100,000.

By its answer the defendant admits that it contracted with the plaintiff to publish the plaintiff's advertisement under the classification "Gas—Liquefied Petroleum—Bottled & Bulk," and that it actually published the advertisement in such directory under the classification "Gas—Industrial & Medical—Cylinder & Bulk" and also under the classification "Ranges & Stoves—Dealers." The answer denies any negligence by the defendant and the sustaining of any damage by the plaintiff by reason of such misplacement of the advertisement.

The answer of the defendant also alleges that the "Yellow Pages" section of its directory is prefaced by the following statement:

> "The Yellow Pages are published for the benefit and convenience of our subscribers. Each business subscriber is listed under one general classification without cost. The Telephone Company assumes no responsibility or liability for errors or omissions occurring in the Yellow Pages. Errors or omissions will be corrected, in a subsequent issue, if reported by letter to the Company."

As a further defense the answer alleges that the defendant acted in good faith, without malice and without wanton or wilful misconduct, and that the contract between the plaintiff and the defendant provided:

> "The Telephone Company's liability on account of errors in or omissions of such advertising shall in no event exceed the amount of charges for the advertising which was omitted or in which the error occurred in the then current directory issue and such liability shall be discharged by an abatement of the charges for the particular listing or advertising in which the omission occurred."

In response to the defendant's request for admissions of fact, the plaintiff admitted that the above quoted Limitation of Liability Clause appeared on the reverse side of the customer's confirmation copy of the contract, but denied that it was part of such contract. The plaintiff also admitted that the directory

contained the above quoted preface to its Yellow Page section and that the defendant has offered to pay to the plaintiff, in satisfaction of the plaintiff's claim against the defendant, $4.70, the amount of charges for the advertising. By affidavit of its president, the plaintiff asserted that this provision, printed under the heading "Terms and Conditions," upon the back of the order form supplied by the defendant to persons desiring to place orders for "Yellow Page" advertising, was never called to its attention and it was unaware of the existence of that provision on the back of the order form.

The defendant's motion for summary judgment, pursuant to Rule 56(b) of the North Carolina Rules of Civil Procedure, was granted by Collier, J., on the ground there is no genuine issue as to any material fact and the defendant is entitled to judgment as a matter of law.

In an opinion by Chief Judge Brock, Judge Parker dissenting, the Court of Appeals reversed on the ground that the provision of the contract limiting the liability of the defendant is unreasonable in consequence of a "real disparity in bargaining power" of the parties and should not be enforced "as a matter of public policy." The Court of Appeals found "little merit in" the plaintiff's contention that the Limitation of Liability Clause was not part of the contract. The majority of the Court of Appeals reasoned that "Yellow Pages" advertising is unique in value as an advertising medium and, consequently, the parties to this action are not in positions of equal bargaining power since the plaintiff must, as a practical matter, advertise in the yellow pages of the directory and the plaintiff could not have bargained for different terms in the contract but must accept or refuse yellow page advertising on a "take it or leave it" basis. The majority of the Court of Appeals also reasoned that the Limitation of Liability Clause is unreasonable in that it places the advertiser at the mercy of the telephone company's negligence, the advertiser having no opportunity to mitigate or abate the effect of error in such advertising until publication of the next directory.

The defendant having appealed by reason of the dissent by Judge Parker in the Court of Appeals, the plaintiff's petition for certiorari was allowed in order to bring forward for review the question of whether the Limitation of Liability Clause was, indeed, a part of the contract between the parties in view of

the plaintiff's contention that the presence of this clause on the back of the order form was not brought to its attention.

The two sides of the order form, signed on its front by the president of the plaintiff and, by rubber stamp, by the agent of the telephone company, was made part of the record by stipulation. On the front thereof, immediately above the signature of the plaintiff's president, in small but legible type, it states:

> "The undersigned hereby applies to Southern Bell Tel. and Tel. Co., under the terms and conditions on reverse side hereof, for the directory advertising described herein; also for the continuance of existing directory advertising, except the advertising ordered discontinued."

On the reverse side, in small but legible type, under the caption, "TERMS AND CONDITIONS," appear seven paragraphs, the sixth of which is the above quoted Limitation of Liability Clause.

Smith, Patterson, Follin, Curtis & James by Charles A. Lloyd for plaintiff.

Brooks, Pierce, McLendon, Humphrey & Leonard by C. T. Leonard, Jr., and Edward C. Winslow III for defendant.

LAKE, Justice.

Two questions are presented for our consideration: (1) Upon this record is there a genuine issue of fact as to whether the Limitation of Liability Clause is part of the contract between the parties? (2) If such clause is part of such contract, is it contrary to public policy or so unreasonable as to make it invalid?

[1] The plaintiff's application, accepted by the defendant, expressly states on its face that it is "under the terms and conditions on reverse side hereof." On the reverse side of this single sheet of paper in small but legible type under the caption "TERMS AND CONDITIONS" appear seven short paragraphs, the sixth of which is the Limitation of Liability Clause. There also appears on the reverse side of the sheet a "KEY TO ABBREVIATIONS USED" in the description on the front of the sheet of the requested advertising. Space limitations would not permit printing of the "TERMS AND CONDITIONS" on the front of this single sheet. The reference on the front of the sheet to the terms on

the reverse thereof appears in a single sentence immediately above the signature of the applicant.

The affidavit of the plaintiff's president, who signed the application for the advertising, states that for several years prior to the occasion in question he made all arrangements for the plaintiff's yellow page advertising in the telephone directory, that "Paragraph 6 under 'TERMS AND CONDITIONS' contained on the back of the order form supplied by Southern Bell" was never called to his attention and he was "totally unaware of that paragraph." It will be observed that this falls short of saying that he was unaware of the existence of the statement of "TERMS AND CONDITIONS" on the reverse side of the document. Nothing whatever in the record suggests that he was prevented or distracted from an examination of these "TERMS AND CONDITIONS," or that they were misrepresented to him or that he was misled in any way concerning them by the defendant's representative in the year in question or in any previous year.

Unquestionably, the general rule concerning a party's failure to read a document before signing it as is stated in *Harris v. Bingham,* 246 N.C. 77, 97 S.E. 2d 453, and in *Williams v. Williams,* 220 N.C. 806, 18 S.E. 2d 364, where it is said:

> "In this State, it is held that one who signs a paper writing is under a duty to ascertain its contents, and in the absence of a showing that he was wilfully misled or misinformed by the defendant as to these contents, or that they were kept from him in fraudulent opposition to his request, he is held to have signed with full knowledge and assent as to what is therein contained."

The plaintiff relies upon *Gore v. Ball, Inc.,* 279 N.C. 192, 182 S.E. 2d 389, wherein we refused to give effect to a provision purporting to limit the liability of a seller of seed who delivered to its customer the wrong variety of seed, thus causing the customer to experience a complete failure of the desired crop. In *Gore v. Ball, Inc., supra,* we noted that the alleged limitation of the amount of recovery for such breach of contract was "dropped into" a paragraph somewhat obscurely captioned. While it appeared in small print, along with a substantial amount of other printed matter, upon the order blank taken by the customer from the seller's seed catalogue and used by him in placing the order, this provision did not appear immediately above the line for the customer's name or above the spaces

provided for his use in listing the seed desired. It appeared over to the side of these portions of the order blank and nothing above these portions of the blank designed for the customer's use directed his attention to the alleged limitation. We said:

> "It is not contended that this limitation of the damages recoverable was otherwise called to the attention of the plaintiff. Therefore, unless its location in and upon the above mentioned documents, the size or color of the type and other circumstances, were sufficient to call this statement to the attention of the plaintiff, as being part of the contract into which he was entering, the statement would not constitute a part of that contract.
>
> * * *
>
> "Under these circumstances, we cannot say that, as a matter of law, the 'LIMITATION OF WARRANTY' became part of the contract of sale so as to justify a directed verdict for the defendant."

We further held that the provision purporting to limit the liability of the seller of the seed was "contrary to the public policy of this State so declared in the North Carolina Seed Law" and, even if it be deemed a part of the contract, did not bar the plaintiff from recovery of the full damages to which he would otherwise be entitled.

The above noted difference in the circumstances distinguishes this case from *Gore v. Ball, Inc., supra.* The present record indicates that the defendant used reasonable means to call to the attention of the plaintiff the Limitation of Liability Clause upon which it relies. No controversy as to the facts with reference to this question appears upon the record, and nothing is shown which will exempt the plaintiff from the application of the general rule. Consequently, in the present case, we find no error in the treatment of the Limitation of Liability Clause as part of the contract between the parties.

[2] The majority of the Court of Appeals was, however, in error in holding that the Limitation of Liability Clause is contrary to public policy, patently unreasonable and, therefore, invalid. The decision of the Intermediate Court of Appeals of Michigan in *Allen v. Michigan Bell Telephone Co.,* 18 Mich. App. 632, 171 N.W. 2d 689, supports the position of the majority of the Court of Appeals, but with virtual, if not complete, unanimity, the remaining courts which have considered the

matter have reached the opposite conclusion. *McTighe v. New England Telephone & Telegraph Co.*, 216 F. 2d 26 (2nd Cir.); *Robinson, Insurance & Real Estate, Inc. v. Southwestern Bell Telephone Co.*, 366 F. Supp. 307 (W.D. Ark.); *Wheeler Stuckey, Inc. v. Southwestern Bell Telephone Co.*, 279 F. Supp. 712 (W.D. Okl.); *Georges v. Pacific Tel. & Tel. Co.*, 184 F. Supp. 571 (D.C. Ore.), *Wilson v. Southern Bell Tel. & Tel. Co.* (La. Ct. App.) 194 So. 2d 739; *Baird v. Chesapeake & Potomac Telephone Co.* (Md. Ct. App.), 208 Md. 245, 117 A. 2d 873; *Mitchell v. Southwestern Bell Telephone Co.* (Mo. Ct. App,), 298 S.W. 2d 520; *State of Montana ex rel. Mountain States Tel. & Tel. Co. v. District Court*, 160 Mont. 443, 503 P. 2d 526; *Federal Building Service v. Mountain States Tel. & Tel. Co.*, 76 N.M. 524, 417 P. 2d 24; *Hamilton Employment Service v. New York Telephone Co.*, 253 N.Y. 468, 171 N.E. 710: *Cunha v. Ohio Bell Telephone Co.*, 26 Ohio Misc. 267, 271 S.E. 2d 321; *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E. 2d 155; *Smith v. Southern Bell Tel. & Tel. Co.*, 51 Tenn. App. 146, 364 S.W. 2d 952; *Wade v. Southwestern Bell Telephone Co.* (Texas Civ. App.), 352 S.W. 2d 460, 92 A.L.R 2d 913; Annot., 92 A.L.R. 2d 917, 935.

The general principle governing the validity of contracts against the charge that they are unreasonable is thus stated in 14 Williston on Contracts, 3d Ed, § 1632:

> " 'People should be entitled to contract on their own terms without the indulgence of paternalism by courts in the alleviation of one side or another from the effects of a bad bargain. Also, they should be permitted to enter into contracts that actually may be unreasonable or which may lead to hardship on one side. It is only where it turns out that one side or the other is to be penalized by the enforcement of the terms of a contract so unconscionable that no decent, fairminded person would view the ensuing result without being possessed of a profound sense of injustice, that equity will deny the use of its good offices in the enforcement of such unconscionability.' "

The leading case on the question of the validity of such a Limitation of Liability Clause in a contract for telephone directory advertising is *McTighe v. New England Tel. & Tel. Co.*,

supra, where Circuit Judge Medina, speaking for the Court of Appeals for the Second Circuit, said:

> "The publication of the classified directory [i.e., the "yellow pages"] * * * is wholly a matter of private contract and contracts relating thereto are not required to be filed with the Public Service Commission [of Vermont] which has no jurisdiction except over matters relating to the public utility services rendered by the company and the rates relative thereto.
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> * * *
>
> "True it is that the courts will scrutinize with care clauses exonerating public utility companies, such as railroads, telegraph and telephone companies and others, from liability for the consequences of their own negligence, *with reference to the public services rendered by them.* The fact that the member of the public patronizing such public utility companies must take the contract proffered by the company or forego using the service has enabled the courts to inquire into the reasonableness of the type of clause now under discussion and by this test the clause applicable to the alphabetical [i.e., white pages] directory would as a matter of contract law be considered unreasonable and unenforceable. But the principle which enables courts to strike down and condemn clauses affecting the performance by the company of its functions as a public utility is limited to the area in which the public services are rendered and has no application whatever to the domain in which the public utility may freely contract in its private capacity. The obtaining of the services of the public utility by way of transportation or communications or providing gas or electricity is quite apart from the leases, advertising contracts and a host of other miscellaneous agreements commonly made by members of the public with public utility companies. If there be some disparity in the bargaining power of the contracting parties it is no more than may be found generally to exist; and the courts follow the general rule that the parties are free to contract according to their own judgment and the reasonableness of their engagements will not be entered into." (Emphasis added.)

The reason for the rule that a common carrier, or other public utility, may not contract away its liability for negligence in the performance of its public utility service and may not

claim the benefit of an unreasonable contract limiting the amount of its liability therefor, is that every member of the public is entitled by law to demand such service with full liability at a reasonable rate therefor. For the company to refuse to serve unless the customer agrees to release it from liability for its negligent performance of its obligation to serve would be a denial of this legal right in the would-be customer. Thus, such a contract limiting the liability of the carrier, or other public utility, unless reasonable, is contrary to public policy and invalid. This limitation upon the right of the common carrier, or other public utility, to contract applies, however, only to its undertakings to render services which fall within its public service business. For example, a telephone company leasing office space to a tenant, or an electric power company selling an electric stove, is as free to contract with reference to those matters as is any other owner of a building or dealer in electric stoves. The business of carrying advertisements in the yellow pages of its directory is not part of a telephone company's public utility business.

The inequality of bargaining power between the telephone company and the businessman desiring to advertise in the yellow pages of the directory is more apparent than real. It is not different from that which exists in any other case in which a potential seller is the only supplier of the particular article or service desired. There are many other modes of advertising to which the businessman may turn if the contract offered him by the telephone company is not attractive.

We find in this record no basis for a conclusion that the application of the Limitation of Liability Clause could lead to a result so unreasonable as to shock the conscience. In the absence of most exceptional circumstances, which do not appear in this record, the insertion of a "Yellow Page" advertisement under the wrong classification heading will not produce a different result from that which would follow a complete omission of the advertisement from the directory. It would be virtually, if not completely, impossible to determine what portion of the business done by an advertiser is attributable to its use of "Yellow Page" advertising. There are many factors which enter into periodic fluctuations in the volume of business done by a seller of goods. The purpose of the Limitation of Liability Clause is to protect the telephone company from the danger of verdicts primarily speculative in amount. This is not an unreasonable objective. In

this respect, the telephone company is not in a different position from the local newspaper, radio or television station, or other advertising media.

The omission of an advertisement from the yellow pages of the directory leaves the would-be advertiser in the same position he would have occupied had he made no contract at all with the telephone company. In this respect, the present case is easily distinguishable from *Gore v. Ball, Inc., supra.* The farmer who contracts to purchase one variety of seed and receives a different, relatively useless variety, plants it in good faith and cultivates the resulting crop until the mistake becomes apparent, is in an entirely different position from that which he would have occupied had he not made any purchase of seed at all. The breach of contract by his supplier has caused him to lose his labor, fertilizer and the use of his land. As we said in *Gore v. Ball, Inc., supra:*

> "To permit the supplier of seed to escape all real responsibility for its breach of contract by inserting therein a skeleton warranty, such as was [there] used, would be to leave the farmer without any substantial recourse for his loss.
>
> "While there is no element of personal safety involved in the use of falsely labeled seed, such as there is in the case of a defective automobile, the breach of the contract of sale of seed does not, like the breach of warranty of an automobile part, *sometimes* cause disaster. It *always* causes disaster. Loss of the intended crop is inevitable. The extent of the disaster is measured only by the size of the farmer's planting."

Furthermore, as we held in *Gore v. Ball, Inc., supra,* by reason of the North Carolina Seed Law, such a Limitation of Liability Clause in a seed contract is contrary to the public policy of this State. There is no comparable statute relating to telephone directory advertising.

The present case is likewise distinguishable from *Henningsen v. Bloomfield Motors,* 32 N.J. 358, 161 A. 2d 69, 75 A.L.R. 2d 1, also relied upon by the plaintiff. There the New Jersey Court held invalid, as against public policy, a provision for limited liability of an automobile manufacturer for damage resulting from a defective part of the automobile sold. As the New Jersey Court said, the public has an interest in the safe

construction of motor vehicles and it would be contrary to that interest to permit manufacturers to insert in their sale contracts provisions which naturally tend to minimize care in the manufacture of such dangerous instrumentalities. Furthermore, the potential injury to the unsuspecting purchaser of a defective automobile is such that he certainly cannot be said to be left by a breach of the warranty of fitness in as good a position as he would have occupied had he made no contract for the purchase of the automobile. To limit to cost of replacement the recovery for severe personal injury or death due to the manufacturer's negligence in the making or installing of an automobile part, as the contract involved in the Henningsen case purported to do, would be shockingly unreasonable. As the New Jersey Court said: "An instinctively felt sense of justice cries out against such a sharp bargain." There is no such comparable sharp bargaining in the present case but, on the contrary, a reasonable effort of the telephone company to protect itself against possible gross injustice through a wholly speculative verdict.

The decision of the Court of Appeals is, therefore, reversed and this matter is remanded to that court for the entry by it of a judgment affirming the judgment of the Superior Court in favor of the defendant.

Reversed and remanded.

STATE OF NORTH CAROLINA v. JAMES DOUGLAS HARRILL

No. 94

(Filed 29 January 1976)

1. **Criminal Law § 91— motion for continuance — denial proper**

The trial court did not err in denying defendant's motion for continuance made on the grounds that he did not receive a copy of the very complicated autopsy report of the victim until seven days prior to the time the motion was heard and that defendant was not discharged from Dorothea Dix Hospital until 21 April 1975, after being confined there for the previous month, and trial began on 13 May 1975.

2. **Criminal Law § 15; Jury § 2— change of venue or special venire — denial of motion — failure to show abuse of discretion**

Defendant failed to show abuse of discretion by the trial court in denying defendant's motion for a change of venue or for a special

venire from another county where the accounts carried by the local news media did not appear to have been beyond the bounds of propriety, the prominence of the victim did not unfairly affect the trial, and defendant failed to include in the record the *voir dire* examination of the jury, thereby failing to show that defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him, or even that any juror had prior knowledge or opinion as to this case.

3. **Criminal Law § 88— limitation of cross-examination — evidence subsequently admitted**

Defendant failed to show prejudicial error of the trial court in refusing to allow him to cross-examine a witness as to the cause of decedent's death where the record failed to show what the witness would have said had he been allowed to answer certain questions and where the witness elsewhere during cross-examination substantially answered the defendant's inquiry.

4. **Criminal Law § 99— voir dire examination — conduct of trial court**

During a *voir dire* examination to determine the admissibility of a confession purportedly made by defendant two hours after the crime, the trial court did not err in striking an opinion of an expert witness, in overruling defendant's objection to a question by the State which interrupted the testimony of the expert witness while being cross-examined by the State, or in striking part of the testimony of defendant's witness when there was no objection on the part of the State to the testimony stricken.

5. **Criminal Law § 102— tendered guilty plea not in evidence — jury argument improper**

The trial court did not err in refusing to permit defendant's counsel to argue to the jury his tender of a plea of guilty to second degree murder which the State refused to accept, since no evidence of the tendered plea of guilty was offered to the jury, and counsel may not inject into his jury argument facts not included in the evidence.

6. **Criminal Law § 114— "confession" — "vicious and brutal killing" — use in jury charge — no expression of opinion**

The trial court in a first degree murder prosecution did not express an opinion in its charge to the jury by erroneously using the terms and phrases, "The defendant confesses," "that confession," "confession," "vicious and brutal killing," and "vicious and brutal slaying."

APPEAL by defendant under G.S. 7A-27(a) from *Friday, J.*, at the 12 May 1975 Session of RUTHERFORD County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first-degree murder of William Cephus Morris on 22 January 1975. The defendant tendered a plea of guilty to

second-degree murder, which the State would not accept, and thereupon the defendant pleaded not guilty. The jury found the defendant guilty of first degree murder (felony murder) and the Court sentenced him to death.

The State's evidence, in summary, is as follows: On 21 January 1975 the defendant went to the Union Trust Bank office at Ellenboro, North Carolina, in Rutherford County to change some money. On 22 January 1975 at 9:20 a.m. he entered the same bank wearing a mask and brandishing a gun. He demanded that the bank tellers fill a pillow case with money. While they were complying with his demand, a customer of the bank, William Cephus Morris, was standing nearby. He had just cashed 2 checks. The defendant told Morris to give him what he had in his hand and within a matter of seconds shot Morris, who fell to the floor. These activities were recorded on film, and the film was received into evidence for illustrative purposes. Morris died on 31 January 1975 as the result of a gunshot wound. After receiving the money, including a series of marked $20 bills, the gunman fled the scene in a green car with a West Virginia license plate. This information was furnished to the law enforcement officials, and at 9:55 a.m. a State Highway Patrolman stopped a green Camaro Chevrolet driven by the defendant at the intersection of Highways 64 and 226 in Burke County, North Carolina. Subsequent to the defendant being removed from the car, a .357 magnum pistol was seen on the floor of the automobile. This was removed and taken into the possession of the Highway Patrolman. Also taken from the car was a pillow case containing $5,862.14, which included $1,000 in marked $20 bills, later identified as having been taken from the bank. Defendant was arrested and given Miranda warnings. His confession was received into evidence after a voir dire hearing had been held and proper findings of fact and conclusions of law had been made by the trial court.

The defendant offered no evidence.

Other pertinent facts and circumstances will be referred to in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General James E. Magner, Jr., for the State.

J. H. Burwell, Jr., and George R. Morrow for defendant appellant.

COPELAND, Justice.

[1] The defendant first contends that the court erred in denying his motion for continuance and, thus, in violation of the Federal and State Constitutions deprived him of an opportunity fairly to prepare and present his defense. The reasons given for making the motion were that he did not receive a copy of the very complicated autopsy report of the victim until 6 May 1975 and that defendant was not discharged from Dorothea Dix Hospital in Raleigh, North Carolina, until 21 April 1975, after being confined there for the previous month.

Since the motion for continuance was based on a right guaranteed by the Federal and State Constitutions, the decision of the trial judge is reviewable as a question of law without a prior determination that there has been a gross abuse of discretion. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112 (1975). The defendant relies heavily on *Smathers,* but the facts are obviously distinguishable. In *Smathers* the defendant had reasonable grounds to believe that he was only charged with a misdemeanor until the day of the trial when he found out he was charged with a felony which could lead to imprisonment for life. We do not have that type of situation here. The defendant was properly charged with 1st degree murder in a warrant and later by bill of indictment. A new trial will be awarded because of a denial of a motion for continuance only if the defendant shows that there was error in the denial and that the defendant was prejudiced thereby. *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964).

A careful examination of the record indicates that there was neither error nor prejudicial error. Counsel for the defendant was appointed in February, 1975, shortly after the arrest of the defendant for murder on 31 January 1975. The defendant was indicted on 10 March 1975, his case was initially called for trial on 17 March 1975, and by his own motion an order was obtained delaying the trial and committing the defendant to Dorothea Dix from 21 March to 21 April 1975 to determine his mental competency to stand trial. The record indicates that the court session began 12 May 1975, this case was called and this motion heard on 13 May 1975, and the jury was empaneled on 14 May 1975. Thus, the defendant had access to the autopsy report for seven days prior to the time this motion was heard, and counsel had approximately three months to prepare for

trial and consult with the defendant. Although he contends that the autopsy report was too complicated to permit adequate preparation during this period, he failed to put the autopsy report into evidence. Furthermore, the testimony admitted as to the cause of death indicated there was ample time for preparation. Certainly, under these circumstances there was no error shown.

The defendant's contention that the denial of the continuance was erroneous for the reason that the trial judge did not exercise his discretion in making his ruling is without merit. Although the court was mistaken in its belief that at the time of this trial there was a statutory deadline for making the motion for continuance and that it had not been satisfied, the court's later statements plainly indicated that it would consider the motion under its discretionary power independently of the requirement of the statutory deadline and that it did properly exercise its discretion after hearing the arguments of counsel.

Additionally, the defendant has failed to show that he has been prejudiced by the denial of the continuance. The evidence of the State is overwhelming, and there is no evidentiary support for the defendant's theory that he would have been able to show that the victim was not killed as the result of the gunshot wound if the continuance had been granted.

For the above reasons this assignment of error is without merit and overruled.

[2] The defendant assigns as error the denial of his motion for a change of venue or for a special venire from another county. This motion was based on the ground that the prominence of the victim and the inflammatory publicity from local news media, as well as discussions from church pulpits, would prevent a fair trial.

The defendant's motion is addressed to the sound discretion of the trial judge, and an abuse of discretion must be shown before there is any error. *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

The defendant's contention that the denial of his motion was an abuse of discretion for the reason that the trial judge did not properly exercise his discretion in making his ruling is without merit. The record plainly discloses that the judge indicated he would consider the motion under his discretionary

power independently of the statutory deadline for making the motion which he mistakenly believed to exist. The judge heard the arguments of counsel and pointed out that on his own motion he had ordered special jurors and that the arguments advanced by the defendant could be taken care of on voir dire examination of prospective jurors. The accounts carried by the local news media do not appear to have been beyond the bounds of propriety or to have been inflammatory. The prominence of the victim does not seem to have unfairly affected the trial. Since the defendant failed to include in the record the voir dire examination of the jury, the record does not disclose that the defendant exhausted his peremptory challenges, that he had to accept any juror objectionable to him, or even that any juror had prior knowledge or opinion as to this case. Under these circumstances, no abuse of discretion has been shown. *State v. Thompson*, 287 N.C. 303, 214 S.E. 2d 742 (1975). This assignment of error is overruled.

[3] Next the defendant complains that the court erred in refusing to allow him to cross-examine Dr. Bass as to the cause or causes of the decedent's death.

"One of the most jealously guarded rights in the administration of justice is that of cross-examining an adversary's witnesses." 1 Stansbury's North Carolina Evidence § 35, at 100 (Brandis Rev. 1973); *accord, Barnes v. Highway Commission*, 250 N.C. 378, 394, 109 S.E. 2d 219, 232 (1959). *See also State v. Hightower*, 187 N.C. 300, 121 S.E. 616 (1924). The appellant has the burden of showing not only error but also prejudicial error. *State v. Robinson*, 280 N.C. 718, 187 S.E. 2d 20 (1972).

The doctor had testified on direct examination that the actual final event that caused the decedent's death was massive hemorrhage due to multiple ulcers of the stomach, referred to as stress ulcers, brought on by the combination of severe trauma and multiple episodes of shock, resulting from a penetration wound of the abdomen apparently caused by gunshot.

On cross-examination the doctor described stress ulcers as usually being a result of "sudden traumatic or sudden onset of injuries." He indicated that the victim did have emphyzema at the time, that he had never heard of a case of stress ulcers as the result of emphyzema, but that it could happen and nothing was beyond the realm of possibility.

The record indicates that the defendant then asked a series of questions to determine if the victim had an ulcer prior to sustaining the traumatic injury from the gunshot wound to such an extent that it might have been the cause of decedent's death rather than the ulcers resulting from the gunshot wound. Although numerous objections of the State were sustained, no prejudice has been shown since the defendant failed to have answers to these questions placed in the record and Dr. Bass elsewhere during cross-examination substantially answered the defendant's inquiry. Dr. Bass testified that he had never seen the decedent before this incident and there were no ulcers at the holes where he observed the gunshot wounds when he operated on 22 January 1975, nine days before the death of the deceased. The doctor stated that he was not able to determine whether there were any ulcers before the injuries resulting from the gunshot wounds since he did not examine the stomach other than the holes. He concluded that the man's death resulted from a series of events which were initiated by the gunshot wound. This assignment of error is overruled.

[4] The defendant contends that during the voir dire examination to determine the admissibility of the confession that the defendant purportedly made approximately two hours after the alleged crime, the court erred in sustaining the State's objections to questions asked Dr. James Groce and in striking his opinions. Dr. Groce, who was accepted by the court as an expert in psychiatry, had examined the defendant from 21 March (58 days after the shooting) to 21 April 1975 at Dorothea Dix Hospital.

The record discloses that the court allowed a single motion to strike an expert opinion given by Dr. Groce. Otherwise, no answers of Dr. Groce to questions to which the State's objections had been sustained were placed in the record for purposes of appellate review except insofar as the court later permitted answers to similar questions to be admitted into evidence for purposes of this voir dire examination. Furthermore, the court later during this voir dire examination received into evidence substantially the same opinion that was stricken. Under these circumstances no prejudicial error has been shown. This assignment of error is overruled.

Next, the defendant complains that the trial court erred in overruling his objection to a question by the State which interrupted the testimony of Dr. Groce while being cross-examined

by the State during the same voir dire examination discussed above. The defendant contends the trial judge in this manner refused to allow Dr. Groce to complete and explain his testimony and in violation of G.S. 1-180 failed to maintain an impartial role.

The original question and the omitted portion of the answer were not placed in the record. Dr. Groce had previously made the same statement without adding the limiting conjunction "but" which appeared at the end of the interrupted statement. Additionally, after the interruption, Dr. Groce gave testimony modifying the interrupted statement and, thus, apparently completed his answer to the State's original question. Under these circumstances there is no prejudicial error, and the assignment of error is overruled.

The defendant also contends that during this voir dire examination relative to the purported confession the trial judge failed to maintain an impartial role in violation of G.S. 1-180 by striking part of the testimony of defendant's witness, Millicent Harrill (his sister-in-law), when there was no objection on the part of the State to the testimony stricken.

It appears that the defendant was trying to secure from this witness her opinion of the defendant being on drugs at the time of the purported confession. She testified that he was on drugs on 20 January 1975 at her home. Thereupon, the court concluded that the question had not been asked properly, struck the answer, and directed counsel to ask her again about it, which was done. She then expressed her opinion that the defendant was under the influence of drugs on the 20th of January, as well as at the Rutherford County jail on 22 January 1975, the date of the alleged crime and confession.

The answers which the defendant wished in the record were placed there. Thus, there was no prejudice to the defendant by the court insisting that the question and answer be repeated before allowing them as evidence during this voir dire examination. The assignment of error is overruled.

Next, the defendant contends that the court erred in allowing into evidence the confession of the defendant.

Both the State and the defendant were permitted to offer evidence on the voir dire hearing as to the admissibility of the confession. Proper findings of fact and conclusions of law were

made. It is well settled that if these facts are supported by competent evidence they are conclusive and binding on appeal. *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. denied, 386 U.S. 911, 87 S.Ct. 860, 17 L.Ed. 2d 784 (1967).

The assignment of error is overruled.

[5] Next, the defendant contends the court erred in not permitting counsel to argue to the jury his tender of a plea of guilty of second-degree murder. This assignment of error is based upon the following argument of the defendant and ruling of the court:

> "Ladies and gentlemen of the jury, as you heard, the defendant tendered a plea of guilty to second degree murder and the State—
>
> "MR. LOWE: Objection.
>
> "COURT: Sustained. You may not argue that line. Proceed with your argument."

The record discloses that before the defendant's plea was made, he tendered a plea of guilty to second degree murder, which the State refused to accept, and thereupon he tendered a plea of not guilty. No evidence of the tendered plea of guilty was offered to the jury. In fact, we do not see its relevancy under the circumstances of this case if the plea had been offered into evidence by the defendant. *See* 1 Stansbury's N. C. Evidence §§ 78-81 (Brandis Rev. 1973). "[W]e 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. Monk,* 286 N.C. 509, 515, 212 S.E. 2d 125, 131 (1975).

Furthermore, although our research discloses that the issue has not been decided in North Carolina, in the light of the emergence of plea bargaining as a major aspect in the administration of criminal justice and the importance of insuring the integrity of this procedure, *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed. 2d 427 (1971), the trend is that any communication relating to legitimate plea bargaining with the district attorney is generally inadmissible as evidence unless the defendant has subsequently entered a plea of guilty which has not been withdrawn. *Hineman v. State,* 292 N.E. 2d 618 (Ind. Ct. of App. 1973); *Moulder v. State,* 289

N.E. 2d 522 (Ind. Ct. of App. 1972); 2 ABA Standards, Pleas of Guilty, § 3.4, at 77 [Approved Draft, March 1968]; *see* 59 A.L.R. 3d 448-460. *See also* 2 Stansbury's N. C. Evidence § 180, at 56 and 58 (Brandis Rev. 1973). *State v. DeBerry,* 92 N.C. 800 (1885), is distinguishable from the present case because there the defendant bargained with the prosecuting witness in an attempt to have the charge dropped.

Under these circumstances the court properly sustained the State's objection to defendant's argument. *See also Clayton v. State,* 502 S.W. 2d 755 (Tex. Cr. App. 1973). "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." *State v. Monk, supra,* at 516, 212 S.E. 2d 125, 131 (1975). The assignment of error is overruled.

[6] The defendant argues that the court expressed an opinion in its charge to the jury by erroneously using the terms and phrases "The defendant confesses," "that confession," "confession," "vicious and brutal killing," "vicious and brutal slaying," said terms imparting to the jury the court's opinion of the alleged crime.

"G.S. 1-180 requires that the trial judge clarify and explain the law arising on the evidence. . . ." *State v. Cameron,* 284 N.C. 165, 171, 200 S.E. 2d 186, 191 (1973). "A trial judge should never give instructions to a jury which are not based upon a state of facts presented by some reasonable view of the evidence. When such instructions are prejudicial to the accused he would be entitled to a new trial. [Citations omitted.]." *State v. Lampkins,* 283 N.C. 520, 523-524, 196 S.E. 2d 697, 699 (1973).

In this case the court was talking about a confession that had been admitted into evidence after a voir dire hearing was held, with the court making proper findings of fact and conclusions of law thereon. All the judge told the jury was that if the jury found that the defendant made the confession, then they would have to consider all the circumstances under which it was made in determining whether it was a truthful confession or not.

With regard to the language "vicious and brutal killing," the court charged the jury as follows:

> "Now, the court also instructs you, ladies and gentlemen, that in passing upon the question of the presence or absence of an actual specific intent to kill and of premeditation and of deliberation, it is proper for you, the jury, to take into consideration evidence tending to show the absence of provocation on the part of the deceased at the time of the killing, evidence tending to show a VICIOUS AND BRUTAL KILLING on the part of the defendant, evidence tending to show all circumstances relating to and surrounding the killing. . . ." (Emphasis added.)

Then the court went on to charge the jury as follows:

> "Now, among the circumstances to be considered in determining whether a killing was with premeditation and deliberation are: (1) Want of provocation on the part of the deceased. (2) The conduct of the defendant before and after the killing. (3) Threats and declarations of the defendant before and during the course of the crime, giving rise to the death of the deceased. (5) The use of grossly excessive force. Premeditation and deliberation, ladies and gentlemen of the jury, may be inferred from a VICIOUS AND BRUTAL SLAYING of a human being." (Emphasis added.)

These instructions were specifically limited in context to the determination by the jury of whether there was premeditation, deliberation, and a specific intent to kill for purposes of the first degree murder charge. Since the jury returned a verdict of guilty of felony-murder, which is not dependent on a determination of premeditation, deliberation, and a specific intent to kill, no prejudice is shown by this charge. This is particularly true since the defendant shot a 68 year old bystander with a .357 magnum pistol while attempting to rob a bank and take from the victim the money he had just been handed by a teller. The State's evidence indicated the victim in no way threatened the defendant. The defendant demanded that the victim "give me that." Then "[t]he robber made a jerk for Mr. Morris' hand and Mr. Morris made a slight jerk—it wasn't a hard jerk, just a slight jerk, and when he did that, he [the defendant] instantly turned that gun to him and shot him before he had time to have a second thought or do anything."

The robber "immediately flipped that gun around" pointing it at a teller and demanded that she turn over all the money. This case is clearly distinguishable from *State v. Buchanan*, 287 N.C. 408, 215 S.E. 2d 80 (1975). There was no prejudicial comment by the trial judge in violation of G.S. 1-180.

The assignment of error is overruled.

Next, the defendant contends that the trial court erred in its charge on second-degree murder in that the judge confused the jury when he referred to "intent" in the charge on second-degree murder.

A review of the instruction discloses that it only seeks to explain to the jury the difference between first-degree murder and second-degree murder. In summary, the court told the jury, "Murder in the first degree, then ladies and gentlemen, is murder in the second degree plus these three essential elements: (1) An actual specific intent to kill, and (2) premeditation and (3) deliberation."

Since the jury returned a verdict of guilty of felony-murder, there has clearly been no error.

There is no merit to this assignment and it is overruled.

Next, the defendant contends that the court erred in expressing an opinion during the course of the trial in violation of G.S. 1-180.

The defendant is attempting to rehash a number of assignments of error, most of which have already been discussed in this opinion. The defendant is not specific and attempts to lump together a number of unrelated incidents. These assignments are broadside in nature and are without merit. *State v. McCaskill*, 270 N.C. 788, 154 S.E. 2d 907 (1967). They are overruled.

Finally, the defendant contends that the trial court erred in sentencing the defendant to death.

Our court has consistently rejected this argument. We do not deem it necessary to set forth again the reasoning of these cases. *State v. Woodson*, 287 N.C. 578, 215 S.E. 2d 607 (1975); *State v. Robbins*, 287 N.C. 483, 214 S.E. 2d 756 (1975); *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975); *State v. Fowler*, 285 N.C. 90, 203 S.E. 2d 803 (1974); *State v. Jar-*

rette, 284 N.C. 625, 202 S.E. 2d 721 (1974). The assignment of error is overruled.

We have carefully reviewed the entire record and we find

No error.

WAFF BROS., INC. v. BANK OF NORTH CAROLINA, N.A., DAVIS SAWYER, SHERIFF OF PASQUOTANK COUNTY; CAROLINA-ALBEMARLE CORPORATION; VACATION PROPERTIES, INC., AND SPENCER BERGER

No. 63

(Filed 29 January 1976)

1. **Appeal and Error § 58— preliminary injunction — appellate review — power of court to make its own findings**

Upon appeal from an order granting or refusing a preliminary injunction, the Supreme Court is not bound by the findings of fact, or lack of such findings, by either of the lower courts, but may review the evidence and make its own findings.

2. **Injunctions § 12— preliminary injunctions — when granted**

Ordinarily a preliminary injunction will be granted pending trial on the merits (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is reasonable apprehension of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably necessary to protect plaintiff's right until the controversy between him and the defendant can be determined.

3. **Injunctions § 13— preliminary injunctions — irreparable harm**

In an action by the holder of a judgment constituting a lien on land to enjoin an execution sale of the land to satisfy another judgment constituting a prior lien on the land, there was a sufficient showing of reasonable apprehension of irreparable harm to the plaintiff if the land be sold to satisfy the other judgment where plaintiff alleged that an execution sale of the land will not produce an adequate sum to pay any appreciable portion of plaintiff's judgment, and defendants conceded that the land did not have a fair market value sufficient to pay the amount of both judgments.

4. **Judgments §§ 52, 54; Mortgages and Deeds of Trust § 16— conveyance of land — assignment of judgment to grantee — no merger of lien**

Where a judgment was obtained against a corporation establishing a lien on land owned by the corporation, the corporation then conveyed the land to a second corporation, the second corporation thereafter paid the owner of the judgment a portion of the amount owed on the judgment, took from the owner an assignment of the

judgment and gave the owner its note for the balance due on the judgment, nothing else appearing, the second corporation became a debtor to the owner of the judgment upon its note, but not upon the judgment, and, nothing else appearing, the judgment cannot be deemed to have been paid or the lien thereof to have been merged into the fee simple estate owned by the second corporation in the land.

5. Mortgages and Deeds of Trust § 16— acquisition of mortgage debt by owner of mortgaged property — primary liability — merger

When the owner of mortgaged land, who is primarily liable for the payment of the debt secured by the mortgage, becomes also the owner of the indebtedness secured by the mortgage, and the security interest incident thereto, the debt is deemed paid and the land is discharged from the lien of the mortgage; the rule is not the same, however, where the owner of the mortgaged property is not personally liable for the payment of the mortgage debt, but in such case the intention of the parties to the transfer of the indebtedness controls.

6. Corporations § 1— alter ego of dominant shareholder

Where corporations are so operated that they are mere instrumentalities or alter egos of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, or for the purpose of fraud, the corporate entities will be disregarded and the corporations and the shareholder treated as one and the same.

7. Injunctions § 13; Corporations § 1; Judgments § 52— restraining execution sale under judgment lien — assignment of judgment to corporation — alter ego of judgment debtor — extinguishment of judgment debt and lien

In an action by the holder of a junior judgment lien against land owned by a corporation to enjoin an execution sale of the land to satisfy a judgment constituting a prior lien on the land, plaintiff showed probable cause to believe that he may be able to establish at a hearing on the merits that the prior judgment lien has been extinguished where it was not controverted that the corporate judgment debtor conveyed the land to a second corporation, the owner of the prior judgment lien assigned his judgment and lien to the second corporation, and the second corporation assigned the judgment to defendant bank, and where defendant's uncontroverted affidavit was to the effect that the second corporation was the mere alter ego of the first corporation, since if the two corporations must be regarded as one and the same person, the transfer of the judgment constituting the prior lien to the second corporation had the same effect as a transfer thereof to the first corporation which was the judgment debtor, and the judgment debt and judgment lien were thereby extinguished and could not be transferred to defendant bank.

8. Injunctions § 13; Marshalling — execution sale — two judgment debtors — resort to other property to satisfy claim

A preliminary injunction should have been issued in this action by the holder of a junior judgment lien on a corporation's land to enjoin an execution sale of the land pursuant to a senior judgment

lien which has been assigned to defendant bank where plaintiff's uncontroverted affidavit was to the effect that defendant bank has other security for its claim against the corporation from which it can obtain full payment and satisfaction for such claim without resorting to the land in question, which is plaintiff's only security for its claim.

ON *certiorari* to the Court of Appeals to review its decision, reported in 25 N.C. App. 517, 214 S.E. 2d 261, affirming the order of *Lanier, J.*, vacating and dissolving a temporary restraining order entered by James, J.

The verified complaint, considered as an affidavit, alleges for a first cause of action: The plaintiff, by virtue of a judgment against Vacation Properties, Inc., has a lien on a described tract of land in Pasquotank County containing 48.672 acres; the defendant Sheriff is advertising the said land for sale under an execution issued upon a judgment in favor of F. Richard Quible against Vacation Properties, Inc., which judgment the defendant claims as assignee and which, when entered, established a lien upon the said land prior to the lien of the plaintiff's judgment; the lien of the Quible judgment was extinguished by the assignment of this judgment to the defendant bank's predecessor in interest, Carolina-Albemarle Corporation, which corporation, at the time of such assignment, was the record owner of the fee in the land; in consequence of the extinguishment of the lien of the Quible judgment, the judgment of the plaintiff has become a first lien upon the said land; if the execution sale so advertised be not enjoined, the plaintiff's security will be lost and the plaintiff will be irreparably damaged, for which damage it has no adequate remedy at law.

For a second cause of action, the complaint alleges the above facts and: The defendant bank is the beneficiary of a deed of trust conveying approximately 500 acres of land, including the said 48.672 acre tract, which deed of trust secures the claim of the defendant bank asserted by virtue of the Quible judgment and other indebtedness owed it by Vacation Properties, Inc., and by Carolina-Albemarle Corporation; the defendant bank, by pursuing its rights under the said deed of trust, can obtain complete satisfaction of all its claims secured thereby without resorting to the 48.672 acre tract, which is the plaintiff's only security; the sale of the 48.672 acre tract, pursuant to the execution issued on the Quible judgment, will not produce an amount adequate to pay "any appreciable portion of plain-

tiff's judgment claim"; the court should exercise its equitable powers and order a marshalling of assets requiring the defendant bank to proceed against its other security.

The complaint further alleges, as to each such cause of action, that Vacation Properties, Inc., and Carolina-Albemarle Corporation are wholly owned and controlled by the defendant Berger, the sole stockholder and chief executive officer of each corporation, that both corporations have been used by Berger as his alter ego and have been used by Berger and the defendant bank "in an effort to extinguish the valid lien of plaintiff * * * by purporting to assign to defendant bank" the Quible judgment after its extinguishment and that the acts and transactions on the part of the two corporations and Berger "are and were in reality acts and transactions by one and the same party."

The prayer of the complaint is: (1) That the defendant sheriff be enjoined from further proceeding with the execution sale, (2) that the court declare the lien of the Quible judgment has been extinguished, and (3) that, if the assignment of the Quible judgment be adjudged valid, the court exercise its equitable powers and order a marshalling of assets so as to require the bank to proceed against its other security for the satisfaction of its claims against defendants Vacation Properties, Inc., and Carolina-Albemarle Corporation.

A temporary restraining order restraining the execution sale was entered by James, J., 27 February 1974, the defendants being directed to show cause why such order should not be continued to the trial of the action. The matter came on to be heard before Lanier, J., upon the show cause order and was heard "upon the complaint, the affidavits, written briefs and oral arguments." It appearing to the court that the plaintiff was not entitled to have the restraining order continued until the final determination of the action, it was vacated and dissolved, but the plaintiff having appealed, the restraining order was continued in effect pending the determination of the appeal.

The Court of Appeals affirmed on the ground that there was a "complete failure of a showing by plaintiff that it will be irreparably damaged if injunctive relief is not granted," the Court of Appeals saying, "Maybe a sale will satisfy both" judgments, the plaintiff's evidence being deemed by the court

"silent upon the question." The Court of Appeals further said, "We do not need to decide whether plaintiff has established probable cause to believe that it will prevail in the final determination of this case because the failure to establish the probability of irreparable harm is sufficient to support the denial of injunctive relief."

In the Court of Appeals, and upon the further review in this Court, the defendants join in the plaintiff's prayer that it be presently determined whether the lien of the Quible judgment was extinguished by the assignment of that judgment to Carolina-Albemarle Corporation.

In addition to the complaint, offered and considered as an affidavit, other affidavits and exhibits offered at the show cause hearing disclose the following sequence of events which are not controverted:

(1) On 26 March 1970, Selvie H. James and wife conveyed to Vacation Properties, Inc., a tract of land in Pasquotank County containing approximately 500 acres, including the 48.672 acre tract here in controversy. On 6 April 1970, Vacation Properties, Inc., executed and delivered a purchase money deed of trust conveying the 500 acre tract, exclusive of the 48.672 acre tract.

(2) On 18 December 1970, plaintiff filed a claim of lien upon the said 500 acre tract in the amount of $193,987.62 for labor and materials.

(3) On the same date (18 December 1970), Quible filed a claim of lien against the same tract in the amount of $63,182.91 for labor and materials.

(4) On 26 May 1972, judgment was rendered in the Superior Court of Pasquotank County in favor of the plaintiff against Vacation Properties, Inc., adjudging that the plaintiff recover of Vacation Properties, Inc., $193,987.62 with interest from 15 November 1970 and further adjudging that plaintiff's lien in that amount was effective as of 9 April 1970 and enforceable by sale of the described land.

(5) On the same date (26 May 1972), judgment was rendered in the Superior Court of Pasquotank County in favor of Quible against Vacation Properties, Inc., adjudging that Quible recover of Vacation Properties, Inc., the amount of $63,182.91 with interest from 30 October 1970 and further adjudging that

Quible's lien in that amount was effective as of 28 February 1970 and enforceable by sale of the described property (thus establishing the Quible lien as prior to the lien of the plaintiff).

(6) On 15 April 1973, Vacation Properties, Inc., conveyed to Carolina-Albemarle Corporation the said tract of 500 acres, including the 48.672 acre parcel here in controversy.

(7) On 30 July 1973, the purchase money deed of trust given as security for the balance due Selvie H. James and conveying to the trustee named therein the 500 acre tract, *"less and except"* the 48.672 acre tract here in controversy, was foreclosed and the land therein described was conveyed by the trustee to Carolina-Albemarle Corporation, assignee of Berger, who had become the last and highest bidder at such foreclosure sale, thus making Carolina-Albemarle Corporation the owner of the fee of the entire 500 acre tract, including the 48.672 acre tract here in controversy, subject to the plaintiff's lien against the 48.672 acre tract and to the Quible lien thereon if the Quible lien remained in effect.

(8) On 28 August 1973, Carolina-Albemarle Corporation executed a deed of trust upon the 500 acre tract, "less and except" the 48.672 acre tract here in controversy, to secure payment of a note to the defendant bank.

(9) On 13 November 1973, Carolina-Albemarle Corporation paid to Quible $20,000 upon the Quible judgment and for the balance thereof gave Quible its note secured by a deed of trust on land other than the 48.672 acre tract here in controversy. The $20,000 so paid to Quible was loaned to Carolina-Albemarle Corporation by the defendant bank.

(10) On the same date (13 November 1973), Quible assigned the Quible judgment to Carolina-Albemarle Corporation.

(11) Also on the same date (13 November 1973), Carolina-Albemarle Corporation assigned to the defendant bank "all rights of the plaintiff (Quible)" in and to the Quible judgment.

(12) Thereafter, execution was issued, at the instance of the defendant bank, under the Quible judgment, against the 48.672 acre tract here in controversy.

White, Hall, Mullen & Brumsey by Gerald F. White and William Brumsey III for plaintiff.

Ellis, Hooper, Warlick, Waters & Morgan by Harold L. Waters and John D. Warlick, Jr., for defendant Bank of North Carolina.

LAKE, Justice.

The sole question before us is whether Judge Lanier erred in concluding and ordering that the temporary restraining order, restraining the sale under execution of the land in question, should be vacated so as to permit the defendant sheriff to sell such property prior to the hearing of this matter on its merits.

[1] In determining that question, we are not bound by the findings of fact, or lack of such findings, by either of the lower courts, but may review the evidence and make our own findings of fact. *Setzer v. Annas,* 286 N.C. 534, 212 S.E. 2d 154; *Board of Elders v. Jones,* 273 N.C. 174, 159 S.E. 2d 545, 37 A.L.R. 3d 262; *Conference v. Creech* and *Teasley v. Creech and Miles,* 256 N.C. 128, 123 S.E. 2d 619. Upon the final hearing of the matter, neither our findings of fact upon this appeal nor the findings or conclusions of the Court of Appeals, or of the trial judge at the hearing upon the order to show cause why the restraining order should not be continued, are to be considered by the Superior Court. *Board of Elders v. Jones, supra;* Strong, N. C. Index 2d, Injunctions, § 12. All such findings of fact relate solely to the question of whether a preliminary injunction should be issued staying the sale of the property until the final determination of the merits of the matter. For that purpose we have reviewed the record and determine the facts to be as set forth above in our statement of the facts.

[2] As this Court, speaking through Justice Clifton Moore, said in *Conference v. Creech* and *Teasley v. Creech and Miles, supra,* "Ordinarily a temporary injunction [or a preliminary injunction] will be granted pending trial on the merits, (1) if there is probable cause for supposing that plaintiff will be able to sustain his primary equity, and (2) if there is *reasonable apprehension* of irreparable loss unless injunctive relief be granted, or if in the court's opinion it appears reasonably neces-

sary to protect plaintiff's right until the controversy between him and the defendant can be determined." (Emphasis added.)

[3] The Court of Appeals erred in its conclusion that there has been a "complete failure of a showing by plaintiff that it will be irreparably damaged if injunctive relief is not granted." In its brief in this Court, the appellee bank concedes: "While, as the Court of Appeals stated * * * a showing by Plaintiff of being irreparably damaged is lacking, during the entire proceeding in the Trial Court, it was understood that the 48 acres tract did not have a fair market value sufficient to equal or exceed the total amount of the Quible and Waff judgments. Also upon any future hearing on the merits Defendant Appellee will not, unless there be substantial change in economic conditions, contend that the fair market value is of such magnitude." The complaint of the plaintiff, considered by the trial court as an affidavit, states: "Plaintiff alleges on information and belief that the sale of said property under execution will not produce adequate sums to pay any appreciable portion of plaintiff's judgment claim of $193,987.62 with interest thereon from November 15, 1970." We, therefore, conclude that there was a sufficient showing of reasonable apprehension of irreparable harm to the plaintiff if the land in question be sold under execution issued on the Quible judgment, and we turn to the question of whether there is probable cause for supposing that the plaintiff will be able to sustain its primary equity.

[4] The plaintiff contends that the land cannot lawfully be sold under the execution issued upon the Quible judgment for the reason that the Quible judgment has been paid and the lien thereof extinguished. Quible obtained his judgment against Vacation Properties, Inc., the judgment establishing that Quible was entitled to recover from Vacation Properties, Inc., $63,-182.91 and that a lien therefor, prior to the plaintiff's lien, extended to the land in question. Vacation Properties, Inc., then conveyed the land to Carolina-Albemarle Corporation. Such conveyance was, as a matter of law, subject to such lien, but the record does not show that Carolina-Albemarle Corporation assumed liability for the payment of the Quible judgment. Thus, nothing else appearing, Carolina-Albemarle Corporation did not become personally liable to Quible upon the judgment. Thereafter, Carolina-Albemarle Corporation paid to Quible $20,000 upon the Quible judgment, took from Quible an assignment of the judgment and executed and delivered to Quible

its note for the balance due on the judgment, which note it secured by a deed of trust upon other land. Thereby, nothing else appearing, Carolina-Albemarle Corporation became a debtor to Quible upon its note, but not upon the judgment. Under these circumstances, nothing else appearing, the Quible judgment cannot be deemed to have been paid or the lien thereof to have been merged into the fee simple estate owned by Carolina-Albemarle Corporation in the land here in question.

The owner of a judgment against another may assign to a third person such judgment and the lien thereof without impairing the validity of either. Clearly, this is what Quible and Carolina-Albemarle Corporation intended to do. Had Carolina-Albemarle Corporation not been the owner of the land in question and had it been wholly unrelated to Vacation Properties, Inc., the Quible judgment and the lien thereof would, unquestionably, have remained in full force and effect following this transaction and would have been assignable by Carolina-Albemarle Corporation to the defendant bank.

We turn now to the effect, if any, of the fact that Carolina-Albemarle Corporation, at the time it acquired the Quible judgment, was the owner of the fee simple estate in the land in question by virtue of a prior conveyance to it from Vacation Properties, Inc.

[5] As is said in Webster, Real Estate Law In North Carolina, § 365, the lien of the Quible judgment, when acquired by Carolina-Albemarle Corporation, was "in the nature of a statutory mortgage." When the owner of mortgaged land, who is primarily liable for the payment of the debt secured by the mortgage, becomes also the owner of the indebtedness secured by the mortgage, and the security interest incident thereto, the debt is deemed paid and the land is discharged from the lien of the mortgage. *Hussey v. Hill,* 120 N.C. 312, 26 S.E. 919. In Tiffany on Real Property, 3d Ed, § 1482, it is said:

> "While, as above stated, the question of merger vel non is ordinarily to be determined with reference either to the intention or the interest of the party in whom the two interests are vested, there may be circumstances under which neither of these considerations can be given effect. Such is the case when one who is primarily liable for the mortgage debt acquires the debt with the lien incidental thereto, 'takes an assignment of the mortgage,' as it is us-

ually expressed. One who is primarily liable for a debt cannot acquire the debt, that is, a claim against himself, and assert that the debt is still outstanding. The same person cannot be debtor and creditor, and the effect of his acquisition of the debt is to render it no longer existent. So when the person whose debt is secured by a mortgage, ordinarily the mortgagor himself, acquires the debt with its incidental lien, the debt being discharged, the mortgage lien is extinguished. And the case is the same when a grantee of the land assumes payment of the mortgage and thereafter acquires the mortgage debt. He being primarily liable for the debt, the debt is discharged."

The rule is not the same, however, where the owner of the mortgaged property is not personally liable for the payment of the mortgage debt. In such case the intention of the parties to the transfer of the indebtedness controls.

In *Furniture Co. v. Potter,* 188 N.C. 145, 124 S.E. 122, the facts were strikingly similar to those in the case before us. There the holder of a junior mortgage sought to enjoin the foreclosure of a senior mortgage on the ground that it had been extinguished by merger when the assignee of it purchased the equity of redemption in the mortgaged land. Justice Stacy, later Chief Justice, speaking for the Court, said:

"It is undoubtedly the general rule of law that where one who holds a mortgage on real estate becomes the owner of the fee, and the two estates are thus united in the same person, ordinarily the former estate merges in the latter. The equitable or lesser estate is said to be swallowed up, or 'drowned out,' by the legal or greater interest. But this rule does not apply where such merger would be inimical to the interests of the owner, as, for example, where it would prevent his setting up the mortgage to defeat an intermediate title—such as a subsequent lien or a second mortgage, as in the instant case—unless the parties intended otherwise; and this intention will not be presumed contrary to the apparent interests of the owner. As to whether such was intended by the parties is a question of fact; and the courts will 'permit or prevent the application of the doctrine as the same may accord with the intent of the parties and the right and justice of the matter.' " (Citations omitted.)

In Tiffany on Real Property, 3d Ed, §§ 1480 and 1481, it is said:

> "The theory on which, upon the acquisition by one person of the mortgaged land and of the mortgage debt with the incidental lien on the land, the debt, and with it the lien, may ordinarily be regarded as extinguished, would seem to be that, under such circumstances the person owning and controlling the debt can usually have no object in keeping it alive, it being in substance a claim against his own property, and he may consequently be presumed to intend that the debt shall be extinguished, a presumption to which, as tending to the simplification of titles, the courts are ready to give full effect. *In accordance with this view are the numerous decisions that the intention of the holder of the two interests is the decisive consideration, and that no merger will take place if there is proof of an intention on his part to the contrary.** * *
>
> "The fact that the mortgage debt with its lien is subsequently assigned by the person who has acquired the two interests has been held to show an intention against merger * * *
>
> "It frequently happens that there is no evidence as to the intention in this regard, and in such a case equity will usually presume that the owner of the two interests intended that they should merge, or the contrary, according as merger vel non would be most for his benefit. *So a presumption against the existence of an intention to merge on the part of the owner of the two interests has been recognized when there was a junior incumbrance on the property, since the effect of a merger in such case would be to accord priority to the junior incumbrance over the claim of such owner.*" (Emphasis added.)

In Powell on Real Property, § 459, the rule is similarly stated and it is said:

> "As in the case of the acquiring mortgagee, a mortgagor is not handicapped by merger on acquiring the mortgage where intervening liens are present. Also, third parties are not prejudiced by merger, as where money is loaned to the mortgagor for the purpose of acquiring the mortgage, and the lender's equitable lien is protected

against junior claimants by keeping the acquired mortgage alive, to the extent of the advances, for his benefit."

To the same effect, see: Thompson on Real Property, § 4798; 51 AM. JUR. 2d, Liens, § 47; 53 C.J.S., Liens, § 17(5).

In *Houck v. Overcash*, 282 N.C. 623, 193 S.E. 2d 905, Chief Justice Bobbitt, speaking for the Court, said:

" 'Where a party *primarily liable* on a judgment pays the judgment, the judgment is discharged and there can be no right of assignment.' 5 Strong, N. C. Index 2d, *Judgments*, § 54. The law applicable *when payment is made by a stranger* having no interest in the judgment is summarized in 49 C.J.S., *Judgments*, § 557, as follows: 'Although a judgment creditor is not bound to accept payment from a stranger * * * yet, where he does accept such payment, *he* is precluded from further recovery, *and the judgment will be kept alive for the stranger's benefit*, rather than extinguished when, and only when, there is an intentional agreement or understanding to this effect * * * . [T]he taking of as assignment affords unequivocal evidence of an intention not to satisfy the judgment unless it is taken so long after payment as to evidence the fact that it was only an afterthought. Such an assignment is valid and the judgment remains unextinguished in favor of a person in whose behalf it is obtained, as well where his credit is accepted as the consideration of the assignment as where it is for a payment in cash made by him." (Emphasis added.)

In the present case, the evidence is overwhelming that Carolina-Albemarle Corporation did not intend to extinguish the lien of the Quible judgment when it acquired such judgment. The rights of its assignee, the defendant bank, would, of course, be the same as those of Carolina-Albemarle Corporation had it retained the Quible judgment.

The plaintiff contends, however, that this is not the entire picture. The plaintiff's complaint, considered as an affidavit in the Superior Court, presently uncontradicted in the record and supported at least in part by a lengthy and detailed affidavit of the plaintiff's president, John Waff, alleges:

"Defendant Carolina-Albemarle was formed by defendant Spencer Berger and at all times complained of the said defendant Carolina-Albemarle and the said defendant Vaca-

tion Properties are and were wholly owned and controlled by defendant Spencer Berger and have been used by him as his alter ego in respect to matters pertaining to the aforesaid property in Salem Township, Pasquotank County, North Carolina, and in particular said corporations have been used by the said defendant Spencer Berger and the defendant Bank in an effort to extinguish the valid lien of plaintiff against said described 48.672 acre tract by purporting to assign to defendant Bank the judgment obtained by F. Richard Quible against defendant Vacation Properties, Inc., said purported assignment being after said Quible judgment had been paid and extinguished or simultaneously with the payment and extinguishment of said Quible judgment.

"That at all times complained of the acts and transactions on the part of defendant Carolina-Albemarle, defendant Vacation Properties, and defendant Spencer Berger are and were in reality acts and transactions by one and the same party. That the acts and transactions on the part of defendant Carolina-Albemarle, defendant Vacation Properties, defendant Spencer Berger, and defendant Bank have been done by them in concert in their effort to deprive plaintiff of its valid lien on said described 48.672 acre tract of land, which in contemplation of law and in fact the transaction or transactions amount to a payment of the aforementioned Quible judgment and in consequence thereof plaintiff is now the holder of a first lien against said described 48.672 acre tract pursuant to plaintiff's aforementioned judgment against defendant Vacation Properties."

[6] The mere fact that all of the outstanding shares of stock of each of two corporations are owned by one individual, who is the chief executive officer of each corporation, does not necessarily destroy the corporate entities so as to make the two corporations and the sole stockholder one and the same person in contemplation of the law. Where, however, the corporations are so operated that they are mere instrumentalities or alter egos of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, or for the purpose of fraud, the corporate entities will be disregarded and the corporations and the shareholder treated as one and the same person. *Henderson v. Finance Co.*, 273, N.C. 253, 160 S.E. 2d 39; *United States v. Milwaukee Re-*

frigerator Transit Co., 142 F. 247; Fetcher, Cyclopedia of Corporations, §§ 41, 41.1 and 45; 18 AM. JUR. 2d, Corporations, §§ 14-17; 18 C.J.S., Corporations, § 7b.

[7] Whether Vacation Properties, Inc., and Carolina-Albemarle Corporation were, in fact, so created, controlled, dominated and used by Berger as to make Carolina-Albemarle Corporation the mere alter ego of Vacation Properties, Inc., must be determined on the final hearing of this matter on its merits. If so, the two corporations must be regarded, for the purposes of its litigation, as one and the same person. In that event, the transfer of the Quible judgment to Carolina-Albemarle Corporation had the same effect as a transfer thereof to Vacation Properties, Inc., the judgment debtor, and thereby the judgment debt and the judgment lien were extinguished under the above mentioned rule and could not, thereafter, be assigned to the defendant bank.

The uncontradicted affidavits of the plaintiff concerning the relationship between Carolina-Albemarle Corporation, Vacation Properties, Inc., and Berger are sufficient to constitute a showing of probable cause for believing that the plaintiff may, upon the final determination of the merits in the matter, prevail upon its alleged equity.

Thus, the plaintiff, for the purpose of establishing his right to a preliminary injunction, has shown probable cause to believe that, at the final hearing of the matter upon its merits, he may be able to establish that the lien of the Quible judgment upon the land in question has been extinguished, so that the land may not lawfully be sold under an execution issued upon the said judgment, and has shown a basis for reasonable apprehension that such a sale will damage the plaintiff irreparably. Consequently, the preliminary injunction should have been issued, continuing the restraining order issued by Judge James in effect until the final determination of this action.

[8] Furthermore, the plaintiff alleges in its complaint, considered as an affidavit and as yet uncontradicted, that the defendant bank has other security for its claim against Carolina-Albemarle Corporation and its claim against Vacation Properties, Inc., from which other security it can obtain full payment and satisfaction of such claims without resorting to the land here in question, which is the plaintiff's only security for its claim. As stated by Justice Bynum, speaking for this Court in

Jackson v. Sloan, 76 N.C. 306, "[W]hen one creditor can resort to two funds for the satisfaction of his debt, and another to one only of the funds, the former shall first resort to the fund upon which the latter has no claim, as that by this means of distribution both may be paid." See also: *Realty Co. v. Wysor,* 272 N.C. 172, 158 S.E. 2d 7; *Trust Co. v. Godwin,* 190 N.C. 512, 130 S.E. 323; *Harrington v. Furr,* 172 N.C. 610, 90 S.E. 775; *Pope and Co. v. Harris,* 94 N.C. 62. For this reason also, the preliminary injunction should have been issued, continuing in effect to the final determination of the action the restraining order entered by Judge James. Whether, in fact, the defendant bank does hold such other security for the payment of its claim is a question to be determined at the trial of the action on the merits.

The judgment of the Court of Appeals is, therefore, reversed, and the matter is remanded to the Court of Appeals for the entry by it of a judgment reversing the order of Judge Lanier and remanding the matter to the Superior Court for the entry of a preliminary injunction restraining the sale of the land here in question under execution issued upon the Quible judgment pending the final determination of this action.

Reversed and remanded.

OLA BLANTON LUCAS, WIDOW OF LEONARD M. LUCAS, DECEASED EMPLOYEE v. LI'L GENERAL STORES, A DIVISION OF GENERAL HOST CORPORATION, EMPLOYER; AND LIBERTY MUTUAL INSURANCE COMPANY, CARRIER

No. 14

(Filed 29 January 1976)

1. Master and Servant § 49— workmen's compensation — claimant as employee

To be entitled to maintain a proceeding for compensation under the Workmen's Compensation Act the claimant must have been an employee of the alleged employer at the time of his injury, or, in case of a claim for death benefits, the deceased must have been such an employee when injured; thus, the existence of the employer-employee relationship at the time of the accident is a jurisdictional fact, and the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding.

2. **Master and Servant § 49— workmen's compensation — dismissed employee rehired without authority**

Decedent was not an "employee" within the meaning of the Workmen's Compensation Act when he was shot and killed during a robbery while he was in defendant's store near the cash register where decedent had been dismissed as an employee of defendant because he sold beer to a minor, decedent's wife succeeded him as Acting Manager of the store, decedent's wife contended that defendant's District Manager told her that decedent could work in the store, but that decedent would be paid through the wife's check, the District Manager had no authority to allow decedent to work in the store, and both decedent and decedent's wife knew that the District Manager was acting in excess of his authority when he permitted decedent to work in the store. G.S. 97-2(2).

ON *certiorari* to the Court of Appeals to review its decision reported in 25 N.C. App. 190, 212 S.E. 2d 525, reversing an award in favor of the claimant by the North Carolina Industrial Commission.

On 26 April 1973, in the course of a robbery of a store in Gastonia owned and operated by Li'l General Stores, Leonard M. Lucas was shot by one of the robbers while in the store near the cash register. As a result of the wound he died the following day. The Industrial Commission found that, at the time of the shooting, he was an employee of Li'l General Stores and that the shooting was an accident arising out of and in the course of his employment. The sole question on this appeal is whether such employment relationship existed at the time of the shooting.

UNDISPUTED FACTS

Li'l General Stores owned and operated five small convenience stores in the Gastonia area and similar stores elsewhere. These were kept open 16 hours a day for seven days a week. From time to time, employees were shifted by the District Manager from one store to another. Due to the size and nature of these stores, they were frequently operated by a single employee, called the Manager. George Shaver, the District Manager, supervised the several stores and assisted the store managers from time to time as needed. Prior to 27 February 1973, Leonard M. Lucas was employed as a store manager. His wife, the claimant, was also an employee of the company, working at times at the Highland Street store and at times at the Carolina Avenue store. On 27 February 1973, Leonard M. Lucas was dismissed from his employment by Li'l General

Stores for the reason that he had sold beer to a minor in violation of the laws of North Carolina. By reason of this violation of the law, the license of Li'l General Stores to sell beer was suspended.

THE CLAIMANT'S EVIDENCE

At the time of the robbery, she was employed as Manager at the Carolina Avenue store. George Shaver, the District Manager, was her superior. In the week prior to the shooting, Mrs. Lucas had been working at the Highland Street store. On Sunday prior to the shooting, Shaver gave her the keys to the Carolina Avenue store and told her to open it on Monday morning. On Monday she and her husband went to and opened the store. They worked there until Thursday, 26 April, the day of the shooting. On that date she was not feeling well and about 8:45 p.m. went into a back office room, lay down and went to sleep, leaving her husband out in front at the cash register. While she slept the robbery and shooting occurred.

When Shaver transferred her to the Carolina Avenue store on the preceding Sunday, he had said with reference to Mr. Lucas, "He can't work over there but four days a week." She asked, "What about Mr. Pepper and them?" Pepper was the Division Manager of the company, the superior of Shaver. Shaver replied, "Well, what they don't know won't hurt them." With further reference to Mr. Lucas, Shaver said, "I'll have to run his pay through your check."

Prior to the husband's discharge, Mrs. Lucas had worked at the Carolina Avenue store, of which Mr. Lucas was then manager. She was just "helping out" and does not know whether she got paid or not. During the week of the robbery, Shaver was in the Carolina Avenue store practically every day and Mr. Lucas was present, frequently "running the cash register and making the books out and making the deposits at the bank." Mr. Shaver had told Mr. Lucas to keep the books. On one day during the week of the robbery and shooting, Mrs. Lucas, with Shaver's knowledge, went to Columbia, South Carolina, for medical treatment, leaving her husband in charge of the Carolina Avenue store. Shaver told her her husband could stay there and run the store until she returned.

Out of the check received by her from Li'l General Stores, Mrs. Lucas paid her husband at the rate of $2.00 an hour, her

check from the company being for two shifts per day, a total of 16 hours per day. Her husband helped her put up stock, made out the books, made out the bank deposits, carried the deposits to the bank and was the only one who had the combination to the safe. Shaver had handed the combination of the safe to Mr. Lucas when he assigned Mrs. Lucas to manage the Carolina Avenue store on the Monday preceding the shooting on Thursday.

While Mrs. Lucas was working at the Highland Street store, her sister, Mrs. Robinson, helped her on parts of four days. Some of this assistance by the sister was pursuant to the direction of Mr. Shaver and for that work the sister's pay was "run through" Mrs. Lucas' check. Other work so done by the sister, at Mrs. Lucas' request, was paid for by Mrs. Lucas out of her own pay from the company. Mrs. Lucas, herself, did not work for Li'l General stores prior to the time her husband was discharged.

Mr. Shaver told Mrs. Lucas to let Mr. Lucas "run the cash register as long as the ABC law didn't catch him." Mrs. Lucas "worked from seven in the morning till * * * eleven at night, 16 hours a day, two shifts" at the store on Highland Street before her transfer back to the Carolina Avenue store. Mrs. Lucas never kept the books at the Carolina Avenue store. Shaver came to the store and saw Mr. Lucas working. He did not forbid him to do so or tell Mrs. Lucas to "get him off the premises."

Mrs. McDaid, a witness for the claimant, testified that a few minutes before Mr. Lucas was shot, she and her son stopped at the Carolina Avenue store, the son went into the store and purchased a bottled drink from Mr. Lucas. On other occasions in the same week, she observed Mr. Lucas at the cash register, Mrs. Lucas being also in the store on some of these occasions.

Other witnesses for the claimant testified that they had observed both Mr. Lucas and Mrs. Lucas at the Carolina Avenue store. Some of these observed Mr. Lucas putting up stock and others were waited on by Mr. Lucas as customers of the store.

THE DEFENDANTS' EVIDENCE

George Shaver, District Manager of the Li'l General Stores in the Gastonia area, testified that Mrs. Lucas, or anyone else,

could work 16 hours a day at the Carolina Avenue store because there was no real work in running this store, it didn't require two people at any one time and all one had to do was "just set there." Mr. Lucas was not employed to work at the store by Shaver, or by anyone acting with Shaver's authority, at the time of the shooting. He was discharged on 27 February 1973 for selling alcoholic beverages to a minor. The personnel transaction sheet on the company form, signed by Shaver, stated Mr. Lucas was "discharged for misconduct by violating Company rules." This paper was signed by Shaver and by his superior, Jacobson, Division Manager of the company. Mrs. Lucas was then acting as assistant manager of that store (Highland Street store) and, upon the discharge of Mr. Lucas, she was put in charge of that store.

Thereafter, Shaver told Mr. Lucas on several occasions that he was not allowed in the company stores, this being against company policy since he was no longer employed by the company. Shaver was usually at the store under his supervision every day and he saw Mr. Lucas in the store "a number of times." Shaver told Mrs. Lucas that Mr. Lucas was not allowed in there and never mentioned anything to her about allowing Mr. Lucas to "make up the books," since Shaver, himself, kept the books from data supplied to him by Mrs. Lucas. Shaver "cleared" the cash register and kept the books himself at that store because Mrs. Lucas was not capable of doing so.

Mrs. Lucas had no authority to hire Mr. Lucas or anyone else to stay in the store with her, or to be her assistant. Shaver, himself, did not have any authority to authorize Mrs. Lucas to do so. To have Mr. Lucas around the store "could have endangered the continuation of the beer license" of the store, in the opinion of Shaver. While Mrs. Lucas was working at the Highland Street store, Shaver spoke to her a few times about Mr. Lucas "coming about the premises." He never authorized her to continue to let her husband "come about the premises and do some work." Shaver knew nothing of any plan for Mrs. Lucas to use part of her pay check to compensate Mr. Lucas for work done by him at the store. He had no conversation with Mrs. Lucas concerning any payment to her sister in this manner. When Mrs. Lucas wasn't working, Shaver knew "who was in her place" and whenever she was not at the store he was "or someone else would be there." Shaver at no time made any arrangements for Mr. Lucas to return to work at the store and did not at any time agree to his working about the store to

assist Mrs. Lucas. She asked Shaver if she could bring her husband to the store to help her and his response was that Mr. Lucas was not allowed in the store to work for fear that if he was allowed to do so, the company would lose its beer license for all five of its stores.

There were frequent occasions when Shaver operated the Carolina Avenue store with just one employee for as much as two or three weeks. Anyone can come into the store who wants to, and if Mr. Lucas was in the store during the week of the shooting, he was "just hanging around" and talking to his wife. At no time after Mr. Lucas was discharged did Shaver see Mr. Lucas carrying out any duties of an employee in any of the company's stores by waiting on customers, ringing up sales, putting up stock, keeping books or otherwise. None of these things was done by Mr. Lucas with Shaver's authority. Mrs. Lucas had no authority to make any contract of employment with her husband. Shaver gave the safe combination at the Carolina Avenue store to Mrs. Lucas, saying, "Probably Mr. Lucas still knows the combination; I don't know if he does or not."

At the time of his testimony, Shaver had already given Li'l General Stores notice of his intent to terminate his own employment by the company, so his continued employment did not depend upon his testimony in this proceeding.

Myron E. Jacobson, Assistant Division Manager of Li'l General Stores, testified that Shaver, his subordinate, did not have any authority to put Mr. Lucas back on the payroll of the company after his discharge, or to authorize Mrs. Lucas to do so, and never discussed this with Jacobson. Mrs. Lucas had no such authority.

Susan Hambrick testified that when Mr. Lucas was discharged Shaver employed her to operate the Highland Street store for one shift, Mrs. Lucas handling the other shift, and instructed her not to have Mr. Lucas in the store. On one occasion, when Mrs. Hambrick had to go to see her doctor, Shaver told her to have Mrs. Lucas come in and work. Mrs. Lucas asked if Shaver would object if Mr. Lucas came to the store and stayed with her. Thereupon, Mrs. Hambrick telephoned Shaver, who replied that Mr. Lucas could not do so. She gave that message to Mrs. Lucas. On occasion, when no one else was available, Mrs. Hambrick has worked consecutive shifts, 16 hours a day, seven days a week, without help.

Bob Craig Gibson, Manager of the Highland Street store when Mrs. Lucas was working there, overheard a conversation between Shaver and Mrs. Lucas with reference to Mrs. Lucas' allowing her husband to work. Shaver then told Mrs. Lucas to keep Mr. Lucas out of the store because it was against company policy for him to be in it. Mr. Gibson told Mr. Lucas the same thing and Mr. Lucas knew it. On occasion, Mr. Gibson has worked 16 hours a day for seven days a week. The book work takes him about 30 minutes a day. He can do it and also wait on customers.

Basil L. Whitener and Anne M. Lamm for plaintiff.

Mullen, Holland & Harrell, P.A., by James Mullen for defendants.

LAKE, Justice.

[1] It is well settled that to be entitled to maintain a proceeding for compensation under the Workmen's Compensation Act the claimant must have been an employee of the alleged employer at the time of his injury, or, in case of a claim for death benefits, the deceased must have been such an employee when injured. *Hicks v. Guilford County,* 267 N.C. 364, 148 S.E. 2d 240; *Askew v. Tire Co.,* 264 N.C. 168, 141 S.E. 2d 280; *Richards v. Nationwide Homes,* 263 N.C. 295, 139 S.E. 2d 645; *Hayes v. Elon College,* 224 N.C. 11, 29 S.E. 2d 137. Otherwise, the Act simply has no application to the claim. Thus, the existence of the employer-employee relationship at the time of the accident is a jurisdictional fact. Notwithstanding G.S. 97-86, the finding of a jurisdictional fact by the Industrial Commission is not conclusive upon appeal even though there be evidence in the record to support such finding. The reviewing court has the right, and the duty, to make its own independent findings of such jurisdictional facts from its consideration of all the evidence in the record. *Hicks v. Guilford County, supra; Askew v. Tire Co., supra; Richards v. Nationwide Homes, supra.* The claimant has the burden of proof that the employer-employee relation existed at the time the injury by accident occurred.

The Workmen's Compensation Act, in G.S. 97-2(2), defines the term "employee," as used in the Act, as follows:

> "The term 'employee' means every person engaged in an employment under any appointment or contract of hire

or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of trade, business, profession or occupation of his employer * * *."

This statutory definition adds nothing to the common law meaning of the term. *Hayes v. Elon College, supra.* As Chief Justice Stacy, speaking for the Court, said in *Hollowell v. Department of Conservation and Development,* 206 N.C. 206, 173 S.E. 603, "An employee is one who works for another for wages or salary, and the right to demand pay for his services from his employer would seem to be essential to his right to receive compensation under the Workmen's Compensation Act, in case of injury sustained by accident arising out of and in the course of his employment." Whether this relationship existed at the time of the injury by accident is to be determined by the application of the ordinary common law tests. *Richards v. Nationwide Homes, supra; Scott v. Lumber Co.,* 232 N.C. 162, 59 S.E. 2d 425; *Hollowell v. Department of Conservation and Development, supra.*

[2] In the present case, the Court of Appeals said: "We find * * * that decedent was not an 'employee' within the meaning of the Workmen's Compensation Act. There being no employer-employee relationship, the Industrial Commission could not take cognizance of the claim. The order granting plaintiff's claim is reversed." Having reviewed the entire record, we concur in this finding and conclusion of the Court of Appeals.

It is clear from the evidence that had Mr. Lucas not been injured in the robbery, he would have had no enforceable claim against Li'l General Stores for compensation for any services rendered by him at the Carolina Avenue store during the week of the robbery. "One who voluntarily assists a servant at the latter's request does not, as a general rule, become the servant of the master so as to impose upon the latter, the duties and liabilities of a master toward such volunteer, or so as to render the master liable to third persons injured by such volunteer's acts or negligence, while rendering such assistance." *Reaves v. Power Co.,* 206 N.C. 523, 174 S.E. 413.

It is undisputed that Mr. Lucas was discharged by Li'l General Stores because he sold beer to a minor in violation of the law of North Carolina and of the policy of Li'l General

Stores. Having been employed as Manager of the store at which he was shot, he was familiar with the organization of the company and the limits of the authority of his wife who had succeeded him as Acting Manager of this store.

There is evidence that Mr. Lucas was frequently in the store after his discharge and, while there, did various things to assist his wife in her work. This is entirely consistent with the desire of an unemployed husband to be in the company of his wife at her place of employment, such association not being calculated to disturb her in her work, and to assist her in the performance of her duties, especially where, as here, the wife would otherwise be working alone at night in a location attractive to armed robbers. Even if the claimant's evidence be viewed in the light most favorable to her contention and the evidence for the company be disregarded, the claimant's evidence fails to show the existence of the employer-employee relation between the company and Mr. Lucas. At most, it would support a finding that the claimant, the District Manager, and Mr. Lucas were in collusion to deceive the company with reference to the fact of Mr. Lucas' working at the store.

The testimony of the District Manager is that he knew nothing about this and did not authorize it or consent thereto. His testimony is corroborated by the testimony of other witnesses. At the time of his testimony, he had already voluntarily given notice of his own resignation from the employment of the company, so his own employment would not have been placed in jeopardy by his admission that he knew of and acquiesced in the alleged employment of Mr. Lucas prior to and at the time of the injury.

The evidence is clear and uncontradicted that the District Manager had no actual authority to re-employ Mr. Lucas after the latter's discharge, or to authorize Mrs. Lucas, the Acting Manager of the local store, to do so. It is true that a principal, who has clothed his agent with apparent authority to contract in behalf of the principal, is bound by a contract made by such agent, within the scope of such apparent authority, with a third person who dealt with the agent in good faith, in the exercise of reasonable prudence and without notice of limitations placed by the principal upon the agent's authority. *Zimmerman v. Hogg and Allen*, 286 N.C. 24, 209 S.E. 2d 795; *Research Corp. v. Hardware Co.*, 263 N.C. 718, 140 S.E. 2d 416; *Powell v. Lumber Co.*, 168 N.C. 632, 84 S.E. 1032. This rule, however,

has no application where, as here, the third party, when dealing with the agent, knew or in the exercise of reasonable care should have known that the agent was not authorized to enter into the contract. *Zimmerman v. Hogg and Allen, supra; Commercial Solvents v. Johnson,* 235 N.C. 237, 69 S.E. 2d 716; *R. R. v. Smitherman,* 178 N.C. 595, 101 S.E. 208.

In discussing the liability of a principal upon a contract entered into by an agent within the latter's apparent authority, Justice Walker, speaking for the Court in *R. R. v. Smitherman, supra,* said:

> "The apparent authority, so far as third persons are concerned, is the real authority, and when a third person has ascertained the apparent authority with which the principal has clothed the agent, he is under no further obligation to inquire into the agent's actual authority. The authority must, however, have been actually apparent to the third person, who, in order to avail himself of rights thereunder, must have dealt with the agent in reliance thereon, in good faith, and in the exercise of reasonable prudence, in which case the principal will be bound by acts of the agent performed in the usual and customary mode of doing such business, although he may have acted in violation of private instructions, for such acts are within the apparent scope of his authority. An agent cannot, however, enlarge the actual authority of his own acts without some measure of assent or acquiescence on the part of his principal, whose rights and liabilities as to third persons are not affected by any apparent authority which his agent has conferred upon himself simply by his own representations, express or implied."

In *Texas Co. v. Stone,* 232 N.C. 489, 61 S.E. 2d 348, Chief Justice Stacy, speaking for the Court, said, "One dealing with an agent or representative with known limited authority can acquire no rights against the principal when the agent or representative acts beyond his authority or exceeds the apparent scope thereof." In the Restatement of the Law of Agency, 2d, § 166, it is said, "A person with notice of a limitation of an agent's authority cannot subject the principal to liability upon a transaction with the agent if he should know that the agent is acting improperly." Comment (a) upon this section of the Restatement reads: "If a person has information which would lead a reasonable man to believe that the agent is violating the

orders of the principal or that the principal would not wish the agent to act under the circumstances known to the agent, he cannot subject the principal to liability. Any substantial departure by the agent from the usual methods of conducting business is ordinarily sufficient warning of lack of authorization." In 2A CJS, Agency, § 166, it is said, "Any apparent authority that might otherwise exist vanishes in the presence of the third person's knowledge, actual or constructive, of what the agent is, and what he is not empowered to do for his principal."

Taking the claimant's evidence to be true and disregarding the contrary testimony of the District Manager, it shows that Mrs. Lucas, herself, had, at least, substantial doubt concerning the authority of the District Manager to authorize the re-employment of her husband, for she testified that she asked the District Manager, "Well, what about Mr. Pepper and them [his superiors]?" To this, she testified, the District Manager replied, "What they don't know won't hurt them." According to her testimony, denied by the District Manager, their plan was to "run his [Mr. Lucas'] pay through [Mrs. Lucas'] check." That is, the plan was designed to conceal from the company's officials the fact that Mr. Lucas was working at the store and to prepare the payroll so as to make it appear that Mrs. Lucas alone was working, she to divide the pay check with him. This circumstance alone is sufficient to put both Mrs. Lucas and Mr. Lucas upon notice that the District Manager was acting in excess of his authority when he authorized Mrs. Lucas to re-employ her husband, assuming that he did so.

Under these circumstances, we think the conclusion is inescapable that there was no contract between Li'l General Stores and Mr. Lucas re-establishing the relation of employer and employee between them. Thus, he was not the employee of Li'l General Stores at the time of his injury and the Industrial Commission should have dismissed the claim.

Affirmed.

State v. Taylor

STATE OF NORTH CAROLINA v. ISAAC JOE TAYLOR, JR., ALIAS MICHAEL ANTHONY YOUNG

No. 8

(Filed 29 January 1976)

1. **Criminal Law § 102— actions and argument of prosecutor**

A prosecuting attorney may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence.

2. **Criminal Law § 102— arguments of counsel — discretion of court — review**

Arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case and all reasonable inferences to be drawn from the facts, and the appellate courts ordinarily will not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations.

3. **Criminal Law § 102— prosecutor's argument — source of defense counsel's information**

Defendant in a homicide case was not prejudiced by the district attorney's question during jury argument as to where defense counsel got information used in questioning a codefendant where the record does not show what knowledge the "information" imparted or which defendant it might have affected, and the record shows the information could have come from persons other than defendant who were present when the crime was committed, particularly when the judge instructed the jury not to consider such argument.

4. **Criminal Law § 102— prosecutor's argument — guilt shown during counsel's argument**

The district attorney's jury argument that the truth about defendant's guilt slipped out during defense counsel's argument to the jury did not constitute a comment on defendant's failure to testify and was not prejudicial to defendant.

5. **Criminal Law § 102— prosecutor's remark about conduct of defense counsel**

Defendant in a homicide case was not prejudiced by the district attorney's remark that defense counsel was deliberately making a misstatement in cross-examining a witness about the time of a prior conviction.

6. **Criminal Law § 92— consolidation of charges against defendants — testimony by one defendant**

Defendant was not prejudiced by the consolidation of his murder trial with that of a codefendant charged with the same crime even though the codefendant elected to testify at the trial and defendant was thus deprived of his right to open and close the jury arguments.

7. Homicide § 24— instructions — burden to rebut malice — Mullaney decision — nonretroactivity

Where the jury returned a verdict of first degree murder, defendant is not entitled to a new trial under the decision of *Mullaney v. Wilbur*, 421 U.S. 684, because of the court's instructions placing the burden on defendant to rebut the presumption of malice so as to reduce the charge of second degree murder to manslaughter since the jury did not reach the questions raised by *Mullaney* as to instructions relating to second degree murder and manslaughter; furthermore, the *Mullaney* decision is not retroactive and does not apply to defendant's trial which was held some two years prior to that decision.

APPEAL by defendant, Isaac Joe Taylor, Jr., alias Michael Anthony Young, from *Hall, J.*, 18 June 1973 Session of DURHAM Superior Court.

Defendant's counsel gave notice of appeal in open court but the appeal was not perfected within the time allowed. Upon motion of the District Attorney, the appeal was dismissed on 30 January 1975. On 6 May 1975, we issued a writ of certiorari to Durham County Superior Court directing that defendant be allowed to perfect his appeal.

Defendants Isaac Joe Taylor, Jr., alias Michael Anthony Young (hereinafter referred to as Taylor), Schuyler Jones and Ezekial Wright were charged with the crimes of murder in the first degree and armed robbery. Prior to 18 January 1973, Ezekial Wright entered a plea of guilty to the second-degree murder of Charles Edward Thompson. On 18 June 1973, the cases of defendant Taylor and defendant Jones were called for trial upon the charges of murder in the first degree. The cases were consolidated for trial over objection of counsel for each defendant. Each defendant entered a plea of not guilty.

The State's evidence tended to show the following:

Ezekial Wright testified that on 29 December 1972 he was walking along Pettigrew Street in Durham, North Carolina, with defendants Jones and Taylor when they discovered a man lying on the side of the street. Taylor took a wallet that was hanging out of the man's pocket. Finding no money in the wallet, they divided its contents and went to the bus station. Shortly thereafter the man they had robbed (later identified as Charles Edward Thompson) came into the station. Taylor asked Thompson if he wanted to accompany them to a "bootleg house." Thompson indicated that he did and he accompanied them to a house on Queen Street where Taylor "wrestled him into the

basement." Taylor demanded that Thompson give him money and Thompson replied that he only had four cents. Taylor, while holding a knife to Thompson's throat, ordered him to take off his clothes. A search of the clothes yielded four pennies. In response to Thompson's pleas that his life be spared, Taylor said "Naw, you get away and get to the police, I got to kill you." Thompson tried to run and Taylor cut him across the chest several times. Upon Taylor's order Jones and Wright tied the victim's hands behind his back with cord taken from a venetian blind lying on the basement floor. Taylor cut a piece of Thompson's trousers and gagged him to quell his screams and pleas. He then tied Thompson into a chair, kicked the chair over and struck him about the head and face five or six times with a piece of cast-iron pipe. The three of them fled. Wright identified several State's exhibits including the knife used to cut the victim, the iron pipe with which Taylor attacked Thompson, and the cord used to tie the victim. On cross-examination, the witness admitted that he had hit and kicked Thompson, and that he had been allowed to plead guilty to second-degree murder.

Lieutenant Richard Morris of the Durham Police Department testified that on 29 December 1972 he went to the basement of a house on Queen Street where he observed the body of Charles Edward Thompson. His hands were tied behind his back and he was gagged. His face was "beaten to a pulp."

Sergeant Patterson of the Durham Police Department testified that he fingerprinted Taylor and that Taylor's fingerprints matched those taken from a venetian blind in the basement of the house on Queen Street.

Dr. Richard Page Hudson, Jr., an expert in medical pathology, testified that he performed an autopsy on the body of Charles Edward Thompson. He described various knife wounds on the body and the wounds about the face and head which were caused by some blunt object. He in part, stated:

> As a result of the autopsy which I performed on the deceased, I am of the opinion that Charles Edward Thompson died of brain injuries secondary to blunt trauma to the head in a beating. Even in the absence of the head injuries that have been described, the victim would have died as a result of the abdominal wounds, unless, of course, he had had fairly rapid surgery for his abdominal wounds.

Either the blows to the head or the blows to his body would have killed him.

The State also offered evidence that certain objects of personal property belonging to Charles Edward Thompson were found in the possession of Jones and Taylor when they were arrested on the morning of 30 December 1972.

Defendant Jones elected to offer evidence and his testimony tended to corroborate the testimony of Ezekial Wright. He also offered some evidence of good character.

Defendant Taylor offered no evidence.

The jury returned a verdict of guilty of murder in the first degree as to James Isaac Taylor, Jr., and a verdict of guilty of murder in the second degree as to defendant Schuyler Jones.

Defendant Taylor appealed from judgment imposing a sentence of imprisonment for the term of his natural life.

Attorney General Rufus L. Edmisten, by Assistant Attorney General William B. Ray and Special Deputy Attorney General William W. Melvin, for the State.

James B. Maxwell for the defendant appellant.

BRANCH, Justice.

Defendant assigns as error the trial judge's actions in overruling his objections to certain statements made by the District Attorney during his argument to the jury.

[1, 2] A prosecuting attorney may not place before the jury incompetent and prejudicial matters not admissible in evidence or include in his argument facts not included in the evidence. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *vacated on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873; *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664. However, arguments of counsel are largely in the control and discretion of the trial judge who must allow wide latitude in the argument of the law, the facts of the case, as well as to all reasonable inferences to be drawn from the facts. *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750; *State v. Westbrook, supra.* See also *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503, *rev'd on other grounds,* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290; *State v. Spence,* 271 N.C. 23, 155 S.E. 2d 802, *rev'd on other grounds,* 392 U.S.

649, 20 L.Ed. 2d 1350, 88 S.Ct. 2290. Ordinarily we do not review the exercise of the trial judge's discretion in controlling jury arguments unless the impropriety of counsel's remarks is extreme and is clearly calculated to prejudice the jury in its deliberations. *State v. Barefoot,* 241 N.C. 650, 86 S.E. 2d 424; *State v. Bowen, supra.*

[3] It is necessary that we consider separately the portions of the argument questioned by this assignment of error. Defendant first points to this portion of the District Attorney's argument:

> MR. BRANNON: You notice Mr. Edwards examining Mr. Jones asking him some interesting questions, didn't he? I asked him if he didn't go in the basement of the building and feel the man's pulse as well as get your knife. Of course, my question of Mr. Edwards, where did he get that information—
>
> MR. EDWARDS: Objection.
>
> THE COURT: Specifically what are you objecting to?
>
> MR. EDWARDS: Where I got the information.
>
> THE COURT: Sustained. You will not consider that last statement by the Solicitor.

Defendant contends that the evil in this argument lies in that the "information" therein referred to could have come only from someone who was present when the crime was allegedly committed and that the remarks, therefore, tended to place defendant at the scene of the crime.

Initially we note that this record does not contain any part of the jury argument of counsel for defendants. Thus we cannot know whether these isolated remarks of the District Attorney are in reply to arguments of defense counsel or to what extent the District Attorney was provoked by defense counsel's arguments. We do not know what knowledge the "information" imparted or which defendant it might have affected. Further, the record discloses that the "information" could have come from at least two people other than defendant who were present in the courtroom and who by their own admission were present when the crime was committed. Finally, any semblance of prejudice which might have arisen from this portion of the solicitor's argument was removed when the trial judge promptly sustained defendant's objection and instructed

the jury not to consider the portion specifically objected to by defense counsel.

[4] The next part of the argument challenged by this assignment of error is as follows:

> MR. BRANNON: The truth of Mr. Jones' guilt slipped out from him on the stand. THE TRUTH ABOUT ISAAC TAYLOR SLIPPED OUT DURING MR. EDWARDS' ARGUMENT TO YOU YESTERDAY. (Emphasis added.)
>
> MR. EDWARDS: Objection and move for a mistrial.
>
> OBJECTION OVERRULED. (R pp 49-50)

Defendant takes the position that the above-quoted statement amounts to a comment on defendant's failure to testify.

The provisions of G.S. 8-54 unquestionably prohibit any mention before the jury of a defendant's failure to testify in his own behalf. *State v. McCall,* 286 N.C. 472, 212 S.E. 2d 132; *State v. Buchanan,* 216 N.C. 709, 6 S.E. 2d 521; *State v. Spivey,* 198 N.C. 655, 153 S.E. 255. Here the District Attorney's remarks do not specifically point to defendant's failure to take the stand. In fact, we do not believe that an average juror would so interpret this language. The first sentence in the challenged argument refers to the testimony of defendant Jones who elected to testify. Certainly the District Attorney was within his rights to argue this evidence and any reasonable inference arising therefrom. *State v. Barefoot, supra; State v. Oxendine,* 224 N.C. 825, 32 S.E. 2d 648. The District Attorney's comment that the truth slipped out during Mr. Edwards' argument does not appear to be improper. Again we do not have the benefit of knowing what Mr. Edwards said. Even so, the general rule allows counsel to address remarks to the argument of opposing counsel. 75 Am. Jur. 2d TRIAL, § 218, page 300. This assignment of error is overruled.

[5] Defendant next assigns as error the failure of the trial judge to grant a mistrial because of derogatory statements made by the District Attorney concerning counsel for defendant. During the cross-examination of the witness Wright by defendant's counsel, the following exchange took place:

> "MR. EDWARDS:
>
> Q. You have been charged, tried and convicted of Public Drunk?

A. No, I paid a fine of $24.00.

Q. That was on the 24th day of December, 1972, was it not?

A. Of '71.

Q. '71?

A. Actually.

Q. Actually Christmas Eve '71?

A. Yes, that is right, I can prove it because I stayed in jail about two days.

MR. BRANNON: Mr. Edwards has the record in front of him, and it does in fact indicate 12-24-71 so he is deliberately making a misstatement.

MR. EDWARDS: Objection to that.

A. I can tell why, because I was only 16.

MR. EDWARDS: Objection. I am going to move for a mistrial.

THE COURT: You will not consider the remark made by the Solicitor. Dismiss it from your minds." (R pp 38-39)

A similar occurrence during a jury argument appears in the case of *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335. We quote a self-explanatory excerpt from that case:

> Defendants assign as error the following part of the solicitor's argument. "There is something in this case that is not very pretty. Mr. Walker, himself a former solicitor of this court until other things tempted him to the place where he now is . . . " The statement about Mr. Walker, who represented defendant Miller at the trial, is not clear, but it is manifest that it was uncomplimentary, and there is nothing in the record before us to justify it. While not so prejudicial as to warrant a new trial, we disapprove of it. Clients, not lawyers, are the litigants. Whatever may be the ill-feeling existing between clients, it should not be allowed to influence counsel in their conduct and demeanor toward each other or toward suitors in the case. All personalities between counsel should be scrupulously avoided. Canons of Professional Ethics, 62 Reports of American Bar Association 1105 § 17.

In 88 C.J.S. TRIAL § 185 at page 367, it is stated:

> . . . Where his remarks are not sustained by the facts it is improper for counsel in argument to make statements reflecting on the character or conduct of the opposite party or his attorney, ...

It would seem that this matter of little moment could have been corrected without resorting to charges that counsel was deliberately misleading the court and the jury. We do not approve of statements unnecessarily reflecting upon the character or conduct of a counsel by his adversary at any stage of a trial. Nevertheless we do not find this language sufficiently prejudicial to defendant to warrant a new trial.

[6] Defendant argues that he was denied a fair trial when, over his objection, the trial judge consolidated his case for trial with the case of defendant, Jones.

The State's motion for consolidation was addressed to the trial judge's sound discretion. Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384; *State v. McVay* and *State v. Simmons,* 277 N.C. 410, 177 S.E. 2d 874. This exercise of discretion by the trial judge will not be disturbed absent a showing that defendant has been deprived of a fair trial by the order of consolidation. *State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858.

Defendant seems to take the position that he was seriously prejudiced by the order of consolidation because his codefendant elected to testify.

It is well established in this jurisdiction that an accomplice is always a competent witness. The fact that his testimony is usually induced by a promise of or a hope for leniency goes only to his credibility as a witness. *State v. Woodson,* 287 N.C. 578, 215 S.E. 2d 607; *State v. Goldberg,* 261 N.C. 181, 134 S.E. 2d 334, *cert. denied,* 377 U.S. 978, 12 L.Ed. 2d 747, 84 S.Ct. 1884.

In instant case, another alleged accomplice in the murder, Ezekial Wright, had already entered a plea of guilty and testified for the State. The record does not disclose that the trial judge knew when he entered the order of consolidation that

either the codefendant Jones or Ezekial Wright would testify. In our opinion, the testimony of the codefendant Jones would have carried equal force if it had been received without the order of consolidation. We find no abuse of discretion in the trial judge's order consolidating the cases for trial. Neither do we find merit in defendant's contention that the consolidation of the cases resulted in prejudicial error to him because he was deprived of his right to open and close the jury arguments when his codefendant elected to testify.

It is well settled in this jurisdiction that when there are several defendants and one of them elects to offer evidence, the right to open and conclude the arguments belongs to the State. *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *State v. Smith,* 237 N.C. 1, 74 S.E. 2d 291.

[7] Finally defendant, relying on *Mullaney v. Wilbur,* 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881, contends that the trial judge erred by charging the jury that if the State proved beyond a reasonable doubt that defendant killed deceased with a deadly weapon, the law raised presumptions that the killing was unlawful and that it was done with malice. Defendant further argues that under the *Mullaney* rule, it was error to place any burden on defendant to rebut the presumption of malice so as to reduce the charge from second-degree murder to manslaughter.

This argument is feckless. Here all the evidence revealed a cold-blooded killing done with malice and with premeditation and deliberation. The jury returned a verdict of murder in the first degree and therefore never reached the questions raised by *Mullaney* as to instructions relating to second-degree murder and manslaughter. Further, in *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (filed 17 December 1975), we declined to apply the *Mullaney* rule retroactively without further instruction from the United States Supreme Court. *Mullaney* was decided 9 June 1975. This case was tried at the 18 June 1973 Session of Durham Superior Court. Thus, even if otherwise applicable, the rules enunciated in *Mullaney* do not apply to instant case.

We have carefully examined this entire record and find no error which would justify a new trial or warrant that the judgment be disturbed.

No error.

STATE OF NORTH CAROLINA v. DARRELL LEE HEDRICK

No. 108

(Filed 29 January 1976)

1. **Burglary and Unlawful Breakings § 4— first degree burglary — pillowcase — admissibility**

Trial court in a first degree burglary case properly allowed into evidence two portions of a pillowcase where there was evidence from which the jury could infer that defendant had removed the pillowcase from a bed in the house and intended to use it as a mask to hide his identity from the occupants of the house or as a means of subduing the occupants who he knew lived there.

2. **Burglary and Unlawful Breakings § 5— first degree burglary — intent to commit larceny — sufficiency of evidence**

Evidence in a first degree burglary case was sufficient to show an intent to commit larceny, though defendant did not disturb any of the valuables in the house which he entered, where such evidence tended to show that defendant entered an occupied dwelling in the nighttime, he climbed a ladder to reach a second-floor balcony, pushed a windowpane out of a balcony door, removed the key from the inside lock, and unlocked the door, television and telephone wires were cut and all the phones in the house were dead except one, the wire to it not having been completely cut through, defendant had done work for the owner of the house and was familiar with its layout, there were valuables in the house, including antiques, silver, jewelry, and money, and when confronted, defendant immediately turned and fled.

3. **Criminal Law § 169— testimony excluded — failure to show what testimony would have been**

Since neither the record nor defendant's brief disclosed what witnesses would have said had they been allowed to answer questions concerning defendant's mental capacity, defendant's assignments of error to the exclusion of the evidence do not comply with Rule 19 of the Rules of Practice in the Supreme Court and will not be considered.

4. **Criminal Law §§ 102, 138— first degree burglary — punishment — no jury argument**

The trial court in a first degree burglary case properly denied the motion of defendant's attorneys to argue the question of punishment to the jury.

APPEAL by defendant from *Lee, J.*, at the 5 May 1975 Regular Criminal Session of WAKE Superior Court.

Defendant was tried and convicted of first degree burglary and sentenced to life imprisonment.

The State's evidence tended to show that Medora Johnson, a companion to Mrs. William B. Drake, was residing in Mrs.

Drake's home at 2025 Fairview Road in Raleigh, North Carolina. Between 10:15 and 10:30 p.m. on 24 March 1975, Mrs. Johnson was watching television in her upstairs bedroom when she heard a "kind of thud" at the back of the house and a little later saw the cable into her television set being pulled taut through the windowsill. Mrs. Johnson called the police. Shortly thereafter she heard a screen door rattling in one of the upstairs bedrooms and heard glass falling. She went downstairs and out the front door where she flagged the two police cars responding to her call.

Officer Notch went upstairs with Mrs. Johnson while Officer Daniels went around the side of the house. As Officer Notch and Mrs. Johnson reached the top of the stairs, defendant emerged from Mrs. Johnson's bedroom. When Mrs. Johnson asked him what he was doing there, he turned and ran through another bedroom and jumped over the deck railing onto the terrace approximately twenty feet below where he was apprehended by Officer Daniels.

Defendant had recently done some roof work on the house and was familiar with the house and its occupants.

The State's evidence also tended to show that both Mrs. Johnson and Mrs. Drake kept valuables such as money, jewelry and antiques in the house but that no valuables were taken or disturbed.

The testimony of defendant's brother, friends and wife tended to show that during childhood defendant acted strangely on many occasions without knowing the reason for his behavior, but that at the present time he was active in a local church and had a good reputation except for a drinking problem. He appeared unable to stop drinking once he started and frequently underwent personality changes after periods of excessive drinking.

Defendant testified about his drinking problems. He further testified that on 24 March 1975 he left his apartment after a fight with his wife over his drinking, cashed a twenty-dollar check and went to a nearby bar where he remained from approximately 6:00 p.m. to sometime after 9:00 p.m. During that time he consumed about eighteen twelve-ounce cans of beer and ate one sandwich. He has no memory of anything from the time he walked out of the bar until he became aware that he was standing in the hallway of Mrs. Drake's house.

Other facts necessary to decision are included in the opinion.

Attorney General Rufus L. Edmisten, Special Deputy Attorney General Sidney S. Eagles, Jr., and Associate Attorney Claudette Hardaway for the State.

Robert A. Hassell and Theodore E. Corvette, Jr., for defendant appellant.

MOORE, Justice.

At the outset it is noted that the record on appeal does not show a single objection or exception taken during the trial. Defendant's attorneys in their brief do refer to objections taken during the trial and refer to page numbers in the trial transcript which, of course, is not before us. In *Gasque v. State,* 271 N.C. 323, 339, 156 S.E. 2d 740, 751 (1967), *cert. den.* 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968), we said:

> ". . . The record does not show any objection to this testimony, but only an exception. This is said in 1 Strong, N. C. Index 2d, Appeal and Error, § 1: 'The jurisdiction of the Supreme Court on appeal is limited to questions of law or legal inference, which, ordinarily, must be presented by objections duly entered and exceptions duly taken to the rulings of the lower court.' This is said in *Conrad v. Conrad, supra* [252 N.C. 412, 113 S.E. 2d 912 (1960)]: 'Error can only be asserted by an exception taken at an appropriate time and in an appropriate manner. Errors based on rulings made during the trial must ordinarily be called to the attention of the court by an objection taken when the ruling is made. G.S. 1-206.' "

See Rules 9 and 10, New North Carolina Rules of Appellate Procedure.

The charge is not included in the record on appeal. It is therefore presumed that the jury was properly instructed as to the law arising upon the evidence as required by G.S. 1-180. *State v. Murphy,* 280 N.C. 1, 184 S.E. 2d 845 (1971); *State v. Staten,* 271 N.C. 600, 157 S.E. 2d 225 (1967); *State v. Harrison,* 239 N.C. 659, 80 S.E. 2d 481 (1954).

Matters discussed in the brief outside the record ordinarily will not be considered since the record certified to the Court

imports verity and we are bound by it. *State v. Fields,* 279 N.C. 460, 183 S.E. 2d 666 (1971); 1 Strong, N. C. Index 2d, Appeal and Error § 42. However, due to the gravity of the offense and the imposition of life imprisonment, we have elected to review defendant's assignments of error as set out in his brief as if properly presented.

[1] Defendant first assigns as error the admission into evidence of State's Exhibit 13A (a piece of pillowcase) and State's Exhibit 13B (a larger portion of a pillowcase) on the grounds that these exhibits were not tied to the defendant or shown to be relevant to the crime. The well established rule in a criminal case is that every object that is calculated to throw light on the supposed crime is relevant and admissible. *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965), *cert. den.* 384 U.S. 1020, 16 L.Ed. 2d 1044, 86 S.Ct. 1936 (1966); 1 Stansbury, N. C. Evidence § 118, p. 356 (Brandis Rev. 1973).

In the present case, Mrs. Johnson testified that she had checked the northwest bedroom earlier in the evening of 24 March, that the pillow was on the bed and the bed was made. Officer Daniels identified Exhibit 13A as the piece of material found in the northwest bedroom beside the pillow which was on the floor near the bed. He identified Exhibit 13B as the pillowcase that was found cut up and balled up under the chair in the southwest bedroom, Mrs. Johnson's room. From this evidence the jury could infer that the defendant had taken off the pillowcase in the northwest bedroom for use as a mask to hide his identity from the occupants of the house or as a means of subduing the occupants who he knew lived there. We hold that these two State's exhibits were relevant and admissible in evidence. This assignment is overruled.

[2] Defendant next contends that the trial court erred in denying his motion to dismiss the indictment on the grounds that the evidence taken in the light most favorable to the State was insufficient to show an intent to commit larceny. This contention is without merit. Intent is a mental attitude which can seldom be proved by direct evidence, but must ordinarily be proved by circumstances from which it can be inferred. *State v. Little,* 278 N.C. 484, 180 S.E. 2d 17 (1971); *State v. Arnold,* 264 N.C. 348, 141 S.E. 2d 473 (1965); 2 Strong, N. C. Index 2d, Criminal Law § 2, p. 481.

The State's evidence showed that defendant entered an occupied dwelling in the nighttime. He climbed a ladder to reach a second-floor balcony, pushed a windowpane out of a balcony door, removed the key from the inside lock and unlocked the door. Television and telephone wires were cut and all the phones in the house were dead except Mrs. Johnson's, the wire to her phone not having been completely cut through. Defendant had done work for Mrs. Drake and was familiar with the layout of the house. Mrs. Johnson testified that there were valuables in the house, including antiques, silver, jewelry and money. When confronted, defendant immediately turned and fled.

The fact that defendant did not disturb any of the valuables in the house does not aid him. As stated in *State v. Accor* and *State v. Moore,* 277 N.C. 65, 175 S.E. 2d 583 (1970):

> "'. . . Numerous cases, however, hold that an unexplained breaking and entering into a dwelling house in the nighttime is in itself sufficient to sustain a verdict that the breaking and entering was done with the intent to commit larceny rather than some other felony. The fundamental theory, in the absence of evidence of other intent or explanation for breaking and entering, is that the usual object or purpose of burglarizing a dwelling house at night is theft.'"

In *State v. McBryde,* 97 N.C. 393, 1 S.E. 925 (1887), the evidence failed to show that the intruder had disturbed any of the personal property within the residence. The evidence was held sufficient to withstand the defendant's motion to dismiss as of nonsuit. Justice Davis, speaking for the Court, said:

> ". . . The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent. . . ."

Accord, State v. Oakley, 210 N.C. 206, 186 S.E. 244 (1936).

We hold that the intent to commit the felony of larceny can be inferred by the jury from the facts and circumstances of this case. The motion to dismiss the indictment was properly denied.

[3] Defendant presents several assignments of error concerning the exclusion of lay witness testimony on defendant's emotional problems, childhood history and state of mind. Defendant contends that the exclusion of this evidence prejudiced his defense of temporary insanity. A review of the record discloses that many aspects of defendant's past and present problems were explored and allowed into evidence. Defendant's brother testified that he and defendant grew up in an atmosphere of extremely strict and sometimes cruel discipline and violent outbursts by their father. He did not believe the defendant was stable and recounted various incidents of erratic and destructive behavior by defendant that defendant said he could not control. He also described defendant's prior heavy use of marijuana and various kinds of pills.

Defendant's wife testified concerning their marital problems caused mainly by defendant's heavy drinking habits. She also testified that he underwent changes in personality under the influence of alcohol, often behaving destructively.

Generally, lay witness testimony concerning a person's mental capacity and condition is admissible as long as the witness has had a reasonable opportunity to observe the person and form an opinion satisfactory to himself on this issue. *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966); *State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936); 1 Stansbury, N. C. Evidence § 127, pp. 402-07 (Brandis Rev. 1973). In the present case a substantial amount of this type of testimony was admitted. Defendant, however, alleges that similar testimony was improperly excluded. Neither the record nor the brief discloses what the witnesses would have said if allowed to answer these questions concerning defendant's mental capacity. An exception to the exclusion of evidence will not be sustained when it is not made to appear what the excluded evidence would have been. *Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966). The defendant's assignments of error relating to the exclusion of evidence therefore do not comply with Rule 19 of the Rules of Practice in the Supreme Court and will not be considered. *Williams v. Boulerice*, 269 N.C. 499, 153 S.E. 2d 95 (1967); *Heating Co. v. Construction Co., supra;* 1 Strong,

N. C. Index 2d, Appeal and Error § 30, pp. 164-65. *See also* Rules 9 and 10 of the New North Carolina Rules of Appellate Procedure. However, in our view of this case these assignments, had they been properly presented, are immaterial. Ample evidence of defendant's mental condition and intoxication was admitted and it is presumed that the court correctly instructed the jury concerning this evidence. *State v. Murphy, supra; State v. Staten, supra; State v. Harrison, supra.* These assignments are overruled.

[4] Defendant's counsel in their brief contend that the trial court erred in refusing them an opportunity to argue to the jury the question of punishment for burglary, in view of the fact that the district attorney had informed the jurors during jury selection that burglary was no longer punishable by death. The record before us does not disclose what statements, if any, were made by the district attorney, what motions were made by defendant's attorneys or what rulings were entered by the trial court.

Defendant concedes that the general rule has been aptly stated by Justice Sharp (now Chief Justice) in *State v. Rhodes,* 275 N.C. 584, 169 S.E. 2d 846 (1969):

> "The amount of punishment which a verdict of guilty will empower the judge to impose is totally irrelevant to the issue of a defendant's guilt. It is, therefore, no concern of the jurors. [Citations omitted.]
>
> * * *
>
> ". . . In the absence of some compelling reason which makes disclosure as to punishment necessary in order 'to keep the trial on an even keel' and to insure complete fairness to all parties, the trial judge should not inform the jurors as to punishment in *noncapital* cases. If information is requested, he should refuse it and explain to them that punishment is totally irrelevant to the issue of guilt or innocence. . . ." (Emphasis added.)

Accord, State v. Henderson, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750 (1973); *State v. Davis,* 238 N.C. 252, 77 S.E. 2d 630 (1953). For capital cases, *see* G.S. 15-176.3 through G.S. 15-176.5; *State v. Bell,* 287 N.C. 248, 214 S.E. 2d 53 (1975).

As stated by Justice Lake in *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974): "The punishment to be imposed not

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

Defendant, however, contends that this case falls within the exceptions to the general rule for noncapital cases because of (1) the danger of jury confusion as to what the actual punishment now is for first degree burglary and (2) the unfairness of allowing the district attorney to state to the jury what the punishment is not while not allowing the defendant to argue the question of punishment. Despite these conclusory assertions made in defendant's brief, the record discloses no evidence of jury confusion nor any evidence of unfairness to defendant. Under these circumstances, no error appears. The motion of defendant's attorneys to argue the question of punishment to the jury was properly denied.

After careful consideration of each of defendant's assignments of error, in his trial we find no error.

No error.

STATE OF NORTH CAROLINA v. MICHAEL ALLEN LESTER

No. 57

(Filed 29 January 1976)

1. **Homicide § 21— killing of hitchhiker — sufficiency of evidence**

Evidence was sufficient to be submitted to the jury in a murder prosecution where it tended to show that defendant picked up two hitchhikers, he subsequently held them up with a gun and knife, demanded money and submission to homosexual acts, a fight ensued, and one of the hitchhikers was stabbed and shot and died as a result of these wounds.

2. **Homicide § 14— unlawfulness and malice — constitutionality of presumptions**

The presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional.

3. **Homicide § 24— heat of passion on sudden provocation — self-defense — burden of proof — jury instructions**

Trial court's instructions which placed upon defendant the burden of proving that there was no malice on his part in order to reduce the crime from second degree murder to manslaughter and the burden of proving self-defense in order to excuse his act altogether

were not invalidated by *Mullaney v. Wilbur*, 421 U.S. 684, since that decision applied only to trials conducted on or after 9 June 1975, and defendant was tried in March, 1975.

4. **Homicide § 26— second degree murder — intent to kill — jury instructions**

The trial court did not err in instructing that second degree murder differs from first degree murder, *inter alia*, in that a specific intent to kill is not an element of second degree murder.

5. **Criminal Law § 46— flight of defendant — admissibility of evidence**

The trial court in a murder prosecution did not err in admitting evidence of flight consisting of testimony that defendant was arrested at his home some days after the crime with his car fully loaded with clothing and cooking utensils, nor did the court err in failing to instruct the jury, without request, on the weight to be accorded this evidence.

6. **Criminal Law § 43— photographs of crime scene — admissibility**

The trial court did not err in admitting into evidence several photographs of the crime scene although the witness who identified the photographs had been at the scene at night and the photographs had been taken during the daytime.

7. **Criminal Law §§ 34, 169— defendant's guilt of other offense — evidence not prejudicial**

Defendant was not prejudiced by the district attorney's cross-examination of him concerning prior convictions where defendant unresponsively volunteered information as to charges against him, and the trial court allowed defendant's motion to strike all the testimony and instructed the jury to disregard it.

8. **Criminal Law § 86— defendant's undesirable military discharge — admissibility**

The trial court did not err in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service.

9. **Criminal Law § 86— impeachment of defendant**

The trial court did not err in allowing the State to show for purposes of impeachment that defendant did not voluntarily turn himself in to police officers where defendant had already testified that he "did not want to run" and where there was already abundant evidence of the circumstances of defendant's arrest.

APPEAL as of right by defendant pursuant to General Statute 7A-27(a).

By an indictment drawn under General Statute 15-144 defendant was charged with the murder on December 29, 1974, of Robert Abram Waller III. On his plea of not guilty he was tried by *Baley, S.J.*, during the second week of the March 31, 1975 Session of GUILFORD Superior Court. Possible verdicts of

murder in the first degree on the theories of felony murder and of a premeditated and deliberate murder, murder in the second degree, manslaughter and not guilty were submitted to the jury. The jury returned a verdict of guilty of second degree murder. Defendant was sentenced to life imprisonment.

Rufus L. Edmisten, Attorney General, by Roy A. Giles, Jr., Assistant Attorney General, for the State.

Wallace C. Harrelson, Public Defender, Eighteenth Judicial District, for defendant appellant.

EXUM, Justice.

[1] Defendant assigns as error the denial of his motion for judgment as of nonsuit. However his argument on this point is limited to the statement, "This is a formal assignment of error and is brought forward to preserve the record." This assignment is abandoned. Rule 28, Rules of Practice in the Supreme Court of North Carolina. Suffice it to say that there was plenary evidence that defendant murdered Robert Waller.

We deem it unnecessary to set out the facts in detail. In brief, evidence for the State tended to show: Defendant picked up two hitchhikers, Kent Wells and Robert Waller, on his way to Greensboro from Danville, Virginia. Wells and Waller were early for a concert at the Greensboro Coliseum so they rode around with defendant, sharing his marijuana cigarettes, and trying to find defendant's "girl friend" Linda. In the course of the episode at the end of a dirt road defendant held up Wells and Waller with a gun and knife, demanding money and submission to homosexual acts. A fight ensued. Waller was stabbed and shot and died as a result of these wounds. Wells escaped. Evidence for defendant tended to show: At the scene of the incident Wells grabbed a bag of defendant's marijuana which precipitated heated discussion and a general fist fight. Waller pulled out a knife, threatened defendant with death, and demanded his money. Defendant stabbed Waller with his own knife and shot him solely for his own protection. The evidence for the defendant tended to show self-defense. Synthesizing the two accounts the jury could also have found that defendant, although not acting lawfully, nevertheless killed in the heat of passion on sudden provocation or used excessive force in an otherwise proper self-defense.

[2, 3] Defendant assigns as error the charge of the court relative to the presumptions of malice and unlawfulness and the burden of proof as to heat of passion on sudden provocation and burden of proof on self-defense contending that it violates Fourteenth Amendment Due Process as interpreted in *Mullaney v. Wilbur,* 421 U.S. 684 (1975). In his charge the trial judge placed upon the State the burden of proving beyond a reasonable doubt that defendant "intentionally and without justification or excuse [i.e., unlawfully] and with malice stabbed and shot Robert Waller with a deadly weapon." However the trial judge also instructed that "[i]f the State proves beyond a reasonable doubt that the defendant intentionally killed Robert Waller with a deadly weapon or intentionally inflicted a wound upon Robert Waller with a deadly weapon that proximately caused his death, the law raises two presumptions: First, that the killing was unlawful; and second, that it was done with malice." The court also charged that "[i]n order to reduce the crime from second degree murder to manslaughter, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that there was no malice on his part. And in order to excuse his act altogether on the ground of self-defense, the defendant must prove not beyond a reasonable doubt but simply to your satisfaction that he acted in self-defense." The constitutionality of this type of charge has been considered at length in *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975) and *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975). In these cases we held that the presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. In *State v. Hankerson, supra,* we held that although the charge in its entirety unconstitutionally relieved the State of proving malice, i.e., absence of heat of passion, and unlawfulness beyond a reasonable doubt when those issues were raised by the evidence, the decision in *Mullaney v. Wilbur, supra,* was not to be applied retroactively to trials conducted before the date of that decision, June 9, 1975. In this case defendant was tried during the second week of the March 31, 1975 Criminal Session of Guilford County Superior Court. Judgment was entered April 11, 1975. This assignment of error is overruled.

[4] Defendant contends that the court erred in instructing that second degree murder differs from first degree murder, *inter alia,* in that a specific intent to kill is not an element of second degree murder. "A specific intent to kill . . . is not an element

of second degree murder or manslaughter." *State v. Gordon,* 241 N.C. 356, 358, 85 S.E. 2d 322, 324 (1955). *Compare State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975) *with State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423 (1971). This contention is consequently without merit.

[5] Defendant next argues that the court erred in admitting evidence of flight and in failing to instruct the jury, without request, on the weight to be accorded this evidence. The defendant was arrested at his home some days after the crime with his car fully loaded with clothing and cooking utensils. The car was impounded. A witness for the State was allowed to testify to numerous articles found in the back seat and trunk of the automobile and photographs were admitted which illustrated his testimony. This testimony was clearly admissible and competent to be considered by the jury in passing upon defendant's guilt. *State v. Self,* 280 N.C. 665, 672, 187 S.E. 2d 93, 97 (1972); *accord, State v. Lampkins,* 283 N.C. 520, 196 S.E. 2d 697 (1973); 2 Stansbury's North Carolina Evidence § 178 (Brandis Rev. 1973).

That the testimony was admissible does not require the judge, without a request therefor, to instruct the jury as to the weight to be given this evidence. In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case. "[I]nstructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefor have been considered subordinate features of the case." *State v. Hunt,* 283 N.C. 617, 624, 197 S.E. 2d 513, 518 (1973). Flight is not an element of the State's case nor is its absence a defense. It is merely a circumstance to be considered by the jury in determining a general *mens rea* in a criminal case. *State v. Lampkins, supra.*

[6] Several photographs were admitted into evidence of the crime scene although the witness who identified the photographs had been at the scene at night and the photographs had been taken during the daytime. Defendant contends this was error. This contention was squarely rejected in *State v. Johnson,* 280 N.C. 281, 286, 185 S.E. 2d 698, 701 (1972) where we said:

> The admissibility of the photographs for the limited purpose did not depend on the degree or the source of the illumination at the time they were made. The photographs

were admissible for the purpose of illustrating the testimony to the end that the court and jury might better evaluate it.

We, likewise, reject it here.

[7] Defendant raises the question whether the trial judge erred in allowing cross-examination of defendant as to prior criminal charges against him. If this had been done it would, of course, have been error. We held in *State v. Williams,* 279 N.C. 663, 185 S.E. 2d 174 (1971) that it is improper to cross-examine a witness as to indictments, warrants or arrests which may have been made against him. There are several reasons why *Williams* is inapplicable here. First, the District Attorney repeatedly asked defendant what he had been convicted of, not what he had been charged with. It was defendant who unresponsively volunteered information as to charges. Second, defendant's motion to strike all this testimony was allowed and the judge instructed the jury to disregard all of it. The general rule is that if "evidence erroneously admitted is later excluded or withdrawn and the jury instructed to disregard it, ordinarily the error in admitting it will be regarded as harmless." 1 Stansbury's North Carolina Evidence § 28 (Brandis Rev. 1973). Third, it appears from his testimony that in fact defendant was convicted of the crime about which the District Attorney inquired—an assault and battery tried April 4, 1972, in Corporation Court in Danville, Virginia, but that in that case he noted an appeal and was not represented by an attorney. From the record, the most likely reason the trial judge struck the testimony and instructed the jury to disregard it was not that he considered it merely a charge but that he was afraid it would be a violation of due process to impeach defendant by proof of prior convictions which were void because defendant was not represented by counsel. *Compare Argersinger v. Hamlin,* 407 U.S. 25 (1972) *with Loper v. Beto,* 405 U.S. 473 (1972).

[8] Defendant next contends that the court erred in allowing cross-examination of defendant concerning the circumstances of his undesirable discharge from military service. It would serve no useful purpose to consider each question and objection. Suffice it to say that no error was committed. It is settled in this State than an accused person who testifies as a witness may be cross-examined regarding prior acts of misconduct. *State v. Gainey,* 280 N.C. 366, 185 S.E. 2d 874 (1972).

[9] Defendant complains that certain questions on cross-examination violated his privilege against self-incrimination. At one point defendant was asked if he had ever told a law enforcement officer that he had been the victim of an attempted robbery by Wells and Waller. After objection and a bench conference the question was withdrawn. At another point he was required to answer the question, "When, if ever, Mr. Lester, did you turn yourself in to the police?" Defendant had already testified that he had "returned from Lexington to Greensboro because I did not want to run." It was entirely proper thereafter for the State to show that he had not voluntarily turned himself in. A testifying defendant is subject to impeachment by cross-examination, generally to the same extent as any other witness. 1 Stansbury's North Carolina Evidence §§ 39, 56 (Brandis Rev. 1973). There was already abundant evidence in the record of the fact and circumstances of defendant's arrest. Assignments of error to which this argument is directed are overruled.

Defendant argues that the trial court erred in allowing testimony for corroborative purposes which was not in fact corroborative. The witness Wells testified without objection that defendant had said he had "good connections" in Richmond. An objection was then sustained to the question, "What, if anything, did you take that to mean?" The witness Knight testified for the purpose of corroborating Wells' testimony that Wells had hold him (Knight) that defendant said he had "some type of connections in Richmond." An objection (not a motion to strike) was lodged to this answer. The overruling of the objection is assigned as error. We are of the opinion that the testimony did corroborate the earlier testimony of Wells which had been admitted without objection. There is no merit to this argument. *See State v. Patterson,* 288 N.C. 553, 220 S.E. 2d 600 (1975).

We have carefully examined all defendant's assignments of error and find them to be without merit.

In the trial we find

No error.

JANIE M. CLARK v. ABRAHAM BODYCOMBE

No. 107

(Filed 29 January 1976)

1. **Automobiles § 62— striking pedestrian — failure to keep lookout vehicle under control**

In an action to recover for personal injuries received by plaintiff when she was struck by defendant's automobile, plaintiff's evidence was sufficient for the jury to find that defendant was negligent in failing to keep a proper lookout and in failing to keep his vehicle under proper control where it tended to show that plaintiff was struck by defendant's automobile while walking in a gutter next to the curb, defendant did not see the plaintiff but only saw a shadow, defendant has had cataracts removed and his peripheral vision is limited, defendant does not look to either side while driving but only looks straight ahead, and defendant's car veered toward the curb before striking plaintiff.

2. **Automobiles § 83— pedestrian — contributory negligence — failure to cross in crosswalk**

In a pedestrian's action to recover for injuries received when she was struck by defendant's automobile, plaintiff could not be held contributorily negligent as a matter of law for crossing a street at a point not within a marked crosswalk where the evidence was conflicting as to whether plaintiff was crossing the street at the time of the accident.

3. **Automobiles § 83— pedestrian — failure to walk on proper side — contributory negligence**

Violations of the statute requiring pedestrians to walk on the left-hand side of a highway, G.S. 20-174(d), do not constitute negligence *per se*.

4. **Automobiles § 83— pedestrian — failure to walk on left-hand side — contributory negligence — jury question**

Plaintiff's evidence did not disclose that she was contributorily negligent as a matter of law in walking along the right-hand side of a highway, but the issue of contributory negligence should have been submitted to the jury, where it tended to show that plaintiff was walking in a westerly direction along a dirt pathway beyond the curb on the north side of a street when she was confronted with an automobile blocking a driveway which traversed the path, plaintiff thereupon left the path and walked along a gutter between the driveway and the portion of the street upon which vehicles ordinarily traveled, plaintiff was never more than 12 inches from the curb of the street, and just before she reached the curb on the western side of the driveway, she was struck by defendant's automobile.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from decision of the Court of Appeals, opinion by *Judge Arnold (Judge*

Martin concurring and *Judge Clark* dissenting) affirming the trial judge's entry of a directed verdict for defendant at the 12 November Session of ORANGE Superior Court.

Plaintiff instituted this action to recover for personal injuries which she alleged were proximately caused when she was struck by an automobile negligently operated by defendant. Defendant denied negligence on his part and alleged that plaintiff's negligence was the sole cause or a contributing proximate cause of her injuries.

Plaintiff offered evidence which tended to show the following:

Plaintiff, Janie M. Clark, testified that she left her place of employment in Chapel Hill at about 5:00 p.m. on 14 December 1972. After describing her course of travel until she crossed from the south side of Rosemary Street to the north side of Rosemary Street plaintiff testified:

> . . . I didn't have any trouble at all crossing the street.
>
> After I crossed over I stepped up on the curb; there is a little pathway, not a sidewalk, and I walked to the end of that. I walked all the way down that little path until I got to the driveway at the SHACK. . . .
>
> The path I walked in was dirt . . . .
>
> When I came to the first driveway entrance into the SHACK there was a car in the mouth of the drive. It lacked about two (2) feet being at the mouth of the driveway, but it was close enough that I had to walk around the car. I got off. There is a lip of about two (2) feet from the curb and I got off on that lip. I wasn't more than a foot from the curb and I got off on that lip. I wasn't more than a foot from the curb or three inches maybe . . . .
>
> * * *
>
> . . . I was walking in the gutter, I was three inches to one foot to the left. The curb was to my right.
>
> * * *
>
> Before making my move off of the curb I looked for cars coming east heading west, and I didn't see one. . . .

She further testified that something hit her just before she reached the other side of the driveway.

Officer Ronald Moses of the Chapel Hill Police Department, testified that he investigated the accident shortly after it occurred. He found tire marks directly behind defendant's car leading up to the place where defendant's car was sitting. The tiremarks began seventy-eight feet three inches east of the place where the car was sitting. They began at about the center of the westbound lane and veered right in a northerly direction toward the north curb of Rosemary Street. He further testified that Rosemary Street is thirty-eight feet inches wide at the place of the accident and that the gutter portion adjacent to the curb is two feet wide.

Glenn M. Sparrow testified that at around 5:30 p.m. on 14 December 1972 he came to the scene of the accident and observed Mrs. Clark lying in the entrance to a driveway leading to a parking lot. He stated:

> . . . Mrs. Clark was in the entrance to the western driveway; her feet was towards the entrance to it, but they was right at what we call the gutter, right on the edge of the gutter. Her head was out into the street. She was lying in a north-south or more northwest, southeast direction, at an angle. Her head was southwest and her feet were northeast. She was about a foot and a half or so from the curb . . . .
>
> * * *
>
> . . . I saw Mr. Bodycombe and talked to him. I asked Mr. Bodycombe what had happened and he just replied he didn't see her and I asked him was there anything I could do for him, because I knew him also, and he told me that he was carrying his maid home and didn't think there was anything I could do for him.

Plaintiff also offered the adverse examination of defendant Abraham Bodycombe by which the defendant testifed that on 14 December 1972 at about 5:15 p.m. he was operating his motor vehicle in a westerly direction on Rosemary Street in the Town of Chapel Hill. It was raining and visibility was somewhat limited. He had his lights on low beam and his windshield wipers were operating. He was engaged in a conversation with Mrs. Geneva Douglas who was the only other occupant of his automobile. Mr. Bodycombe, in part, testified:

> I did not see Mrs. Clark. I saw a shadow. . . . I could see a shadow dodging cars. This was to my left. On the

south side (of Rosemary Street) (parentheses added for clarification).

* * *

I wear glasses and have done so probably fifty (50) years. Before December 14, 1972, I had cataracts removed. . . . My glasses correct me to twenty-four. My peripheral vision is limited; . . . and always will be for the rest of my life. Seeing directly ahead is an advantage in driving I don't want anything other than straight ahead. When I drive I pay no attention to anything on either side of me. . . .

. . . I was looking straight at it and it was a shadow, wasn't a person; everything was all mulky, mulky, with glaring lights ahead. . . . I slammed on the brakes when I saw the shadow and just simply kept gliding the car just in the right direction. . . . I just barely hit the person, and she spiraled easily down to the ground without a bump of any kind. . . .

* * *

. . . I never veered either to the right or run off into the curb or to the left and run across the center. . . .

Plaintiff offered other witnesses whose testimony was either cumulative or related to damages.

Defendant offered the testimony of Geneva Douglas, the person in his automobile at the time of the accident, who stated that the automobile driven by defendant "did not strike or hit anything."

Judge Godwin allowed defendant's motion for a directed verdict and plaintiff appealed.

Joseph I. Moore and James R. Farlow, by James R. Farlow, for plaintiff appellant.

Haywood, Denny & Miller, by George W. Miller, Jr., for defendant appellee.

BRANCH, Justice.

The single question presented by this appeal is whether the trial judge erred by granting defendant's motion for a directed verdict. The Court of Appeals sustained the judgment

granting a directed verdict on the premises that: (1) plaintiff failed to show actionable negligence on the part of the defendant and (2) that plaintiff had established her own contributory negligence as a matter of law.

When a defendant moves for a directed verdict pursuant to Rule 50(a), the trial judge must take plaintiff's evidence to be true, consider all the evidence in the light most favorable to plaintiff and give him the benefit of every reasonable inference which may be legitimately drawn therefrom. The motion should be granted only when the evidence is insufficient to support a verdict. *Summey v. Cauthen,* 283 N.C. 640, 197 S.E. 2d 549; *Rayfield v. Clark,* 283 N.C. 362, 196 S.E. 2d 197; *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297.

In Blashfield Automobile Law and Practice Vol. II § 103.4 it is stated:

> The standard of care to be exercised by a motorist is precisely the same regardless of mental or physical ability. Accordingly, physical infirmities, such as those of old age, defective hearing, and defective eyesight are weighed against a driver in case of accident, and a motorist who is partially deaf is required to hear at his peril that which a normal driver would have heard. . . .
>
> . . . [T]he conduct of the handicapped individual must be reasonable in the light of his knowledge of his infirmity which is treated merely as one of the circumstances under which he acts. . . . In theory the standard remains the same, but it is sufficiently flexible to take his physical defects into account.

W. Prosser, Handbook of the Law of Torts, § 32 at 152 (4th ed. 1971).

[1] Here there was ample evidence from which the jury could infer that defendant negligently failed to keep a proper lookout and negligently failed to keep his vehicle under control thereby proximately causing plaintiff's injuries. We, therefore, hold that the evidence in this case was sufficient to permit the jury to decide whether defendant was guilty of actionable negligence.

[2] There remains the question of whether the Court of Appeals properly sustained the trial judge's judgment directing a verdict for defendant on the premise that plaintiff was contributorily negligent as a matter of law. In this connection,

defendant argues that the directed verdict should be sustained because there is evidence that at the time of the accident that plaintiff was negligently *crossing* Rosemary Street at a point not within a marked crosswalk, in violation of G.S. 20-174(a). Taken in the light most favorable to plaintiff the evidence shows no violation of G.S. 20-174(a) at the time of the accident. When considered in the light most *unfavorable* to the plaintiff the evidence would support an inference that she was injured as she crossed Rosemary Street at a point not within a marked crosswalk. Such opposing inferences present a question for the jury. *Bowen v. Gardner,* 275 N.C. 363, 168 S.E. 2d 47; *Stewart v. Gallimore,* 265 N.C. 696, 144 S.E. 2d 862.

[4] The only remaining ground to support the directed verdict is that plaintiff violated the provisions of G.S. 20-174(d) and that such negligence was a proximate cause of her injuries.

At the time of this accident G.S. 20-174(d) provided:

> (d) It shall be unlawful for pedestrians to walk along the traveled portion of any highway except on the extreme left-hand side thereof, and such pedestrians shall yield the right-of-way to approaching traffic.

We note, in passing, that G.S. 20-174(d) was rewritten by the 1973 General Assembly by Chapter 1330 § 33 of the Session Laws effective 1 January 1975.

The general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge. *Bowen v. Constructors Equipment Rental Co.,* 283 N.C. 395, 196 S.E. 2d 789; *Jernigan v. Atlantic Coast Line R. Co.,* 275 N.C. 277, 167 S.E. 2d 269; *Bowen v. Gardner, supra; McWilliams v. Parham,* 273 N.C. 592, 160 S.E. 2d 692; *Galloway v. Hartman,* 271 N.C. 372, 156 S.E. 2d 727.

[3] Ordinarily one who violates the provisions of safety statutes is guilty of negligence per se absent a specific legislative exception. *Poultry Co. v. Thomas,* 289 N.C. 7, 220 S.E. 2d 536; *Stone v. Texas Co.,* 180 N.C. 546, 105 S.E. 425. No specific legislative exception appears in this safety statute. However, our

Court has consistently held that violations of G.S. 20-174 do not constitute negligence per se. *Simpson v. Wood,* 260 N.C. 157, 132 S.E. 2d 369; *Gamble v. Sears,* 252 N.C. 706, 114 S.E. 2d 677; *Moore v. Bezalla,* 241 N.C. 190, 184 S.E. 2d 817; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649; *Lewis v. Watson,* 229 N.C. 20, 47 S.E. 2d 484. In so holding the Court has often pointed to Subsection (e) which provides that "Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, ... "

Because of their factual similarity to instant case, we will review two of the above-cited cases.

In the case of *Lewis v. Watson, supra,* plaintiff's intestate was pushing a handcart on the right-hand side of the highway in violation of G.S. 20-174(d) when he was struck from the rear by defendant's vehicle. The usual issues of negligence were submitted to the jury and the jury answered the first issue "No." This Court, in an opinion by Justice Ervin, granted a new trial for errors in the charge but in a dictum statement observed:

> It follows that it was the duty of the plaintiff's intestate to push his handcart along the extreme left-hand side of the highway facing the automobile traffic coming on that side when he elected to travel on foot on the highway. G.S., 20-174(d). The fact, however, that he was proceeding unlawfully on the wrong side of the road at the time he was stricken did not render him guilty of contributory negligence as a matter of law upon the record in the case at bar. Both the common law and the statute provide that notwithstanding the provisions of G.S., 20-174(d), "every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway." G.S., 20-174(e); *Arnold v. Owens,* 78 F. (2d), 495. . . .

Our Court considered the same statute in the case of *Simpson v. Wood, supra.* There the plaintiff was injured while walking on the right-hand side of the highway several feet from the paved portion upon which vehicles traveled. He was struck from the rear by the automobile operated by defendant. The case was submitted to the jury and issues of negligence and contributory negligence were answered in the affirmative. Plaintiff appealed. The Court found error in the trial judge's instruc-

tions to the effect that plaintiff did not violate the provisions of G.S. 20-174(d) when he walked on the shoulder and off the paved portion over which vehicles traveled. Nevertheless the Court affirmed on the ground that the instruction was favorable to the plaintiff. In so holding, Chief Justice Denny, writing for the Court, stated:

> G.S. 20-174(d) makes it unlawful to walk along the traveled portion of any highway except on the extreme left-hand side thereof. It follows, therefore, that it is unlawful to walk on the right-hand shoulder of a highway along the traveled portion thereof. In view of our decisions, however, interpreting this statute, it is to be left to the jury to consider a violation of the statute as evidence of negligence along with other evidence in determining whether or not the plaintiff contributed to his own injury and was, therefore, guilty of contributory negligence. *Bank v. Phillips,* 236 N.C. 470, 73 S.E. 2d 323; *Simpson v. Curry,* 237 N.C. 260, 74 S.E. 2d 649; *Moore v. Bezalla,* 241 N.C. 190, 84 S.E. 2d 817; 4 A.L.R. 2d Anno: Pedestrian's Noncompliance With Statute, pages 1253 through 1264.

These holdings are consistent with our rule that when a defendant pleads contributory negligence as bar to plaintiff's recovery, he has the burden of proving by the greater weight of the evidence that plaintiff's negligence was one of the proximate causes of his injury or damages. *Poultry Co. v. Thomas, supra; Warren v. Lewis,* 273 N.C. 457, 160 S.E. 2d 305; *Jones v. Holt,* 268 N.C. 381, 150 S.E. 2d 759; *Owens v. Kelly,* 240 N.C. 770, 84 S.E. 2d 163. Further, the cases are also consistent with the well-recognized rule that ordinarily it is for the jury to determine from the attendant circumstances what proximately caused an injury. *White v. Mote,* 270 N.C. 544, 155 S.E. 2d 75; *Barefoot v. Joyner,* 270 N.C. 388, 154 S.E. 2d 543; *Farmers Oil Co. v. Miller,* 264 N.C. 101, 141 S.E. 2d 41.

[4] Taking plaintiff's evidence as true, as we must upon consideration of a motion for a directed verdict, it appears that she was proceeding along a dirt pathway beyond the curb on the north side of Rosemary Street when she was confronted with an automobile blocking a driveway which traversed the path. Thereupon, plaintiff left the dirt path and walked along a gutter between the driveway and the portion of Rosemary Street upon which vehicles ordinarily traveled. She was never more

than twelve inches from the north curb of Rosemary Street and just before she reached the curb on the western side of the driveway, she was struck by defendant's automobile.

This evidence permits diverse inferences as to whether plaintiff acted in a reasonable manner and whether her acts proximately caused her injuries. Thus, the issue of contributory negligence should have been submitted to the jury.

The Court of Appeals erroneously affirmed the trial judge's order directing a verdict for defendant. Therefore, the decision of the Court of Appeals is

Reversed and remanded.

RICHARD G. PRUITT, EMPLOYEE-PLAINTIFF v. KNIGHT PUBLISHING COMPANY, EMPLOYER-DEFENDANT AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. 110

(Filed 29 January 1976)

1. **Master and Servant § 94— workmen's compensation — agreement between employer and employee — filing with Industrial Commission**

G.S. 97-82 provides that an employer and an injured employee may reach an agreement in regard to compensation under the Workmen's Compensation Act, execute a memorandum of the agreement in the form prescribed by the Industrial Commission, and file it with the Commission for approval.

2. **Master and Servant § 94— workmen's compensation — agreement for compensation approved by Industrial Commission — binding effect**

An agreement for the payment of compensation, when approved by the Industrial Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from or an award of the Commission affirmed upon appeal. G.S. 97-17.

3. **Master and Servant § 94— workmen's compensation — compensation agreement between employer and employee — binding effect**

Plaintiff was bound by a written agreement on I. C. Form 26 dated 6 June 1974, and approved by the Commission, wherein defendants agreed to pay and plaintiff agreed to accept compensation based on a 10 percent permanent partial disability of his back, since there was no evidence in the record suggesting error due to fraud, misrepresentation, undue influence or mutual mistake.

PURSUANT to G.S. 7A-30(2) defendants appeal from decision of the Court of Appeals, 27 N.C. App. 254, 218 S.E.

2d 876 (1975), reversing the order and award of the North Carolina Industrial Commission entered 25 February 1975.

For several years prior to 30 November 1972 plaintiff Richard Pruitt was employed by defendant Knight Publishing Company in its printing plant. Plaintiff's job required him to handle heavy printing plates, and on 30 Novembber 1972 he sustained an accidental injury to his back under compensable circumstances.

All jurisdictional facts were stipulated. Defendants admitted liability under the North Carolina Workmen's Compensation Act and paid plaintiff compensation at the rate of $56.00 per week, the maximum at that time, from 1 December 1972 until 1 December 1973 during which time he was temporarily totally disabled as a result of the injury to his back.

During the course of medical treatment, plaintiff was referred to Dr. J. Leonard Goldner at Duke University Medical Center for examination, treatment, and evaluation. The record reveals that Dr. Goldner had treated plaintiff for a back injury sustained in an automobile accident in 1961 and had performed a spinal fusion on plaintiff's back in 1963. The prior injury did not arise while plaintiff was serving in the Army or Navy of the United States and did not occur under compensable circumstances.

Dr. Goldner was of the opinion that plaintiff's second injury at Knight Publishing Company aggravated the preexisting condition in plaintiff's back so that on 10 May 1974 plaintiff had a 35 percent permanent partial disability of the spine with 25 percent attributable to the first injury and lumbar fusion and 10 percent attributable to aggravation of the preexisting condition by the subsequent injury at defendant's printing plant.

On or about 6 June 1974 plaintiff and defendants entered into a written agreement on Industrial Commission Form 26 whereby the defendant carrier (Travelers Insurance Company) agreed to pay plaintiff compensation at the lawful rate of $56.00 per week for a 10 percent permanent partial disability of the spine and plaintiff agreed to accept same. The agreement was filed with and approved by the Industrial Commission, and on 11 June 1974 the Commission entered its award based thereon.

On 17 June 1974 plaintiff, having employed counsel, filed with the Industrial Commission an "Application for Review of the Award," contending that he was entitled to compensation for a 35 percent, rather than a 10 percent, permanent partial disability of his back. The Commission thereupon set the matter for hearing in Durham on 1 November 1974 before Deputy Commissioner Denson for the purpose of taking the testimony of Dr. J. Leonard Goldner. Dr. Goldner was unable to be present on the hearing date, and the parties, through their counsel of record, stipulated that Dr. Goldner, if present, would testify in accordance with his medical report dated 18 February 1974, his orthopedic note dated 10 May 1974, and his 12 August 1974 response to a letter from plaintiff's counsel dated 9 July 1974. By stipulation, these writings were received in evidence to be treated as Dr. Goldner's testimony.

Based upon Dr. Goldner's stipulated testimony, and other stipulations not pertinent to the controversy, Deputy Commissioner Denson found as a fact and concluded as a matter of law that there must be "a causal relationship between the injury and the disability and that relationship has been established by Dr. Goldner at a 10% disability of the back." From an award compensating him for only 10 percent permanent partial disability of the back, plaintiff appealed to the Full Commission where the opinion and award of the deputy commissioner was affirmed. Plaintiff appealed to the Court of Appeals and that court reversed, holding that plaintiff was entitled to compensation for a 35 percent permanent partial disability of his back. Clark, J., dissented, and defendants thereupon appealed to the Supreme Court as of right, assigning errors noted in the opinion.

Spears, Spears, Barnes, Baker & Boles by Alexander H. Barnes, attorneys for defendant appellants.

Palmer, Pittman & Campbell, P.A., by Bryan W. Pittman, attorneys for plaintiff appellee.

HUSKINS, Justice.

We note at the outset that G.S. 97-33, pertaining to the prorating of permanent disability between injuries compensable under G.S. 97-31 and injuries sustained in military service or in another employment, is not applicable to this case. That statute is designed to prevent double recoveries. See *Schrum v. Upholstering Co.*, 214 N.C. 353, 199 S.E. 385 (1938). Likewise,

G.S. 97-34 and G.S. 97-35 are inapplicable here. Application of those statutes is restricted to those instances where the employee (1) receives an injury for which compensation is payable while he is still receiving or entitled to compensation for a previous injury in the same employment, or (2) receives a permanent injury specified in G.S. 97-31 after having sustained another permanent injury in the same employment. Here, plaintiff's earlier back injury arose out of a noncompensable automobile accident, separate and apart from any employment whatever. We therefore put aside all questions raised concerning these statutes.

This appeal presents two determinative questions:

1. Is plaintiff bound by the written agreement on I. C. Form 26 dated 6 June 1974, and approved by the Commission, wherein defendants agreed to pay and plaintiff agreed to accept compensation based on a 10 percent partial disability of his back?

2. Where an employee is paid compensation for a period of temporary total disability caused by a compensable injury which materially aggravated a preexisting 25 percent permanent partial loss of use of the back so that the employee had a 35 percent permanent partial loss of use of the back at the end of the healing period, is the employee entitled to compensation under G.S. 97-31(23) for 10 percent or 35 percent permanent partial loss of use of the back?

The Court of Appeals did not decide the first question under the mistaken notion that all parties had stipulated before the hearing commissioner that "[t]he sole question for determination in this case is whether allocation of the disability to plaintiff's back as rated by Dr. Goldner should be prorated, or whether the defendants should bear the entire responsibility for the disability." The quoted language follows the last stipulation to which the parties agreed but is not a part of it. It is the conclusion reached by Deputy Commissioner Denson as to the question involved in this case following the hearing conducted before her in Durham on 1 November 1974. The inadvertence is understandable in view of the proximity of the quoted language to the stipulations.

We now consider the questions in the order listed.

[1] G.S. 97-82 provides that an employer and an injured employee may reach an agreement in regard to compensation under

the Workmen's Compensation Act, execute a memorandum of the agreement in the form prescribed by the Industrial Commission, and file it with the Commission for approval. "If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified." In approving a settlement agreement the Industrial Commission acts in a judicial capacity and the settlement as approved becomes an award enforceable, if necessary, by a court decree. *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E. 2d 777 (1953). The wisdom of the statutory provision authorizing voluntary agreements in the manner prescribed by the Commission has been demonstrated by the fact that, through the years, more than 95 percent of all claims for compensation based on industrial injuries have been disposed of by agreements executed in conformity with the statute. *See Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956).

G.S. 97-17 provides:

> "Nothing herein contained shall be construed so as to prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article. A copy of such settlement agreement shall be filed by employer with and approved by the Industrial Commission: Provided, however, that no party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement."

[2] In interpreting and applying G.S. 97-17 and G.S. 97-82, it has been uniformly held that an agreement for the payment of compensation, when approved by the Commission, is as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal. *Tabron v. Farms, Inc.*, 269 N.C. 393, 152 S.E. 2d 533 (1967); *White v. Boat Corp.*, 261 N.C. 495, 135 S.E. 2d 216 (1964); *Tucker v. Lowdermilk*, 233 N.C. 185, 63 S.E. 2d 109 (1951). The Commission's approval of settlement agreements is as conclusive as if made upon a determination of facts in an adversary proceeding. *Stanley v. Brown*, 261

N.C. 243, 134 S.E. 2d 321 (1964). The unambiguous language of G.S. 97-17 prohibits all parties to any agreement for compensation, when approved by the Commission, to deny the truth of the matters therein set forth unless it is made to appear to the satisfaction of the Commission "that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement." *Neal v. Clary,* 259 N.C. 163, 130 S.E. 2d 39 (1963).

[3] On the record before us the first question must be answered in the affirmative. Plaintiff is bound by the Commission-approved written agreement on I. C. Form 26 dated 6 June 1974 where defendants agreed to pay and plaintiff agreed to accept compensation based on a 10 percent permanent partial disability of his back. There is no evidence in the record suggesting error due to fraud, misrepresentation, undue influence or mutual mistake. In his application for review, plaintiff merely states that the agreement "should be disapproved, set aside, voided, or modified." He requested the Commission to reconsider the evidence, receive further evidence, rehear the parties and amend the award on the grounds that (1) at the time plaintiff signed the agreement to accept compensation based on a 10 percent permanent partial disability of his back he was without legal counsel; (2) the parties were mutually mistaken about the meaning of Dr. Goldner's medical reports; (3) plaintiff believed Dr. Goldner would be offended if he declined to agree to the doctor's 10 percent disability rating; (4) plaintiff was extremely reluctant to sign the agreement, did not have a copy of Dr. Goldner's medical report and was induced by defendants to believe that Dr. Goldner had rated his compensable disability at only 10 percent; (5) prior to his injury on 30 November 1972 plaintiff had no incapacity to work and earn wages and as a result of said injury "is no longer capable of performing the heavy physical work and is now one-hundred (100%) percent unable to work at his trade," and (6) plaintiff has not received payment based on the 10 percent disability rating and does not intend to accept such payment until further action by the Commission. Only ground No. (4) has any tendency to suggest error due to fraud, misrepresentation, undue influence or mutual mistake, and there is no evidence in the record—none whatever—to support that allegation.

In fact, the stipulated testimony of Dr. Goldner constitutes *all* the evidence in the record before us. Absent evidence from

which the Commission may find fraud, misrepresentation, undue influence or mutual mistake in the execution of the agreement, all parties are bound by the written, Commission-approved agreement to pay and accept compensation based on a 10 percent permanent partial loss of use of the back.

Since the approved agreement is binding on the parties unless and until set aside by the Commission, we neither reach nor decide the other interesting question posed.

For the reasons stated, the decision of the Court of Appeals is reversed. The case will be remanded by that court to the North Carolina Industrial Commission for disposition in accordance with this opinion. If plaintiff desires to attack the agreement for fraud, misrepresentation, undue influence, or mutual mistake, and has evidence to support such attack, he may make application in due time for a further hearing for that purpose. In such event, the Industrial Commission shall hear the evidence offered by the parties, find the facts with respect thereto, and upon such findings determine whether the agreement was erroneously executed due to fraud, misrepresentation, undue influence or mutual mistake. If such error is found, the Commission may set aside the agreement, G.S. 97-17, and determine whether a further award is justified and, if so, the amount thereof. If not, the case is closed, subject to be reopened for the reasons stated in G.S. 97-47, but not otherwise.

Reversed and remanded.

CLAUDE WHITAKER v. HERBERT R. EARNHARDT

No. 73

(Filed 29 January 1976)

1. **Appeal and Error § 26; Rules of Civil Procedure § 52— failure to except to findings — sufficiency of evidence to support findings — appellate review**

The failure to except to the findings of the trial judge does not necessarily preclude appellate review on the question of whether the evidence supported the findings of fact. G.S. 1A-1, Rule 52(c).

2. **Rules of Civil Procedure § 50— nonjury trial — motion for judgment n.o.v.**

A motion for judgment n.o.v. is inappropriate in a case tried by the court without a jury. G.S. 1A-1, Rule 50(b).

3. Rules of Civil Procedure § 41— motion to dismiss

The lodging of a motion to dismiss under Rule 41(b) permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff may have made out a *prima facie* case which would have repelled the motion for nonsuit under the former practice.

4. Rules of Civil Procedure § 41— motion to dismiss — judgment after all evidence

In case of a motion to dismiss, it is the better practice for the trial judge to decline to render judgment until all the evidence is in except in the clearest cases.

5. Animals § 3— escape by cattle — damage to crops — negligence

The evidence was sufficient to support the trial court's determination that defendant was negligent in failing to keep his fence in a state of repair so as to prevent cattle grazing on his land from escaping and damaging plaintiff's soybean crop where it tended to show that defendant used land next to plaintiff's soybean crop for grazing cattle which were the only cattle kept in this area, the 1600-foot common boundary between plaintiff's crop and defendant's land was separated by a cedar post and barbed wire fence that was in a poor state of repair, plaintiff on numerous occasions told defendant the fence was incapable of containing defendant's cattle, in July 1973 plaintiff inspected his soybean crop and found it undamaged, and a subsequent inspection in August revealed that cattle had eaten and trampled two acres of plaintiff's soybean crop.

6. Damages § 4— damages to crops — market value — deductions for expenses

The trial court erred in awarding as damages for two acres of growing soybeans destroyed by cattle the local market price of the expected yield of the two acres without deducting expenses which would have been required to mature, care for and market the crop.

APPEAL by defendant pursuant to G.S. 7A-30(2) from decision of the Court of Appeals which affirmed judgment entered by *Grant, District Judge,* in ROWAN District Court on 23 January 1975.

Plaintiff instituted this action seeking damages for destruction of his soybean crop by cattle which he alleged defendant negligently allowed to run at large. His damaged crop grew on land located near Mahaley Road in Rowan County.

Defendant's answer admitted ownership of land on Mahaley Road in Rowan County, and that he kept cattle on this land at various times. His answer otherwise amounted to a general denial of plaintiff's allegations.

The case was heard by Judge Grant sitting without a jury. At the close of plaintiff's evidence, defendant moved for

a directed verdict which was denied. Defendant then rested without offering evidence and again moved for a directed verdict which was denied. The trial judge found facts, stated his conclusions of law and entered judgment for plaintiff in the amount of $420. Defendant then moved for judgment n.o.v. which was denied.

The Court of Appeals, in an opinion by Chief Judge Brock, concurred in by Judge Morris, affirmed. Judge Hedrick dissented on the question of damages.

Robert M. Davis for defendant appellant.

No counsel contra.

BRANCH, Justice.

Defendant did not except to the trial judge's findings of fact or contend by specific assignment of error that the evidence did not support the findings of the trial judge. The Court of Appeals affirmed the judgment of the trial judge on the ground that his findings were unchallenged. In so ruling the Court of Appeals relied upon the following rule of law:

> Defendant has not taken exception to any finding of fact made by the trial judge. In the absence of proper exceptions to the findings of fact by the trial judge, the appeal presents for review only the question whether the findings of fact support the conclusions of law and the entry of the judgment. 1 Strong, N. C. Index 2d Appeal and Error § 26 (1967). In the absence of proper exceptions to the findings of fact, exceptions to the admission of evidence, as well as exceptions to rulings of the judge in denying defendant's motions to dismiss, are ineffectual. . . .

We are advertent to the decisions of this Court which adopt and approve this rule. See *Nationwide Homes of Raleigh, Inc. v. First Citizens Bank and Trust Co.*, 267 N.C. 528, 148 S.E. 2d 693; *Keeter v. Lake Lure*, 264 N.C. 252, 141 S.E. 2d 634; *Taney v. Brown*, 262 N.C. 438, 137 S.E. 2d 827; *Burnsville v. Boone*, 231 N.C. 577, 58 S.E. 2d 351. However, the rule seems to be in direct conflict with the provisions of G.S. 1A-1, Rule 52(c) which provides:

> When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency

> of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

G.S. 1A-1, Rule 52(c) became effective on 1 January 1970. According to our research the last time this Court considered and applied the rule relied upon by the Court of Appeals was in the case of *Nationwide Homes of Raleigh, Inc. v. First Citizens Bank and Trust Co., supra,* which was filed on 16 June 1966. This conflict poses a question of first impression for this Court. Our Rule 52(c) is nearly identical to the Federal Rule 52(b) and we, therefore, turn to the Federal Courts' interpretation of their rule for guidance.

The Ninth Circuit Court of Appeals considered a similar question in the case of *Monaghan v. Hill,* 140 F. 2d 31, and there Stephens, J., speaking for the Court, stated:

> Appellee moves to dismiss the appeal or to affirm the order of the District Court on the ground that appellant made no objections and took no exceptions to the order or to the findings of fact and conclusions of law of the trial court, submitted no proposed findings and conclusions in lieu of those adopted, and requested no amendments to the same. The motion is denied. Appellant outlined her objections in her statement of points on appeal. That she made no prior mention of them is immaterial under the provisions of Rule 52 of Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c: (2) "In all actions tried upon the facts without a jury, * * *. Requests for findings are not necessary for purposes of review. * * *" (b) "* * * When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment." . . .

Accord: *Bingham Pump Co., Inc. v. Edwards,* 118 F. 2d 338 (9th Cir. 1941) cert. denied 314 U.S. 656, 86 L.Ed. 525, 62 S.Ct. 107; *Hill v. Ohio Casualty Ins. Co.,* 104 F. 2d 695 (6th

Cir. 1939); 5A Moore's Federal Pracetice ¶ 52.10; 9 Wright & Miller, Federal Practice and Procedure § 2581.

[1] The plain language of our Rule 52(c) and the interpretation placed upon their rule by the Federal Courts leads us to conclude that defendant's failure to except to the findings of the trial judge did not necessarily preclude appellate review on the question of whether the evidence supported the findings of fact. Nevertheless, it was incumbent upon appellant to assign error so as to outline his objections on appeal. Other than assignments of error directed to rulings of the trial court on admission of evidence, defendant's only assignments of error were that: (1) the court erred in denying defendant's motion for a directed verdict at the close of plaintiff's evidence, (2) the court erred in denying defendant's motion for a judgment for defendant and for a directed verdict at the end of all the evidence, (3) the action of the court in denying defendant's motion for a dismissal and (4) the action of the trial court in denying defendant's motion for a judgment n.o.v.

[2] It is obvious that defendant's motion for judgment n.o.v. was feckless. The motion for judgment n.o.v. must be preceded by a motion for a directed verdict which is improper in non-jury trials. G.S. 1A-1, Rule 50(b). Obviously the motion for judgment n.o.v. is inappropriate when addressed to the trier of fact.

It is now well established that in a civil action tried without a jury, the former motion for nonsuit has been replaced by the motion for dismissal. G.S. 1A-1, Rule 41(b). A motion for a directed verdict is appropriate in cases tried by jury. G.S. 1A-1, Rule 50; *Cutts v. Casey,* 278 N.C. 390, 180 S.E. 2d 297. However, we will treat defendant's motions for directed verdicts as motions for dismissal.

[3, 4] The motion to dismiss differs from the former motion for judgment as for nonsuit in that the lodging of a motion to dismiss under Rule 41(b) permits the trial judge to weigh the evidence, find facts against plaintiff and sustain defendant's motion at the conclusion of plaintiff's evidence even though plaintiff may have made out a prima facie case which would have repelled the motion for nonsuit under the former practice. In case of a motion to dismiss, the trial judge may decline to render judgment until all the evidence is in. In our view, this is the better practice "except in the clearest cases."

Helms v. Rea, 282 N.C. 610, 194 S.E. 2d 1; Phillips' 1970 Supplement to 1 McIntosh North Carolina Practice and Procedure § 1375; see also 5 Moore's Federal Practice 2d Ed. ¶ 41.13[4].

In the case before us, the motion to dismiss was of little significance since defendant offered no evidence. At this point the trial judge was required to find facts, state separately his conclusions of law and enter judgment. G.S. 1A-1, Rule 52(a)(1). *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E. 2d 149. Defendant's notice of appeal and exception to the entry of this judgment presents the face of the record for review including the question of whether the facts found support the judgment and whether the judgment is regular in form. *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52; *Sternberger v. Tannenbaum*, 273 N.C. 658, 161 S.E. 2d 116; *London v. London*, 271 N.C. 568, 157 S.E. 2d 90. When the trial judge sits as the trier of facts, his judgment will not be disturbed on the theory that the evidence did not support his findings of fact if there be any evidence to support the judgment.

[5] Plaintiff introduced competent evidence which tended to show: Plaintiff leased fifteen acres of land from L. H. Foster and during the summer of 1973 all fifteen acres were planted with soybeans. Defendant owned a tract of land adjacent to plaintiff's field. Defendant used this land to graze some of his cattle which were the only cattle kept in this area. The 1,600-foot common boundary was separated by a poor grade cedar post and barbed wire fence that was in a poor state of repair. The barbed wire was old and rusty. Plaintiff, on numerous occasions, told defendant that the fence was incapable of containing defendant's cattle. In July 1973, plaintiff inspected his soybean crop and found it undamaged. A subsequent inspection in August revealed that cattle and calves had eaten and trampled approximately two acres of plaintiff's soybean crop. When plaintiff harvested his soybeans in November 1973, he unsuccessfully attempted to harvest soybeans from the damaged two acres, but the other 13 acres yielded 40 bushels per acre. On the day the soybeans were harvested, the market price of soybeans was $5.25 per bushel.

In our opinion this evidence is sufficient to support the trial judge's conclusion "[t]hat the defendant was negligent in that he failed to keep his fence in a state of repair that would prohibit the cattle grazing on his land from escaping from his land and roaming at large." Therefore, the Court of Appeals

correctly affirmed the trial judge's determination as to actionable negligence.

[6] We nevertheless find merit in Judge Hedrick's dissent. Defendant's exception to entry of judgment also presents the question of whether the facts found will support the trial judge's legal conclusion "that as a result of defendant's negligence the plaintiff was damaged in the amount of $420." *Fishing Pier v. Town of Carolina Beach,* 274 N.C. 362, 163 S.E. 2d 363; *Taney v. Brown,* 262 N.C. 438, 137 S.E. 2d 827; *Schloss v. Jamison,* 258 N.C. 271, 128 S.E. 2d 590.

There is a paucity of North Carolina authority on the question of the measure of damages in cases involving injury to or destruction of growing crops. The North Carolina cases which have considered the measure of damages to growing crops are sparse and rather uninformative. In the early case of *Denby v. Hairston,* 8 N.C. 315, this Court approved an instruction that plaintiff was entitled to recover from defendant-trespasser the highest price the crops were worth. This case did not give any indication as to the time in which the value would be ascertained. The case of *Sanderlin v. Shaw,* 51 N.C. 225, stands for the proposition that evidence may be admitted to show what the price of growing crops would have been at maturity. The Court, in *Roberts v. Cole,* 82 N.C. 292, allowed recovery for such sum as would cover "the injury done to the crops before the plaintiff knew of the irruption of the hogs and had time to drive them out." In the case of *Dixon v. Grand Lodge,* 174 N.C. 193, 93 S.E. 461, plaintiff sought damages for destruction of crops by defendant's trespassing animals. There the Court very briefly stated: "The court properly charged that the damages, if the jury found that damages were sustained by the negligence of defendant, were the reasonable value of the crop destroyed."

These North Carolina cases are generally consistent with the widely accepted rule that the measure of damages for destruction of crops is the value of the crop at the time and place of destruction, and by the same token, the measure for crops injured but not totally destroyed is the diminution in the value of the crop at the time and place of injury. Dobbs Handbook of the Law of Remedies § 5.2 at 325; *Farm Bureau Lumber Company v. McMillan,* 211 Ark. 951; 203 S.W. 2d 398; *Brous v. Wabash R. Co.,* 160 Iowa 701, 142 N.W. 416; *Beville v. Allen,* 28 Ariz. 397, 237 P. 184. See Annotation: Measure of Damages

for Injury to and Destruction of Growing Crops, 175 A.L.R. 159. However, ordinary or annual growing crops often have no ascertainable market value in the field. A practical method for ascertaining damages to growing crops when injured or destroyed in the field is stated in Dobbs Remedies CROPS § 5.2, page 325 as follows:

> . . . Absent specific testimony as to the value of the crop in the field, courts generally make no practical use of the stated measure of damage. Instead they usually award the plaintiff the market value of the lost portion of his crop, as measured at maturity of the crop, less the cost he would have had in harvesting and marketing the lost portion. Under this formula, the plaintiff must prove not only how much was destroyed and its market value at maturity, but also what his probable cost of harvesting and marketing would have been as to the destroyed or damages portion. . . .

A similar rule is stated in 21 Am. Jur. 2d CROPS § 76, page 663, to wit:

> It is the absence of market value generally which necessitates the adoption of some method of calculating the reasonable actual value of a growing crop in the field. The most widely accepted method of arriving at the value of a growing crop at the time of its destruction, assuming that it had no market value, is: (1) to estimate the probable yield had the crop not been destroyed; (2) calculate the value of that yield in the market; and (3) deduct the value and amount of labor and expense which subsequently to, and but for, the destruction would have been required to mature, care for, and market the crop. . . . *Teller v. Bay & R. Dredging Co.*, 151 Cal. 209, 90 P. 942; *Eppling v. Seuntjens*, 254 Iowa 396, 117 N.W. 2d 820; *Cities Service Gas Co. v. Christian* (Okla.) 340 P. 2d 929; *Franklin Drilling Co. v. Jackson*, 202 Okla. 687, 217 P. 2d 816, 19 A.L.R. 2d 1015; *Berg v. Yakima Valley Canal Co.*, 83 Wash. 451, 145 P. 619.

Here there was no testimony as to the value of the growing crop at the time and place of its destruction. The evidence as to damages tended to show that two acres of soybeans were destroyed in August 1973 by defendant's cattle, and the remaining portions of the crop in the same field yielded forty bushels

per acre when harvested in November of the same year. Further that the local market price for soybeans in November 1973 was $5.25 per bushel.

[6] In awarding damages in the amount of $420 to plaintiff it is evident that the trial judge merely multiplied the estimated yield of the destroyed two acres by the local market price at the time of harvest. No consideration was given to labor and expenses which would have been required to "mature, care for and market the crop." This was error.

For reasons stated, the judgment is vacated and this cause is remanded to the Court of Appeals with direction that it be returned to the District Court in Rowan County with instruction that there be a new trial in accord with this opinion on the single issue of damages.

Affirmed in part and reversed in part.

STATE OF NORTH CAROLINA v. JACK SELLERS

No. 49

(Filed 29 January 1976)

1. **Assault and Battery § 14; Property § 4— damage to person and property by use of dynamite — sufficiency of evidence**

In a prosecution for malicious damage to person and property by means of dynamite and conspiracy to injure a person by means of dynamite, evidence was sufficient to be submitted to the jury where it tended to show that defendant and his coconspirators learned that their victim was an undercover narcotics agent for the SBI, they questioned another informer at gunpoint about his and the victim's roles as undercover narcotics agents, the informer observed defendant handling dynamite and clips in the house of one of the coconspirators, later that night defendant compelled the informer to identify the victim, the informer, while he was being held at gunpoint by a coconspirator, observed defendant and a coconspirator carry a bag of dynamite to the victim's car, while they were beside the car the hood was raised and lowered two times, when defendant came away from the victim's car he stated, "it would happen in the morning," and on the following morning the dynamite exploded and the car was damaged and the victim seriously injured when he started the car.

2. **Criminal Law § 116— failure of defendant to testify — wording of jury instruction**

The trial court did not err in instructing the jury that the fact that defendant did not take the stand "should not be considered by

you against him" rather than "*shall* not be considered by you against him."

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Rousseau, J.*, at the 10 March 1975 Session of RANDOLPH County Superior Court from judgment of life imprisonment. A motion *nunc pro tunc* to bypass the Court of Appeals was allowed as to the other charges.

Defendant was tried on separate bills of indictment charging him with wilful and malicious damage by means of dynamite to an automobile occupied by Albert Stout, Jr. in violation of G.S. 14-49.1; with wilful and malicious injury to Albert Stout, Jr. by means of dynamite in violation of G.S. 14-49; and with conspiring with Jeanette Martha Grier, Jule Hutton, Otis Blackmon, and Wilbur James Sanders to wilfully and maliciously injure Albert Stout, Jr. by the use of dynamite. The case was transferred from Rowan County on defendant's motion for a change of venue. The bills of indictment were consolidated for trial and defendant entered pleas of not guilty to all charges. It would appear that the case of Jeanette Martha Grier, an alleged co-conspirator, was consolidated for trial with the instant case, but this is not before us at this time.

The evidence for the State tended to show the following: Albert Stout, Jr. was assigned to the Charlotte area as an undercover agent for the State Bureau of Investigation. His work consisted of making narcotic purchases from known sellers of drugs and aiding in their prosecution. On 9 September 1974 Stout went to the home of Jule Hutton, Jr. in Charlotte on three occasions between the hours of 3:00 p.m. and 10:00 p.m. but failed to see him.

Agent Stout returned to his residence in Salisbury, North Carolina, about midnight and parked his brown 1974 Torina automobile, owned by the North Carolina State Bureau of Investigation, in a parking area near his apartment. He locked it and went into his apartment. The next morning a little after 8:00 a.m. he unlocked his automobile, inserted the key in the ignition, and turned the switch. He then felt pain, saw a flash of light, and heard a blast or a loud noise. Without losing consciousness, he observed that his right leg and foot were blown off by the explosion and his right hand was so mangled that he could not use it. His right eye was destroyed and various bones were broken.

Prior to 9 September 1974 Stout had testified against Jeanette Grier and Otis James Blackmon in connection with heroin purchases he had made from them. The charges against Blackmon were pending on 9 September 1974. Stout had never met or testified against the defendant.

Jule Hutton, Jr. testified that he was an informer for the Charlotte Police Department and the SBI and that he was supposed to meet Agent Stout on 9 September 1974. On this date Hutton went to the home of Jeanette Grier looking for a girl known as Sissy Gail. When Hutton arrived at Jeanette Grier's house about noon he found Jeanette Grier, Wilbur James (Chuck) Sanders, Otis Blackmon, and the defendant. Blackmon immediately asked Hutton if he knew Albert Stout. When Hutton said he did not, Blackmon grabbed him and slammed him against the wall. After Mrs. Grier inquired about the license plate of Stout's car and Hutton again refused to cooperate, Blackmon and defendant pushed Hutton down on the couch. The defendant then gave Sanders a .38 caliber pistol which Sanders held on Hutton.

Subsequently, Hutton saw Blackmon come from the back door followed by someone else whom he did not know. The person with Blackmon had a brown paper bag with a Winn Dixie sign stamped on it. When the man who had the bag left, he did not take it with him.

Later, the defendant told Chuck Sanders to bring Hutton into the area of the dining room table. Hutton saw the brown bag on the table. The defendant put on gloves, opened the bag, took out a cellophane bag which contained about five sticks of dynamite, some wire with clips on the end of it, and some other silver objects. After examining it, the defendant told Blackmon that everything was there. The package was folded up and replaced in the brown paper bag with the Winn Dixie sign on it. The defendant, Blackmon, and Grier then had a ten minute meeting while Sanders held Hutton under surveillance. Blackmon told the defendant that he would return later and left with the bag and its contents.

Later that night the defendant, armed with the same .38 caliber pistol, escorted Hutton to Hutton's house. Shortly thereafter they heard a knock on the door, peeped through the window, and saw Agent Stout knocking on the door. Defendant asked if that was "the undercover agent," and Hutton replied

affirmatively. Hutton and the defendant did not answer the knock on the door and returned to the Grier house soon after Stout left.

On the way back to the Grier house Hutton admitted he had been an informer since 1963, and the defendant told Hutton that he ought to be dead. When they arrived at the Grier house, the defendant told Chuck Sanders that he had seen the undercover agent. Shortly thereafter, the defendant left the Grier residence, but, before leaving, he gave Sanders the .38 caliber pistol so he could guard Hutton. When the defendant returned about midnight he told Sanders to get ready. The defendant, accompanied by Sanders and Hutton, then drove the Grier Buick automobile to Salisbury where they stopped for a few minutes on a side street. Blackmon soon joined them carrying a Winn Dixie brown paper bag. The defendant drove them to an apartment complex and stopped behind a brown Torino identified by Hutton as Agent Stout's vehicle.

Sanders remained in the car guarding Hutton with the pistol while the defendant and Blackmon got out of the car with Blackmon carrying the Winn Dixie brown paper bag. After the defendant and Blackmon had been beside the Torina automobile for five or six minutes, the hood was raised. It was again raised and lowered while Blackmon was out of sight for about five minutes. After the defendant and Blackmon came back to the Buick, Blackmon said "It would happen in the morning." Blackmon was returned to his vehicle, but, before they separated, defendant asked Blackmon what to do with Hutton and Blackmon replied, "Kill the MF and leave him out beside the highway." The defendant and Sanders returned to Charlotte with Hutton.

A forensic chemist who investigated the scene testified that an alligator clip was attached to one of the posts on the starter of Stout's car. Hutton identified this clip as one of two such clips he had seen in the Winn Dixie bag. A second forensic chemist testified that the extensive damage to the Torina automobile was caused by dynamite.

The State rested and the defendant made a motion to dismiss all charges against him, which was denied.

The defendant did not testify, but offered evidence tending to show an alibi through Jack Sharpshire, who testified that he saw the defendant in Charlotte in a gambling game on

Monday, 9 September 1974 but did not recall positively whether it was Sunday or Monday evening. Another witness, Milton Murray, testified that the defendant was in a poker game in Charlotte at the same place between 11:00 p.m. and 12 midnight on 9 September 1974 and between 1:30 and 2:30 a.m. on 10 September 1974.

Also called as a witness was Caroline Walker (Sissy Gail). She indicated she was serving a three to five year prison sentence for selling and delivering heroin; that she had used heroin with Hutton three or four times a week from the last of July until the first of September; and that Hutton was a heroin addict.

At the conclusion of all the evidence the defendant renewed his motion for dismissal as to all charges, which was overruled.

Other evidence relative to this decision will be set out in the opinion.

The jury returned verdicts of guilty as to all charges. The defendant was sentenced to life imprisonment for the wilful and malicious damage to occupied personal property by means of explosives and to fifteen years to begin at the expiration of the previous sentence, upon the charges of maliciously injuring Albert Stout, Jr. by the use of explosives and conspiring to maliciously injure Albert Stout, Jr. by the use of explosives. Defendant appealed directly to the Supreme Court from the judgment imposing life imprisonment, and we allowed his motion *nunc pro tunc* to bypass the Court of Appeals on the charges of wilful and malicious injury to Albert Stout, Jr., and conspiring to maliciously injure Albert Stout, Jr. by the use of explosives.

The facts in this case are substantially the same as those outlined and discussed in *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975).

Attorney General Rufus L. Edmisten by Assistant Attorney General James E. Magner, Jr. for the State.

Charles V. Bell for defendant appellant.

COPELAND, Justice.

[1] The defendant contends that the trial court erred in overruling his motion to dismiss all the charges made at the conclusion of all the evidence.

"It is elementary that, for the purpose of ruling upon a motion for judgment as of nonsuit, the evidence for the State is taken to be true, every reasonable inference favorable to the State is to be drawn therefrom and discrepancies therein are to be disregarded." *State v. Rankin,* 284 N.C. 219, 223, 200 S.E. 2d 182, 185 (1973). *Accord, State v. Sanders, supra; State v. Felton,* 283 N.C. 368, 196 S.E. 2d 239 (1973); *State v. Spencer,* 281 N.C. 121, 187 S.E. 2d 779 (1972); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

The State's evidence disclosed that Jeanette Martha Grier, Jule Hutton, Otis Blackmon, Wilbur James Sanders, and the defendant had discovered that Albert Stout, Jr. was an undercover narcotics agent for the SBI. He had testified against Grier and Blackmon, and charges were still pending against Blackmon on 9 September 1974. On that date the defendant, Blackmon, Grier and Sanders interrogated Hutton about his and Stout's roles as undercover narcotics agents. After an unknown man brought a brown bag with a Winn Dixie sign on it to the Grier house, an identical bag containing dynamite was opened and examined by the defendant. He informed Blackmon that everything was there and then had a ten minute meeting with Blackmon and Grier while Sanders held Hutton under surveillance with a gun. Later that day the defendant compelled Hutton to ride with him to Hutton's house and to identify Stout. In this way the defendant was able to learn that Stout was meeting Hutton despite Hutton's previous denials of any personal knowledge of Stout. Also, the defendant compelled Hutton to admit that he was an informer.

Sometime after midnight the defendant, Sanders and Hutton met Blackmon in Salisbury on a side street and drove to Stout's car carrying a bag identical to the one in which the dynamite had been placed earlier that day. While the defendant and Blackmon had this same bag in their possession and were beside the car of Stout for about ten minutes, the hood was raised and lowered twice. In view of the above circumstances and subsequent events, the statement of the defendant upon returning from Stout's car that "it would happen in the morning" indicated that dynamite had been planted at this time so as to detonate in the morning. The statement of Blackmon thereafter directing defendant to kill Hutton further indicated the criminal nature of their activity at that time. Around midnight Stout had parked his car for the evening of 9 September 1974,

and on the morning of 10 September 1974 a little after 8:00 a.m. he was severely injured and his car was damaged when he attempted to start his car. Expert testimony indicated that a dynamite charge had been set to the ignition switch to his car and was the cause of the injuries and damage.

In light of the foregoing legal principles, the evidence for the State was sufficient to permit the jury to find that the defendant assisted in the planning, drove some of the conspirators to the scene, and actively participated with Blackmon in putting the dynamite in the Stout automobile. This assignment of error is without merit and overruled.

[2] The defendant also contends that the trial judge erred in the manner in which he charged the jury on the failure of the defendant to testify in his own behalf.

Counsel for the defendant in his brief says, among other things, that the court should have used the word "shall" rather than the word "should" in the following instruction to the jury:

> " . . . The fact that the defendants have not taken the stand and testified in his or her own behalf *should* not be considered by you against him or she [sic], or to his or her prejudice at any stage, for the defendant was exercising a right which the law gives to him." (Emphasis supplied.)

This is without merit. An examination of the jury instruction in *State v. Sanders, supra,* discloses that the same judge made almost an identical charge to that given in the instant case. The same assignment of error was made in *Sanders,* and our Court held that the instruction was proper. On the authority of *Sanders* this assignment is overruled.

Defendant makes no further contentions, but because of the seriousness of the offenses, we have carefully examined the entire record and it reveals that the defendant has received a fair trial, free from prejudicial error, and we find

No error.

STATE OF NORTH CAROLINA v. LAWRENCE JEROME HARRIS ALIAS JOE HARRIS

No. 99

(Filed 29 January 1976)

1. **Homicide § 24— instructions — accident — burden of proof**

The trial court in a homicide case erred in placing upon defendant the burden of satisfying the jury that decedent's death was the result of an accident since accident is not an affirmative defense.

2. **Criminal Law § 168— burden of proof — erroneous instruction — subsequent correct instruction**

An erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point.

DEFENDANT appeals from judgment of *Falls, J.*, 6 January 1975 Schedule "C" Session, MECKLENBURG Superior Court.

The bill of indictment is drawn in conformity with the requirements of G.S. 15-144 and charges defendant with the murder of Richard Evans Weddle on 10 September 1974 in Mecklenburg County. Upon the call of the case, however, the district attorney announced he would not seek a first degree murder conviction but would ask for defendant's conviction of murder in the second degree.

The State's evidence tends to show that Keith Blackwell, Gary Gillespie and Richard Weddle, the deceased, shared a three-bedroom apartment at 1420 Santera Apartments in the City of Charlotte. On 10 September 1974 at approximately 6 p.m., Keith Blackwell, in a telephone conversation with one Randall Simmons, offered to sell Simmons about two pounds of marijuana and advised him to pick it up around 10:30 p.m. that night. Pursuant to that conversation, Randall Simmons drove the defendant Lawrence Jerome Harris and one Eddie Staten to Blackwell's apartment about 10 p.m. En route, according to the testimony of Randall Simmons, Staten and the defendant discussed a plan to rob Keith Blackwell of the marijuana. Simmons, who did not participate in the scheme, waited outside in the car while defendant and Staten entered the apartment with Keith Blackwell.

While defendant waited in the living room, Keith Blackwell took Eddie Staten into Blackwell's bedroom where the marijuana was hidden. After viewing a sample of the marijuana,

Staten returned to the living room and talked privately with defendant Harris for five to ten minutes. The three men then returned to the bedroom where Keith Blackwell prepared to weigh the marijuana on a set of scales. Two visitors at the apartment, David Bolt and Harris Grant, remained in the living room. As Keith Blackwell got on his knees to set up the scales, defendant Harris pulled a small revolver from his pocket, placed it against Keith Blackwell's right temple, and said, "Just be cool and take it easy and nothing will happen." He commanded Blackwell to lie on the floor, which he did. He told Eddie Staten to take Blackwell's shotgun, which was lying on the floor of the bedroom, go to the living room and bring everyone else into the bedroom. After this order was executed, David Bolt was forced to lie on his stomach across Keith Blackwell's shoulders. Then Harris Grant was tied up with an electric cord and forced to lie on the floor. Defendant Harris and Eddie Staten then started looking for the marijuana. Staten slapped Harris Grant and said: "If you don't tell us where the rest of it is, you will get some more of this."

At that time Richard Weddle, who was in his own bedroom with a girl named Emily Kennedy, opened his bedroom door to ascertain what was going on. Defendant Harris turned his pistol on Weddle and said, "Freeze, don't move." Weddle moved his hand and arm, apparently in an attempt to push his girl friend Emily Kennedy away from the door, and defendant shot Weddle in the chest with the pistol. Eddie Staten grabbed the shotgun and the marijuana and, followed by defendant Harris, left the apartment.

The foregoing narration of the State's evidence is derived from the testimony of Randall Simmons and three eyewitnesses to the shooting—Keith Blackwell, David Bolt and Emily Kennedy.

Dr. Hobart Wood performed an autopsy on the body of Richard Weddle and expressed the opinion that Weddle died as a result of a gunshot wound in the chest.

Police officers testified that defendant was apprehended in Montgomery, Alabama on or about 29 September 1974 and was extradited to stand trial for the murder of Richard Weddle.

Defendant testified as a witness in his own behalf. He stated that he and Eddie Staten accompanied Randall Simmons to Keith Blackwell's apartment a few minutes after 10 p.m. on

the night of 10 September 1974. Simmons wanted defendant and Eddie Staten to finance him in the purchase of about two and a half pounds of marijuana from Keith Blackwell. Eddie Staten, not Simmons, was driving the car. Shortly after Staten parked the car at the Santera Apartments, a van pulled up and three white men got out. One of the men said he was Keith Blackwell. After conferring with Keith Blackwell, Eddie Staten informed defendant that the price for the marijuana was about $380.00. Defendant stated they only had $350.00, and Keith Blackwell said, "Well, that is all right. Just come on in the apartment. I have got something to show you." Thereupon, defendant and Eddie Staten accompanied Keith Blackwell into the apartment. Two men were in the living room watching television. Keith and Eddie went down a hallway and entered a bedroom and called defendant who joined them. Defendant saw no marijuana and observed no scales in the bedroom. He did see a shotgun on the floor and asked Keith Blackwell if it was normal to leave shotguns lying around in his house on the floor. Blackwell replied, "Yes, it is normal." Defendant asked whether the gun was loaded and Blackwell said, "Yes it is loaded." Then Keith Blackwell pulled a pistol, pointed it at defendant and said, "This gun is loaded, too. . . . Don't try nothing."

Defendant describes the events which followed in this language: "So at this time the bedroom that I had faced coming down the hall, the door opened, so I saw a figure from a shadow hit the wall and at the same instant I crashed into Keith. I hit Keith, sort of like a low projectile. The gun discharged. When the gun discharged, it was in Keith's hands. Keith and I had a struggle. I took the gun from him. After I took the gun from him there was this dude lying in the hall. He had been shot. He was a white man and I did not know him. Then I noticed a female in the bedroom. She didn't see me. I just saw just a figure of a body. She was running towards some kind of—must have been a closet. She was fully dressed. The dude who got shot was just lying on the floor moaning and groaning, so I told Eddie to get the shotgun and let's go. Then we left."

Defendant denied involvement in any conversation on the way to the Santera Apartments "about trying to steal the marijuana." Defendant said he and Eddie took Randall Simmons home, went to the Bahama Apartments to pick up some clothes, and prepared to leave town. "We went to Boone, North Carolina, because I know some people up there. We stayed in Boone

approximately three days. Then we came back to Charlotte. Then on September 28, or 27 or 28, it was a Friday, I went to Alabama. The police picked me up in Alabama, Montgomery, Alabama."

The jury convicted defendant of murder in the second degree and he was sentenced to life imprisonment. Defendant's appeal was inadvertently docketed in the Court of Appeals but duly transferred to this Court by order of the Chief Justice. Errors assigned will be discussed in the opinion.

Peter A. Foley, Attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; Jesse C. Brake, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

We overrule defendant's assignments of error based on his contentions that (1) the court failed "to give equal stress to the State and defendant" in summarizing the evidence, (2) the court erred in charging on *flight* as bearing on defendant's guilt or innocence, and (3) the court erred in failing to charge on the law of self-defense. The court's recapitulation of the evidence was in substantial compliance with G.S. 1-180. The court's instruction on flight was based on evidence reasonably tending to show that defendant fled the jurisdiction immediately following the crime. Defendant's version of the killing does not invoke legal principles applicable to a killing in self-defense. We therefore put aside these assignments without further discussion and go directly to the question raised in defendant's remaining assignment of error.

[1] Defendant contends the court committed prejudicial error in its charge by placing upon him the burden of satisfying the jury that Weddle's death was the result of an accident. This constitutes the basis for defendant's final assignment of error and requires examination of the following challenged portions of the charge:

> "If the State of North Carolina proves beyond a reasonable doubt that the defendant intentionally killed Weddle with a deadly weapon or intentionally inflicted the wound upon Weddle with a deadly weapon that proximately caused his death, the law raises two presumptions: First, that the killing was unlawful and, second, that it was done with

malice. Nothing else appearing, the defendant would be guilty of second degree murder because a killing with a deadly weapon raises a presumption of malice, raises a presumption that it was done with malice rather.

Now, in order to excuse it altogether on the grounds of accident, members of the jury, the burden is upon the defendant to satisfy you, not by the greater weight or not beyond a reasonable doubt, but simply to satisfy you that this death of Weddle was an accident." (Emphasis added.)

After defining the word "accident" and summarizing for the jury the three elements necessary to render a homicide excusable by reason of accident (absence of intent to do harm, lawfulness of the act from which death results, and proper precautions to avoid mischief), the court charged the jury as follows:

"Now, members of the jury, bearing in mind that the burden of proof rests upon the State to establish the guilt of this defendant Harris beyond a reasonable doubt, I charge you that if you find from this evidence that the killing of the deceased was accidental, that is, that this Weddle's death was brought about by an unknown cause or that it was from an unusual or unexpected event from a known cause, and you also find that the killing of the deceased was unintentional, that at the time of the homicide the defendant was engaged in the performance of a lawful act without any intention to do harm and that at the time he was using proper precautions to avoid danger, if you find these to be the facts, remembering that the burden is upon the State, then I charge you that the killing of the deceased was a homicide by misadventure and if you so find, it would be your duty to render a verdict of not guilty as to this defendant."

Assertion by the accused that a killing with a deadly weapon was accidental is in no sense an affirmative defense shifting the burden to him to satisfy the jury that death of the victim was in fact an accident. *State v. Phillips*, 264 N.C. 508, 142 S.E. 2d 337 (1965). Defendant's contention here that Weddle's death resulted from accident "was a denial that he committed the crime charged, and such contention is not an affirmative defense which resulted in the imposition of any burden of proof upon him. The burden remained upon the State

to prove each and every element of the crime charged beyond a reasonable doubt." *State v. Jones,* 287 N.C. 84, 214 S.E. 2d 24 (1975); *accord, State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Wrenn,* 279 N.C. 676, 185 S.E. 2d 129 (1971); *State v. Woods,* 278 N.C. 210, 179 S.E. 2d 358 (1971); *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); *State v. Fowler,* 268 N.C. 430, 150 S.E. 2d 731 (1966); *State v. Williams,* 235 N.C. 752, 71 S.E. 2d 138 (1952). *See generally* Annot., Homicide: Burden of Proof on Defense that Killing was Accidental, 63 A.L.R. 3d 936 (1975).

[2] In light of these legal principles it is quite apparent that the italicized portion of the charge to the jury above quoted in this case was erroneous in that it placed the burden on defendant to satisfy the jury that the death of Weddle was an accident. It is equally apparent that the last quoted paragraph from the charge is a correct statement of the law. "It has been uniformly held that where the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part. This is particularly true when the incorrect portion of the charge is the application of the law to the facts. [Citations omitted.] A new trial must also result when ambiguity in the charge affords an opportunity for the jury to act upon a permissible but incorrect interpretation." *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230 (1969); *accord, State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577 (1971). The jury cannot be expected to know which of two conflicting instructions is correct. *State v. Holloway,* 262 N.C. 753, 138 S.E. 2d 629 (1964). It must be assumed on appeal that the jury was influenced by that portion of the charge which is incorrect. *State v. Starnes,* 220 N.C. 384, 17 S.E. 2d 346 (1941). Moreover, an erroneous instruction on the burden of proof is not ordinarily corrected by subsequent correct instructions upon the point. *State v. Faulkner,* 241 N.C. 609, 86 S.E. 2d 81 (1955); *see State v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387 (1954); *State v. Floyd,* 220 N.C. 530, 17 S.E. 2d 658 (1941); *State v. Patterson,* 212 N.C. 659, 194 S.E. 283 (1937).

For the reasons stated, the judgment is vacated and the case remanded to the Superior Court of Mecklenburg County for a

New trial.

JUDY BRADLEY PENLAND, AND HUSBAND, BRUCE ELBERT PENLAND v. RONNIE GREEN

No. 83

(Filed 29 January 1976)

1. **Trial § 16— stricken testimony —final jury instructions proper**

The trial court's final instructions to the jury to disregard stricken testimony were not ambiguous and confusing to the jury.

2. **Automobiles § 18— entering public road from private drive — requirements of statute**

In order to comply with G.S. 20-156(a) (1975) the driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road, or driveway is only required to look for vehicles approaching on the highway at a time when his lookout may be effective, to see what he should see, and to yield the right-of-way to vehicles on the highway which, in the exercise of reasonable care, he sees or should see are being operated at such a speed or distance as to make his entry onto the highway unsafe, by delaying his entry onto the highway until a reasonable and prudent man would conclude that the entry could be made in safety.

3. **Automobiles § 90— speed of defendant's vehicle — jury instruction**

In an action for personal injury and property damages arising out of a two car collision the trial court's recitation of facts with respect to the speed of defendant's automobile was not prejudicial to defendant.

4. **Automobiles § 90— contributory negligence — jury instruction proper**

The trial court's instruction on contributory negligence that, "A proximate cause would result in liability," did not mislead the jury or prejudice defendant where the court subsequently gave full and proper instructions on the issue of contributory negligence.

APPEAL of right by defendant pursuant to General Statute 7A-30(2) to review the decision of the Court of Appeals reported in 24 N.C. App. 240, 210 S.E. 2d 505 (1974), which found no error, *Campbell, J.*, dissenting, in the trial before *Friday, J.*, at the February 11, 1974 Session of BUNCOMBE County Superior Court. This case was docketed and argued as No. 68 at the Spring Term 1975.

This is a civil action for personal injury and property damages arising out of a two car collision. The evidence is fully recounted in the opinion of the Court of Appeals and will only be repeated here as necessary for an understanding of defendant's arguments.

Cecil C. Jackson, Jr., for plaintiff appellees.

Morris, Golding, Blue & Phillips by James N. Golding, for defendant appellant.

EXUM, Justice.

[1] On several occasions during the course of the trial, the judge allowed motions to strike certain testimony and the jury was told on each occasion to disregard that testimony and not consider it in their deliberations. In his final instructions to the jury the judge said:

> . . . The Court will again instruct you that when it has instructed you to disregard testimony, disabuse it from your mind not to consider it. Please follow those instructions in your deliberations.

Defendant strenuously argues that the second and third "it" in the first sentence quoted above refer to the judge's prior instructions rather than to the testimony itself and that, in effect, the judge was countermanding his prior instructions. The argument is patently without merit. The use of the words "again instruct" followed by the sentence, "Please follow those instructions. . . ." removes beyond doubt any ambiguity which might otherwise exist regarding the antecedent of the pronoun "it."

Defendant next contends there was error when the trial judge confused the law relating to entering a highway from a private road or drive, N. C. Gen. Stat. 20-156(a), and the law relating to entering a dominant highway from a servient highway, N. C. Gen. Stat. 20-158. The femme plaintiff entered a public highway from a private driveway of the American Enka plant. Defendant motorist was traveling on the public highway. The trial judge, on occasion, used the terms "dominant" and "servient" in referring to the roads in question. The Court of Appeals correctly noted that while this nomenclature may not have been precisely correct under the circumstances, the trial judge instructed upon proper principles of law applicable to each motorist and defendant was not prejudiced thereby.

On appeal to this Court defendant's contention that he has been prejudiced is made somewhat clearer. He seems to argue that General Statute 20-156(a) (1965) insofar as it required a motorist entering from a private drive to "yield the right-of-way to *all* vehicles approaching on such public highway" (em-

phasis supplied) should have been construed so as to have imposed an absolute duty here upon femme plaintiff to yield to defendant even if the jury could have found that femme plaintiff, exercising reasonable care, was not, and should not have been, aware that defendant was approaching at such a high and negligent speed as to make her entry onto the highway an unsafe maneuver.

This is not the law. Ordinarily a person has no duty to anticipate negligence on the part of others. In the absence of anything which gives or should give notice to the contrary, he has the right to assume and to act on the assumption that others will observe the rules of the road and obey the law. *Wrenn v. Waters,* 277 N.C. 337, 177 S.E. 2d 284 (1970); *Cox v. Freight Lines* and *Matthews v. Freight Lines,* 236 N.C. 72, 72 S.E. 2d 25 (1952). However, the right to rely on this assumption is not absolute, and if the circumstances existing at the time are such as reasonably to put a person on notice that he cannot rely on the assumption, he is under a duty to exercise that care which a reasonably careful and prudent person would exercise under all the circumstances then existing. *Cox* and *Matthews, supra.* In *Kirkman v. Willard,* 259 N.C. 135, 129 S.E. 2d 895 (1963), the plaintiff's evidence was that she stopped before entering an intersection in the city limits of Wilmington because there were "Yield Right of Way" signs. She had a clear view to the left and saw no moving vehicles. She entered the intersection and was struck by defendant's vehicle which was traveling 45-50 mph from her left. Although defendant's evidence differed, the jury answered issues of negligence, contributory negligence and damages in favor of plaintiff. This Court held that defendant's motion for nonsuit was properly denied. There was no suggestion that plaintiff's admitted duty to yield the right-of-way extended to vehicles which, the jury could have found she had not and, in the exercise of reasonable care, should not have seen.

[2] General Statute 20-156(a) (1965) did not, nor does it now, as defendant seems to argue, require omniscience on the part of a motorist entering a public highway from a private drive. In order to comply with General Statute 20-156(a) (1975) the driver of a vehicle about to enter or cross a highway from an alley, building entrance, private road, or driveway is only required to look for vehicles approaching on the highway at a time when his lookout may be effective, to see what he should

see, and to yield the right-of-way to vehicles on the highway which, in the exercise of reasonable care, he sees or should see are being operated at such a speed or distance as to make his entry onto the highway unsafe, by delaying his entry onto the highway until a reasonable and prudent man would conclude that the entry could be made in safety. *Warren v. Lewis*, 273 N.C. 457, 160 S.E. 2d 305 (1968) (dealing with a private drive situation but inadvertently citing N. C. Gen. Stat. 20-158); *Galloway v. Hartman*, 271 N.C. 372, 156 S.E. 2d 727 (1967); N.C.P.I.—Civil 203.29 (May 1975). This in substance is how the trial judge instructed the jury in this case.

[3] Appellant quibbles with the recitation of facts both by the Court of Appeals and the trial judge in his jury instructions by arguing in his brief as follows:

> The Court of Appeals' decision in reciting the facts states: "Vicks testified that plaintiff was going between 10 and 20 miles per hour and defendant was going between 45 and 60 miles per hour." The trial court instructed the jury as to these same speeds even though it had earlier instructed the jury not to consider this statement as "evidence of the truth."

It is true that Vicks did not testify regarding defendant's speed before the jury. A prior recorded statement of Vicks in which he did give defendant's speed as "45 to 60 miles an hour" was put before the jury by defendant during his cross-examination of Vicks and by stipulation of both parties purportedly for the purpose of impeaching this witness. The trial judge properly instructed the jury to consider Vicks' earlier recorded statement not as "evidence of the truth of what was said at that earlier time" but only upon the question of the witness' credibility at trial. Later while instructing the jury that operating a motor vehicle at a speed in excess of the speed limit was negligence *per se*, the judge said:

> (Now in that connection the plaintiff contends to you that the defendant on this occasion was exceeding the speed limit, he was doing more than 35 miles per hour, doing between 45 and 60, or 65 and 70.)
>
> The defendant says and contends to you that he was not, he says and contends to you that he was only driving 30 to 35 miles per hour on this occasion.

Defendant excepted to and assigned as error that portion of the above instructions in parentheses.

There is no merit to this assignment of error. Another witness, Ronald Revis, testifying for plaintiffs, did observe defendant's vehicle and gave the jury his estimate of its speed prior to the collision at 65 or 70 miles per hour. Still another eyewitness, Clarence Grogan, stated in the jury's absence that in his opinion defendant's vehicle was traveling "at least 65 miles an hour" before the collision. For reasons known only to plaintiffs this testimony was not given to the jury. The testimony of Revis was enough to support the statement by the judge of plaintiffs' contention that defendant was exceeding the speed limit and was traveling between 65 or 70 miles per hour. The fact that the judge also mentioned the speeds 45 to 60 miles per hour in the absence of testimony as to these speeds could not possibly have prejudiced defendant. If mention of these speeds affected the jury at all, it probably did so to defendant's benefit. Defendant, furthermore, never suggested any correction of this statement at trial. At the close of his instructions the trial judge asked, "Now is there anything further on either side?" Both plaintiffs and defendant replied that they had nothing to suggest to the court. In order for inaccuracies in the recitation of facts or contentions in jury instructions to be considered on appeal, they must be called to the attention of the trial judge in time for him to correct them at trial. *Lewis v. Barnhill,* 267 N.C. 457, 468, 148 S.E. 2d 536, 544 (1966).

[4] Defendant assigns as error this statement in the trial judge's instructions on the second (contributory negligence) issue: "A proximate cause would result in liability, members of the jury." A finding by the jury of plaintiffs' negligence proximately causing the collision would, of course, mean *no* ultimate liability on the part of defendant. Almost immediately after the complained of statement, however, the trial judge instructed, in substance (except where quoted): (1) if the jury found plaintiff negligent and her negligence a proximate cause of the collision, it would answer the second issue YES; (2) if the jury failed to so find, it would answer the issue NO; and (3) "if you answer the second issue YES . . . [having answered the first issue YES] under those circumstances neither could recover [defendant had asserted a counterclaim] and that would end the lawsuit, in which event you would not consider the remaining issues. . . . However if your answer to the sec-

ond issue is No, then you would take up and consider the third issue . . . [amount of plaintiffs' damages]." Standing alone the complained of statement is meaningless. Taken in the context of subsequent full and proper instructions regarding the manner of answering the second issue and the consequences of either answer, the jury could not have been misled nor defendant prejudiced by the statement.

We have carefully examined all of defendant's assignments of error and find them to be wholly without merit. Defendant's appeal consists almost entirely of an inordinate straining at gnats. He has had a fair trial free from prejudicial error. It is time he paid the judgment rendered against him at that trial.

The decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA, EX REL. UTILITIES COMMISSION v. SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY

No. 84

(Filed 29 January 1976)

Appeal and Error § 9— appeal from Utilities Commission order — subsequent order while appeal pending — appeal moot

Defendant's appeal from the decision of the Court of Appeals affirming an order of the Utilities Commission in a general rate making case issued on 30 April 1974 is moot where Southern Bell filed a new application for another rate increase while this case was on appeal to the Court of Appeals, and the Commission's order in that case filed on 19 December 1975 rendered all questions raised in this appeal academic.

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

APPEAL of right under General Statute 7A-30(3) by Southern Bell Telephone and Telegraph Company (hereinafter Southern Bell) from decision of the Court of Appeals, 24 N.C. App. 327, 210 S.E. 2d 543 (1975) affirming an order of the North Carolina Utilities Commission (hereinafter Commission) in a general rate-making case. This case was docketed and argued as No. 77 at the Spring Term 1975.

Southern Bell filed with the Commission on June 30, 1973, an application seeking approval of an increase in rates for intrastate service in North Carolina in the amount of $33,812,129. On July 30, 1973, the Commission suspended the effective date of the requested increase until further order of the Commission, declared the case to be a general rate case, and set the matter for hearing. After interventions (including that of the North Carolina Attorney General on behalf of the using and consuming public) the case was heard by the Commission in November and December, 1973.

On April 30, 1974, the Commission issued its Final Order (hereinafter Order) authorizing Southern Bell to increase its annual rates and charges by $8,271,000, effective May 15, 1974.

Rufus L. Edmisten, Attorney General, by I. Beverly Lake, Jr., Deputy Attorney General, and Robert P. Gruber, Associate Attorney, for the State.

Edward B. Hipp, Commission Attorney, Maurice W. Horne, Assistant Commission Attorney, and Lee West Movius, Associate Commission Attorney, for plaintiff appellees.

R. C. Howison, Jr., John F. Beasley, R. Frost Branon, Jr., attorneys for defendant appellant.

EXUM, Justice.

The ultimate relief sought by Southern Bell on this appeal is reversal of the Commission's Order and remand to the Commission for further findings and a new order in accordance with legal principles that Southern Bell contends should govern this proceeding. The Commission, Southern Bell contends, erred in that it: (1) failed to find Southern Bell's cost of equity capital as a material fact prerequisite to setting a fair rate of return on the utility's rate base; (2) understated the rate base by improperly excluding therefrom certain amounts for materials and supplies and cash working capital; (3) understated revenues obtainable under the new rates by (a) disallowing charitable contributions as an operating expense, (b) improperly allocating certain interest expense of Southern Bell's parent company, American Telephone and Telegraph Company, to Southern Bell, and (c) erroneously calculating the amount of the allocated interest expense; and (4) illegally issued its Order several days beyond the period prescribed in General Statute 62-134(b).

We note, at the outset, however, that on July 19, 1974, while this case was on appeal to the Court of Appeals, Southern Bell filed a new application for another rate increase with the Commission. By order issued August 5, 1974, the Commission set this new application for investigation and hearing in Docket No. P-55, Sub. 742, and declared the same to be a general rate case. After interventions the matter was heard October 7-29, 1975. On December 19, 1975, the Commission issued its Final Order (hereinafter 1975 Order) allowing Southern Bell a $36,-169,090 rate increase on the basis of new determinations of the fair value of Southern Bell's property, reasonable operating expenses, and fair rate of return, all as required by General Statute 62-133. No party has given notice of appeal from that decision within the 30 days allowed by General Statute 62-90(a), although the Attorney General after intervening has obtained an extension of time until March 1, 1976, to note an appeal.

Although it is not in the record before us, we have no hesitancy in taking notice of this latter proceeding. "The device of judicial notice is available to an appellate court as well as a trial court. . . . " 1 Stansbury's North Carolina Evidence § 11 (Brandis Rev. 1973). This Court has recognized in the past that important public documents will be judicially noticed. *Staton v. R.R.*, 144 N.C. 135, 145, 56 S.E. 794, 797 (1907) (railroad reports to the Corporation Commission judicially noticed) ; 1 Stansbury's North Carolina Evidence § 13 (Brandis Rev. 1973). Consideration of matters outside the record is especially appropriate where it would disclose that the question presented has become moot, or academic, and therefore neither of the litigants has any real interest in supplementing the record. *In re Estate of Thomas*, 243 N.C. 783, 92 S.E. 2d 201 (1956).

The Commission's 1975 Order makes this appeal moot. "When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court." *Parent-Teacher Association v. Board of Education*, 275 N.C. 675, 170 S.E. 2d 473 (1969). *Cf. Crew v. Thompson*, 266 N.C. 476, 146 S.E. 2d 471 (1966) ; *Cochran v. Rowe*, 225 N.C. 645, 36 S.E. 2d 75 (1945). Note, "Cases Moot

on Appeal: A Limit on the Judicial Power," 103 U. Pa. L. Rev. 772 (1955).

In the case now before us all questions raised have been rendered academic by the Commission's 1975 Order. Because of this 1975 Order no further order in the instant proceeding could be made by the Commission in favor of Southern Bell. All of the Commission's findings in this proceeding have been superseded by its findings in the 1975 Order. N. C. Gen. Stats. 62-130(d), 62-133, and 62-134. Were we to agree with any one or all of Southern Bell's contentions on this appeal, reverse and remand the case as Southern Bell asks, no further proceedings before the Commission would in fact take place. Were it not for the 1975 Order the Commission conceivably in this proceeding on remand could allow appellant additional rate increases. Because of the 1975 Order this would not be possible. We will not further entertain the cause "merely to determine abstract propositions of law." *Parent-Teacher Association v. Board of Education, supra.*

Although the mootness doctrine in federal courts is primarily grounded in the "case" or "controversy" requirement of Article III, § 2 of the United States Constitution, the case of *United States v. Anchor Coal Co.*, 279 U.S. 812 (1929) is sufficiently analogous to the instant situation to support our determination of mootness. The facts in that case, known as the "Lake Cargo Rate Case," are set out in Arnold, "Trial by Combat and the New Deal," 47 Harv. L. Rev. 913, 915 (1934) as follows:

> . . . [T]he entire coal industries of Pennsylvania and West Virginia were awaiting an interpretation of the Interstate Commerce Act. A bitter dispute was in process of litigation. The Interstate Commerce Commission had been enjoined from requiring a certain differential between West Virginia and Pennsylvania coal mines. In order to clarify the situation pending an appeal, a compromise rate had been approved. This was considered by the parties to be only a necessary compromise until the Supreme Court could make its decision. Instead of deciding the question . . . the Supreme Court held that no "issues" were before it.

The Supreme Court held that because of the intervening compromise rate order the controversy was "no longer a subject appropriate for judicial action." 279 U.S. at 813. In the case

before us the new rates were allowed not on the basis of a compromise pending appeal but after a full, adversary hearing and fresh determinations of changed facts by the Commission. The case for mootness here is, consequently, considerably stronger than it was in *Anchor Coal Co.*

The short of it is that because of the Commission's 1975 Order a dispute between the parties to this appeal no longer exists.

When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. *Parent-Teacher Association v. Board of Education, supra.* This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals. *See* Note, "Cases Moot on Appeal: A Limit on the Judicial Power," *supra* at 793-94. As the appeal is to be dismissed for reasons arising subsequent to a proper notice of appeal, each party will pay its own costs in this Court. Costs in the Court of Appeals will stand as heretofore determined. *Cf. Wikel v. Board of Commissioners,* 120 N.C. 451, 27 S.E. 117 (1897).

Appeal dismissed. Decision of Court of Appeals vacated.

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

Overton v. Boyce

PENELOPE BADHAM OVERTON, AND ALEXANDER BADHAM, (ORIGINAL PLAINTIFFS); ROBERT BEMBRY, ADMINISTRATOR OF PENELOPE BADHAM OVERTON AND ROBERT BEMBRY, ADMINISTRATOR OF ALEXANDER BADHAM v. A. C. BOYCE, SOMETIMES KNOWN AS LONNIE BOYCE (ORIGINAL DEFENDANT); CELIA U. BOYCE, WIDOW OF A. C. BOYCE; AND CELIA U. BOYCE AND NAOMI E. MORRIS, EXECUTRICES OF A. C. BOYCE

No. 104

(Filed 29 January 1976)

1. **Boundaries § 10— ambiguous description in deed — deed void**

A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty.

2. **Boundaries § 10— description of land conveyed — admissibility of parol evidence**

When a deed itself, including its references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land; however, parol evidence is not admissible to enlarge the scope of the description in the deed. G.S. 8-39.

3. **Boundaries § 10— patently ambiguous description of land — inadmissibility of parol evidence**

When it is apparent upon the face of a deed itself that there is uncertainty as to the land intended to be conveyed and the deed itself refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous, and parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument.

4. **Boundaries § 10— deed conveying pocosin land — patently ambiguous description — deed void**

The description in a deed conveying a "tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing by estimation, Three Hundred and Nineteen acres" was patently ambiguous and referred to nothing extrinsic to which one could turn in order to identify with certainty the land intended to be conveyed; therefore, the deed was void and could not be the basis for a valid claim of title in the plaintiffs.

Justice COPELAND did not participate in the consideration or decision of this case.

ON *certiorari* to the Court of Appeals to review its decision reported in 26 N.C. App. 680, 217 S.E. 2d 704. The Court of Appeals vacated a summary judgment in favor of the de-

fendant entered by *Cowper, J.*, at the 19 December 1974 Session of CHOWAN.

The original plaintiffs instituted this action in 1965 to quiet title to real property and to remove a cloud on their alleged title to land which they claim as heirs of Hannibal Badham, Senior. In their complaint the plaintiffs describe the land as follows:

> "A certain tract of pocosin land adjoining the lands of the late Henderson Luton and others, lying and being in Chowan County, and State of North Carolina, containing by estimation three hundred nineteen (319) acres, more or less, and being the same land conveyed to Hannibal Badham, Sr., by H. H. Page and wife by deed and [sic] duly recorded in Chowan County Registry in Book B, Page 198."

The deed, under which the plaintiffs claim, a certified copy of which is attached to defendants' motion for summary judgment, describes the tract of land which it purports to convey as follows:

> "[T]he following real estate in Chowan County, to wit: A certain tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing, by estimation, Three Hundred and Nineteen Acres."

The Superior Court, hearing the matter on the motion for summary judgment, found facts, which findings are supported by documents attached to the defendants' motion for summary judgment and which findings include the following (summarized and renumbered):

> (1) The deed referred to in the complaint as the source of the plaintiffs' title describes the land therein purported to be conveyed as above stated.
>
> (2) Three deeds conveyed to Henderson Luton three separate and distinct tracts of land lying in Chowan County.
>
> (3) There is no reference in the deed, under which the plaintiffs claim title, to indicate which of the three Luton tracts the land which the plaintiffs claim adjoined.
>
> (4) An affidavit of W. J. Berryman, surveyor, now deceased, is to the effect that he surveyed a tract of land

known as the "W. S. White tract" in Chowan County and made diligent efforts to locate "a certain tract of pocosin land adjoining the lands of the late Henderson Luton and others containing by estimation 319 acres, and he was unable to locate said tract of land."

(5) The description of the land purported to be conveyed by the deed under which the plaintiffs claim title does not contain a sufficient description of such land and contains no reference to any source by which such land could be identified. There is much pocosin land in Chowan County.

The Court of Appeals, recognizing that the description of the land purported to be conveyed by the deed under which the plaintiffs claim is ambiguous, considered the ambiguity to be latent so as to permit extrinsic evidence to be introduced for the purpose of identifying the property conveyed. It, therefore, held:

"We find that the summary judgment was improvidently entered and erroneously disposed of a genuine issue of fact, i.e., the identity of the land. At trial the plaintiff may offer extrinsic evidence to identify the land, and the defendants may offer such evidence with reference thereto tending to show impossibility of identification."

Richard E. Powell and Samuel S. Mitchell for plaintiffs.

Pritchett, Cooke & Burch by J. A. Pritchett, W. W. Pritchett, Jr., and W. L. Cooke for defendants.

LAKE, Justice.

[1, 2] A deed purporting to convey an interest in land is void unless it contains a description of the land sufficient to identify it or refers to something extrinsic by which the land may be identified with certainty. *State v. Brooks,* 279 N.C. 45, 181 S.E. 2d 553; *Carlton v. Anderson,* 276 N.C. 564, 173 S.E. 2d 783; *Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269; *Deans v. Deans,* 241 N.C. 1, 84 S.E. 2d 321; *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593; Strong, N. C. Index 2d, Boundaries, § 10. When the deed itself, including the references to extrinsic things, describes with certainty the property intended to be conveyed, parol evidence is admissible to fit the description in the deed to the land. G.S. 8-39; *State v. Brooks, supra.* Parol evidence

is not admissible, however, to enlarge the scope of the description in the deed. *State v. Brooks, supra; Self Help Corp. v. Brinkley,* 215 N.C. 615, 2 S.E. 2d 889.

[3] When it is apparent upon the face of the deed, itself, that there is uncertainty as to the land intended to be conveyed and the deed, itself, refers to nothing extrinsic by which such uncertainty can be resolved, the description is said to be patently ambiguous. *Carlton v. Anderson, supra;* Strong, N. C. Index 2d, Boundaries, § 10. As Justice Barnhill, later Chief Justice, speaking for the Court, said in *Thompson v. Umberger,* 221 N.C. 178, 19 S.E. 2d 484, "[A] patent ambiguity is such an uncertainty appearing on the face of the instrument that the Court, reading the language in the light of all the facts and circumstances *referred to in the instrument,* is unable to derive *therefrom* the intention of the parties as to what land was to be conveyed." (Emphasis added.) Parol evidence may not be introduced to remove a patent ambiguity since to do so would not be a use of such evidence to fit the description to the land but a use of such evidence to create a description by adding to the words of the instrument. *Cummings v. Dosam, Inc.,* 273 N.C. 28, 159 S.E. 2d 513; *McDaris v. "T" Corp.,* 265 N.C. 298, 144 S.E. 2d 59; *Lane v. Coe, supra; Thompson v. Umberger, supra.*

[4] The description in the deed under which the plaintiffs claim title is patently ambiguous. It refers to nothing extrinsic to which one may turn in order to identify with certainty the land intended to be conveyed. All that the deed tells us about the land is that it is "pocosin land," i.e., swamp land, in Chowan County, it adjoins the lands of the late Henderson Luton and contains, *by estimation,* 319 acres. It is a matter of common knowledge that there are numerous, extensive tracts of pocosin land in Chowan County. The deed leaves the reader of it in doubt as to each of the following things: (1) The exact area of the tract intended to be conveyed, (2) whether the tract intended to be conveyed is all or only part of a single pocosin area, (3) assuming the "Henderson Luton" tract can be located with certainty, on which side of it lies the land here intended to be conveyed, and (4) the length of the common boundary between the "Henderson Luton" tract and the land here intended to be conveyed. Furthermore, the record shows, and the Superior Court found, there were recorded in the office of the Register of Deeds of Chowan County three separate deeds conveying large tracts of land in Chowan County to Henderson

Luton and another deed conveying a smaller tract to Henderson Luton and another. The descriptions of the three larger tracts conveyed to Henderson Luton alone show that each of these tracts had one or more boundary lines running along or through a swamp or along the Chowan River.

Since the description in the deed under which the plaintiffs claim is patently ambiguous, the deed is void and cannot be the basis for a valid claim of title in the plaintiffs to the land now claimed by them. It follows that the summary judgment in favor of the defendants was properly entered by the Superior Court. The judgment of the Court of Appeals is, therefore, reversed and the matter is hereby remanded to the Court of Appeals for the entry by it of a judgment affirming the judgment of the Superior Court.

Reversed.

Justice COPELAND did not participate in the consideration or decision of this case.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BILLINGS v. HARRIS CO.

No. 27 PC.

Case below: 27 N.C. App. 689.

Petition for discretionary review under G.S. 7A-31 allowed 3 February 1976.

BOGLE v. POWER CO.

No. 132 PC.

Case below: 27 N.C. App. 318.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

DAVIS v. INSURANCE CO.

No. 26 PC.

Case below: 28 N.C. App. 44.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

ELKS LODGE v. BOARD OF ALCOHOLIC CONTROL

No. 15 PC.

Case below: 27 N.C. App. 594.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

GRADING CO. v. CONSTRUCTION CO.

No. 31 PC.

Case below: 27 N.C. App. 725.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

GREEN v. EURE, SECRETARY OF STATE

No. 12 PC.

Case below: 27 N.C. App. 605.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

GRUPEN v. FURNITURE INDUSTRIES

No. 28 PC.

Case below: 28 N.C. App. 119.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

HELTON v. COOK

No. 144 PC.

Case below: 27 N.C. App. 565.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

HORNE v. WALL

No. 129 PC.

Case below: 27 N.C. App. 373.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

HOSPITAL v. DAVIS

No. 1 PC.

Case below: 27 N.C. App. 479.

Petition for discretionary review under G.S. 7A-31 allowed 3 February 1976.

INDUSTRIES, INC. v. RAILWAY CO.

No. 135 PC.

Case below: 27 N.C. App. 331.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

JOHNSON v. HOOKS

No. 33 PC.

Case below: 27 N.C. App. 584.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

LEVI v. JUSTICE and SEARCY v. JUSTICE

No. 5 PC.

Case below: 27 N.C. App. 511.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

LEWALLEN v. UPHOLSTERY CO.

No. 7 PC.

Case below: 27 N.C. App. 652.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

MEN'S WEAR v. HARRIS

No. 25 PC.

Case below: 28 N.C. App. 153.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

PIATT v. DOUGHNUT CORP.

No. 10 PC.

Case below: 28 N.C. App. 139.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. ABRAMS

No. 143 PC.

Case below: 27 N.C. App. 627.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. AUSTIN

No. 21 PC.

Case below: 26 N.C. App. 535.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. BRADSHAW

No. 147 PC.

Case below: 27 N.C. App. 485.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. BULLOCK

No. 35 PC.

Case below: 28 N.C. App. 1.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

STATE v. FOGLER

No. 8 PC.

Case below: 27 N.C. App. 659.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. HANCOCK

No. 11 PC.

Case below: 28 N.C. App. 149.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

STATE v. HARRIS

No. 24 PC.

Case below: 28 N.C. App. 122.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. KEARNS

No. 124 PC.

Case below: 27 N.C. App. 354.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. LEWIS

No. 16 PC.

Case below: 28 N.C. App. 212.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. MINOR

No. 34 PC.

Case below: 28 N.C. App. 85.

Petition for discretionary review under G.S. 7A-31 allowed 3 February 1976.

STATE v. MITCHELL

No. 9 PC.

Case below: 27 N.C. App. 313.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. PARKS

No. 13 PC.

Case below: 28 N.C. App. 20.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

STATE v. RUSH

No. 29 PC.

Case below: 28 N.C. App. 226.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

STATE v. SPINKS

No. 14 PC.

Case below: 27 N.C. App. 642.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

STATE v. WISE

No. 23 PC.

Case below: 27 N.C. App. 622.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 February 1976.

STONEY v. MacDOUGALL

No. 30 PC.

Case below: 28 N.C. App. 178.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

TAYLOR v. SHIRT CO.

No. 18 PC.

Case below: 28 N.C. App. 61.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

VILLAGE, INC. v. FINANCIAL CORP.

No. 118 PC.

Case below: 27 N.C. App. 403.

Petition for discretionary review under G.S. 7A-31 denied 3 February 1976.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1976

C. CAPERS SMITH v. STATE OF NORTH CAROLINA; JAMES E. HOLSHOUSER, GOVERNOR; JOE K. BYRD, CHAIRMAN, STATE BOARD OF MENTAL HEALTH; RALPH SCOTT, ADVISORY BUDGET COMMISSION; DAVID T. FLAHERTY, SECRETARY OF HUMAN RESOURCES; N. P. ZARZAR, COMMISSIONER, MENTAL HEALTH; TREVOR G. WILLIAMS, SUPERINTENDENT, BROUGHTON HOSPITAL

No. 70

(Filed 2 March 1976)

1. **State § 4— action for breach of employment contract — plaintiff as State employee**

By virtue of N. C. Sess. Laws 1963, Ch. 1166, §§ 3, 4, plaintiff, who was appointed by the Governor as Superintendent of Broughton Hospital, one of the State's hospitals for the mentally disordered, was an employee of the State, and at the time of his appointment, the State employed him as Superintendent of the Hospital for a period of six years, provided only his employment not be earlier terminated for cause.

2. **State § 4— contract by State — implied consent to be sued — no sovereign immunity in contract actions**

Whenever the State of N. C., through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract; thus, in the present case and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State, and the State will occupy the same position as any other litigant.

3. State § 4— action for breach of contract — no sovereign immunity — no execution against State

Since plaintiff's suit is predicated upon a contract which was fully authorized by the State legislature, the trial court properly denied the State's motion to dismiss on the ground of sovereign immunity; however, if plaintiff is successful in establishing his claim against the State, he cannot obtain execution to enforce the judgment.

4. Constitutional Law § 5; Courts § 2; State § 3— claims against State — no original jurisdiction in Supreme Court — jurisdiction constitutionally defined

The N. C. Constitution no longer gives the Supreme Court original jurisdiction over claims against the State, nor is such jurisdiction given the Supreme Court by G.S. 7A-25, since the General Assembly intended that N. C. Sess. Laws, Ch. 1258, § 5 (1969) should repeal that statute; moreover, had it not been repealed, G.S. 7A-25 would be unconstitutional, since it is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the Legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the Constitution.

5. Public Officers § 9— breach of contract — sufficiency of complaint

In plaintiff's action against defendant public officers arising from plaintiff's allegedly wrongful discharge from employment, the trial court properly denied the individual defendants' motion to dismiss since it does not appear beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief against the individual defendants.

6. Public Officers § 9; State § 4— breach of contract — action against State and officials — State alone liable

When an action for breach of contract to recover lost benefits is brought against the State and the officials who acted for the State in the transaction which is the basis for the suit, the State alone will be liable for a breach of the contract; in such case, to hold the officials liable, a plaintiff must state and prove more than a claim for breach of contract.

7. Venue § 4— action against public officers — county where action arose proper — action against State — county of plaintiff's residence proper

Pursuant to G.S. 1-77(2), plaintiff was entitled to bring his action against defendant public officers in Burke County, since plaintiff's allegedly wrongful discharge from employment occurred in that county and any potential cause of action arose there; however, as to plaintiff's action against the State, G.S. 1-82 was applicable, and plaintiff could bring his action in Burke County, the county of his residence.

Justice LAKE dissenting.

APPEAL under G.S. 7A-30(2) from the decision of the Court of Appeals reported in 23 N.C. App. 423, 209 S.E. 2d

336 (1974), which affirmed an order of *Ervin, J.*, denying defendants' motion to dismiss and to change venue, entered at the 20 October 1973 Session of BURKE Superior Court, docketed and argued as Case No. 61 at the Spring Term 1975.

Plaintiff, C. Capers Smith, a medical doctor, with approved training and experience in psychiatry and duly licensed in North Carolina, instituted this action on 24 July 1973 against the State of North Carolina and the following State officers in their official and individual capacity: James E. Holshouser, the present Governor of North Carolina; Joe K. Byrd, Chairman of the State Board of Mental Health; Ralph Scott, legislative member of the Advisory Budget Commission; David Flaherty, Secretary of the Department of Human Resources; N. P. Zarzar, State Commissioner of Mental Health; and Dr. Trevor G. Williams, Acting Superintendent of Broughton Hospital and former Western Regional Commissioner of Mental Health. Plaintiff alleges that he is entitled to recover damages against both the State and the individual defendants for his wrongful discharge as Superintendent of Broughton Hospital.

In summary the complaint alleges (enumeration ours):

1. On or about 1 October 1970 Governor Robert W. Scott, who was then Governor of the State, confirmed plaintiff's appointment as Superintendent of Broughton Hospital, one of the State's hospitals for the mentally disordered. The appointment made in accordance with G.S. § 122-25 (1964) (repealed 1 July 1973 by N. C. Sess. Laws, Ch. 476, § 133 (1973)), was for a term of six years. Plaintiff accepted the appointment and performed his duties as superintendent "properly, efficiently and according to the contract" until 18 April 1973, when he was discharged without cause and without a hearing.

2. On 18 April 1973 Dr. Trevor Williams, Western Regional Commissioner of Mental Health, demanded that plaintiff release to him "the tape recorder cassettes" allegedly made during an official credentials committee meeting called by plaintiff as superintendent of Broughton Hospital. Plaintiff, at that time, did not have the cassettes and therefore could not release them to Dr. Williams. Notwithstanding, because of his failure to produce the tapes, Dr. Williams summarily discharged plaintiff from his position although plaintiff's contract with the State gave him three years and five months additional employment. Plaintiff's removal as superintendent was thereafter approved

by Dr. N. P. Zarzar, State Commissioner of Mental Health; David Flaherty, Secretary of the Department of Human Resources; and Governor Holshouser.

3. Plaintiff's dismissal was "without due cause or authority"; "against the statute"; "without any hearing whatsoever and without due process." He was dismissed "in a manner of harassment, embarrassment, with widely publicized news coverage and under circumstances designed to embarrass and humiliate plaintiff." Defendants' actions deprived plaintiff "of his livelihood and right to employment" and "resulted in his professional defamation." Plaintiff's age and the prejudicial circumstances under which he was released will render it difficult if not impossible for him to obtain other employment of a comparable nature.

4. After his dismissal, plaintiff, pursuant to G.S. 122-1.1 (1964) (repealed 1 July 1973 by N. C. Sess. Laws, Ch. 476, § 133 (1973)), served upon the Governor and the Chairman of the Advisory Budget Commission a claim for severance pay. When no action was taken on his claim, plaintiff filed this action.

Plaintiff's prayer for relief is that he recover from "the defendants jointly and severally" the amount of $250,000.

On 21 August 1973 all defendants except Joe K. Byrd, pursuant to G.S. § 1A-1, Rule 12(b), moved to dismiss the action on the grounds that sovereign immunity barred the suit against the State and against the individual defendants since they were acting in their official capacities. In the event the motion to dismiss was denied, pursuant to G.S. § 1-77 and G.S. § 1-83(2), defendants moved to change the venue from Burke County to Wake County on the grounds (1) the discharge occurred in Wake and, the action being against public officers, the case properly should be tried in Wake; and (2) the convenience of witnesses and the ends of justice would be promoted by removing the case to Wake County.

Defendant Joe K. Byrd filed a separate answer, affidavit, and response to the motion to dismiss in which he opposed the two motions made by the other defendants.

On 20 October 1973 Judge Ervin denied the motions to dismiss and to change the venue. The moving defendants' petition for certiorari to the North Carolina Court of Appeals was

allowed 16 November 1973. The Court of Appeals, Judge Baley dissenting, affirmed the trial judge's rulings, and the moving defendants appealed to this Court as a matter of right.

Hatch, Sitton and Powell and James J. Booker for plaintiff appellee.

Blanchard, Tucker, Denson & Cline for Joe K. Byrd, defendant appellee.

James H. Carson, Jr., Attorney General, and Parks H. Icenhour, Assistant Attorney General, for defendant appellants.

SHARP, Chief Justice.

Appellants' first assignment of error challenges the trial court's denial of their motion to dismiss made on the grounds (1) that the State of North Carolina is the real party in interest, and (2) that its sovereign immunity bars plaintiff's action against both the State and the individual defendants, who were State officials acting within the scope of their official authority and in the exercise of the discretion invested in them by virtue of their respective positions.

In determining whether the motion to dismiss was properly denied we first consider whether the doctrine of sovereign immunity precludes plaintiff's action against the State itself without reference to its application to the individual defendants. As to them different considerations are, or may be, involved.

[1] Plaintiff's claim against the State for the salary he alleges he would have earned during the three years and five months of his unexpired term as superintendent of Broughton Hospital, to be tenable, must be based upon status as a State employee under a valid contract of employment. Since the decision in *Mial v. Ellington,* 134 N.C. 131, 149, 46 S.E. 961, 967 (1903), it has been the law of this State that " 'an appointment or election to public office does not establish contract relations between the persons appointed or elected and the State.' " *See* 63 Am. Jur. 2d *Public Officers and Employees* § 10 (1972).

In a sense public office is an employment but, briefly stated, the distinction is this: "[A] position is a public office when it is created by law, with duties cast on the incumbent which involves some portion of the sovereign power and in the

performance of which the public is concerned. . . . " *Id.* at § 11. *See also Bland v. City of Wilmington,* 278 N.C. 657, 180 S.E. 2d 813 (1971) ; Annot., 140 A.L.R. 1076 (1942).

Plaintiff was appointed superintendent pursuant to N. C. Sess. Laws 1963, ch. 1166, § 4 (codified as G.S. § 122-25 (1964)) (repealed by Sess. Laws 1973, ch. 476, § 133). In pertinent part this enactment provided: "The Commissioner of Mental Health with the approval of the State Board of Mental Health, shall appoint a medical superintendent for each hospital. The medical superintendent shall be a medical doctor duly licensed in North Carolina with approved training and experience in psychiatry. The appointment shall be for a term of six (6) years. . . . "

In specifying the powers and duties of the State Board of Mental Health "a policy-making body within and for the State Department of Health," N. C. Sess. Laws 1963, ch. 1166, § 3 (codified as G.S. 122-1.1 (1964)) (repealed by Sess. Laws 1973, ch. 476, § 133), provided, *inter alia: "The Board shall determine policies and adopt necessary rules and regulations governing the operation of the State Department of Mental Health and the employment of professional and staff personnel.* The State Board of Mental Health by and with the approval of the Governor, may terminate for cause the services of any *employee* appointed for a specific length of time. In the event of any such termination, severance pay shall be adjusted by the Governor and the Advisory Budget Commission." (Emphasis added.)

The foregoing statutes clearly make the medical superintendent of a state hospital a state employee. Thus, simply stated, plaintiff was a medical expert employed to supervise a psychiatric hospital owned and operated by the State. He had no duties which required or permitted him to exercise any portion of the sovereign power of the State. It was the State Board of Mental Health, "a policy-making body within and for the State Department of Mental Health," which exercised the State's sovereign power by formulating the policies and guidelines for the operation of its mental hospital. These policies determined, *inter alia,* the admission of patients and the extent and duration of their treatment—matters of public concern. The State Board was also authorized to enact ordinances for the regulation and deportment of persons in the buildings and grounds of the mental hospitals. G.S. § 122-16 (1974). Plaintiff,

as superintendent of Broughton Hospital, was subordinate to the Board. With the consent of the Governor, the Board could terminate his employment only for cause since he was an employee appointed for a specific length of time. Plaintiff's duties were to implement the Board's directives and policies, and to make those administrative and professional decisions which are daily required of the superintendent of a mental hospital.

The intent of the legislature to give the medical superintendents of the State's mental hospitals the status of employees, as well as the reasons for such designation, is apparent. The proper operation of a mental hospital requires a superintendent who is a medical expert with administrative ability and whose tenure will be unaffected by political changes. Thus, the superintendents themselves were given no policy-making authority. That was reposed in the State Board, the members of which were appointees of the Governor. Divorced from political considerations, the superintendents were to provide the expertise and continuity necessary to insure the continued efficient operation of the hospitals notwithstanding changes in the Executive Department of the State's government.

We hold, therefore, by reason of the statutes cited above that (1) plaintiff was an employee of the State and (2) at the time of his appointment the State employed him as superintendent of Broughton Hospital for a period of six years, provided only his employment not be earlier terminated for cause.

Here it is pertinent to note that N. C. Sess. Laws 1963, ch. 1166, § 13 (codified as G.S. § 122-31 (1964)) provided that the State Board of Mental Health shall fix the salaries and compensation of the superintendents of the State hospitals, and that "[t]he salaries shall not be diminished during the term of the incumbents." The provision quoted above was carried forward when G.S. § 122-31 was rewritten by N. C. Sess. Laws 1973, ch. 673, § 12 (now codified as G.S. § 122-31 (1974)).

Having determined that a contract existed between plaintiff and the State, the question remains whether the State is immune from an action for damages for the alleged breach of that contract.

The doctrine of sovereign immunity—that the State cannot be sued without its consent—has long been the law in North Carolina. The doctrine has proscribed both contract and tort actions against the state and its administrative agencies, as

well as suits to prevent a State officer or Commission from performing official duties or to control the exercise of judgment on the part of State officers or agencies. *See Lewis v. White,* 287 N.C. 625, 216 S.E. 2d 134 (1975); *Orange County v. Heath,* 282 N.C. 292, 192 S.E. 2d 308 (1972); *Steelman v. City of New Bern,* 279 N.C. 589, 184 S.E. 2d 239 (1971); *General Elec. Co. v. Turner,* 275 N.C. 493, 168 S.E. 2d 385 (1969); *Nello L. Teer Co. v. Highway Comm.,* 265 N.C. 1, 143 S.E. 2d 247 (1965); *Shingleton v. State,* 260 N.C. 451, 133 S.E. 2d 183 (1963); *Great Am. Ins. Co. v. Gold,* 254 N.C. 168, 118 S.E. 2d 792 (1961); *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18 (1960); *Floyd v. Highway Comm.,* 241 N.C. 461, 85 S.E. 2d 703 (1955); *Nello L. Teer Co. v. Jordan,* 232 N.C. 48, 59 S.E. 2d 359 (1950); *Schloss v. Highway Comm.,* 230 N.C. 489, 53 S.E. 2d 517 (1949); *Kirby v. Stokes County Board of Education,* 230 N.C. 619, 55 S.E. 2d 322 (1949); *Prudential Insurance Co. of America v. Unemployment Compensation Comm.,* 217 N.C. 495, 8 S.E. 2d 619 (1940); *Vinson v. O'Berry,* 209 N.C. 287, 183 S.E. 423 (1936); *Carpenter v. Atlanta & C. A. L. Ry.,* 184 N.C. 400, 114 S.E. 693 (1922); *Moody v. State Prison,* 128 N.C. 12, 38 S.E. 131 (1901); *Clodfelter v. State,* 86 N.C. 52 (1882); 7 Strong's N. C. Index 2d, § 4 (1968).

The traditional rules governing the State's liability on its contracts and its immunity to suits are stated as follows in 72 Am. Jur. 2d, *States, Etc.* (1974).

"The rights and responsibilities of a state under an ordinary business contract are, with few exceptions, the same as those of individuals. Although it cannot be sued without its consent, the state, when making a contract with an individual, is liable for a breach of its agreement in like manner as an individual contractor. And while it may refuse to respond in damages, and leave a claimant without any remedy, as it may refuse to pay its bonds, the obligation remains. No legislative fiat can destroy or impair that. In order to impose a contractual liability on the state, there must be a contract obligation on its part. It is not bound by a contract entered into by its officers without authority." *Id.* § 88.

"As to its contract, the State should be held to the same rules and principles of construction and application of contract provisions as govern private persons and corporations in contracting with each other. But aside from the fact that a contract of the State must ordinarily rest upon some legislative enact-

ment and in this respect is distinguished from contracts with individuals, there is another essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other cannot. This result flows from the established principle that a state cannot be sued. The legislature has the ability to avoid payment of the obligations of the state by a failure or refusal to make the necessary appropriation, although that body cannot impair the obligation of the contract and creditors accepting obligations of the state are bound to know that they cannot enforce their claims against the state directly or against its officers when no appropriation has been made for their payment. Unless there is an appropriation, courts have no power to enforce a contract of a state, even though they do not doubt its validity." *Id.* § 73.

The substance of the foregoing statement is (1) that, although the state is fully obligated on its contracts, the doctrine of sovereign immunity prevents a suit to enforce its obligation unless the state has waived the immunity; and (2) that any judgment against the state will be uncollectible unless the legislature appropriates funds which can be used to pay the obligation.

The cases previously cited herein evidence this Court's strict adherence to the doctrine of sovereign immunity. Yet in *Lyons & Sons, Inc. v. Board of Education,* 238 N.C. 24, 76 S.E. 2d 553, decided 12 June 1953, in writing the opinion for the Court, Justice Parker (later Chief Justice) noted that the exemption of the sovereign from suit involves hardship where consent has been withheld and also that "the current trend of legislative policy and of judicial thought is toward the abandonment of the monarchistic doctrine of governmental immunity." *Id.* at 27, 76 S.E. 2d at 555.

In *Steelman v. City of New Bern, supra,* a wrongful death case decided 10 November 1971, the negligence of the defendant municipality was so gross, and the righteousness of plaintiff's claim so apparent, that we reexamined the doctrine of governmental immunity which relieved municipalities of tort liability. Justice Moore, writing the opinion for the Court, reviewed the history of the doctrine. In doing so he noted that (1) This "judge-made doctrine" was first adopted by this Court in 1889

in *Moffitt v. Asheville,* 103 N.C. 237, 9 S.E. 695, earlier North Carolina cases having specifically rejected it. (2) For many years the doctrine has been under attack. *See* 5 Wake Forest Intra. L. Rev. 383 (1969); 1964 Duke L. J. 888 (1964); 41 N. C. L. Rev. 290 (1963). (3) In 1957 the Supreme Court of Florida broke the states' solid ranks by holding that sovereign immunity "had been erroneously transposed into our democratic system and that the time had arrived to declare this doctrine anachronistic not only to our system of justice, but to our traditional concepts of democratic government." (4) "Since 1957 fifteen other jurisdictions . . . had overruled or greatly modified the immunization of muncipalities from tort liability."

We suggested in *Steelman v. City of New Bern,* "It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted." *Id.* at 595; 184 S.E. 2d at 243. However, we declined to abrogate a municipality's governmental immunity from tort liability for the negligence of its agents acting in the scope of their authority. The rationale was that, albeit the doctrine was "judge-made," the General Assembly had recognized it as the public policy of the State by enacting legislation which permitted municipalities and other governmental bodies to purchase liability insurance and thereby waive their immunity to the extent of the amount of insurance so obtained. *Id.* at 594-96, 184 S.E. 2d at 242-43.

The arguments for and against sovereign immunity are usually set out in opinions involving tort actions, but they have been applied indiscriminately to actions to enforce government contracts. Professor Kenneth Culp Davis, author of a multivolume treatise on administrative law and Administrative Law Text (1972), is perhaps the best known and most outspoken critic of sovereign immunity. His views are summarized in a publication of The National Association of Attorneys General, *Sovereign Immunity: The Liability of Government and its Officials,* January 1975 at p. 17 as follows:

"Professor Davis notes that the following policy grounds are usually offered for immunity: a need to prevent the diversion of public funds to compensate for private purposes; a need to avoid disruption of public service and safety; a need to prevent governmental involvement in endless embarrassments, difficulties and losses subversive to the public interest; and the nonprofit nature of government should be reflected in non-

liability. Balanced against these policy grounds, according to Davis, are the following considerations which tend to support governmental liability: since the public purpose involves injury-producing activity, injuries should be viewed as an activity cost which must be met in the furtherance of public enterprise; there is no control of government activity involved in the typical law suit; it is better to distribute the cost of government caused injuries among the beneficiaries of government than entirely on the hapless victims; although the government does not profit from its activities, the taxpayers do, so the taxpayers should bear the cost of governmental tort liability." *See also* K. Davis, Administrative Law Text, Ch. 27 (1972). For a full discussion of the provisions and consequences of sovereign immunity as it applies to governmental liability for tort see W. Prosser, Handbook of the Law of Torts, § 131 (4th Ed. 1971).

Recognizing the validity of many of the arguments against sovereign immunity and that it often results in injustice, Congress and a number of state legislatures (including North Carolina's) have enacted Tort Claims Acts which authorizes suits for certain torts. In addition, the courts of at least twenty-four states have now judicially abrogated or otherwise modified the doctrine of sovereign immunity as it relates to tort actions against the state. *See Steelman v. City of New Bern, supra* at 593-94, 184 S.E. 2d at 242, and NAAG at 26-32.

Though the law reviews and treatises contain comparatively little discussion of sovereign immunity as it relates to contract actions, there has, nonetheless, been both legislative and judicial activity in that area. For example, 28 U.S.C.A. § 1491 (1973) (commonly known as a part of the Tucker Act) gives the Court of Claims jurisdiction over many contract claims against the federal government. On the state level many courts have judicially abolished the doctrine of sovereign immunity as it applies to contract actions by holding that the state impliedly waives its sovereign immunity whenever it enters into a contract. Among cases supporting this view are the following:

Souza and McCue Constr. Co. v. Superior Court of San Benito County, 57 Cal. 2d 508, 20 Cal. Rptr. 634, 370 P. 2d 338 (1962); *Ace Flying Service, Inc. v. Colorado Dept. of Agriculture,* 136 Colo. 19, 314 P. 2d 278 (1957); *George & Lynch, Inc. v. State,* 57 Del. 158, 197 A. 2d 734 (1964); *Regents of the University System of Georgia v. Blanton,* 49 Ga. App. 602 (1934); *Grant Constr. Co. v. Burns,* 92 Idaho 408, 443 P. 2d

1005 (1968); *Kersten Company v. Department of Social Services,* 207 N.W. 2d 117 (Iowa 1973); *Humphreys v. J. G. Michael & Co.,* 341 S.W. 2d 229 (Ky. 1960); *W. H. Knapp Co. v. State Highway Dept.,* 311 Mich. 186, 18 N.W. 2d 421 (1945); *V. S. Dicarlo Constr. Co. v. State,* 485 S.W. 2d 52 (Mo. 1972); *Meens v. State Board of Education,* 127 Mont. 515, 267 P. 2d 981 (1954); *Todd v. Board of Educational Lands and Funds,* 154 Nebraska 606, 48 N.W. 2d 706 (1951); *P, T & L Constr. Co. v. Commissioner, Dept. of Trans.,* 55 N.J. 341, 262 A. 2d 195 (1970). *See also,* 72 Am. Jur. 2d *States, Etc.* § 118 (1972). But see *State ex rel Dept. of Highways v. McKnight,* 496 P. 2d 775 (Okla. 1972), where the Oklahoma Supreme Court expressly refused to hold that the State impliedly waived its sovereign immunity by entering into a contract. It adhered to its position that if the doctrine was to be abrogated or relaxed it should be done by the legislature.

The rationale of the foregoing decisions is well stated in the several cases from which excerpts are quoted below.

In *Grant Construction Co. v. Burns, supra,* the plaintiff, a highway contractor, brought an action against the Idaho Board of Highway Directors to recover damages resulting from its breach of a road construction contract. The trial court denied defendant's motion to dismiss based upon sovereign immunity, and, after a trial on the merits, entered judgment in plaintiff's favor. Defendant appealed contending that as a state agency it was immune from liability by reason of the sovereign immunity of the State of Idaho. In affirming the trial court, the Supreme Court of Idaho said:

"We have held that the state cannot be sued without its consent, and that such consent cannot be implied but must be expressly given by constitutional or statutory provisions. (Cites omitted.)

"We have recognized, however, that our constitutional provision prohibiting the taking of property for public use until just compensation has been paid waives the immunity of the state from suit where the state took or damaged the property without first condemning it. (Cites omitted.)

"In the instant action, the state, acting through appellants, entered into a highway construction contract with respondents and allegedly breached the contract to the damage of respond-

ents. Appellants refused to entertain parts of respondents' damage claim, and now assert the defense of sovereign immunity.

. . . .

"The Supreme Court of Indiana in 1891, in *Carr v. State ex rel. Coetlosquet,* 127 Ind. 204, 26 N.E. 778, 779, 11 L.R.A. 370, made the following pertinent assertion:

'In entering into the contract it [the state] laid aside its attributes as a sovereign, and bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state whenever it enters into an ordinary business contract * * * . The principle that a state, in entering into a contract, binds itself substantially as an individual does under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation. * * * '

"Courts in other jurisdictions are in accord with the ruling of the Supreme Court of Indiana and have held, in effect, that where the legislature has by statute authorized the state to enter into certain contracts, the state upon entering into such a contract thereby consents to be sued if it breaches the contract to the damage of the other contracting party." (Citations to the Calif., Colo., Ga., Mont., and Neb. decisions cited above omitted.) *Id.* at 412-13, 443 P. 2d at 1009-10.

"We agree with this principle. To deny the right to sue in such a contractual situation would be to deprive the damaged contracting party of property without due process of law. U. S. Const. Amendments 5 and 14. Accordingly, we hold that where, as here, the state has entered into a contract pursuant to legislative authorization, the state has consented to be sued for alleged breaches of its contractual responsibilities and cannot invoke the protection of sovereign immunity."

The Idaho Court also said that the plaintiff's claim for damages was within the contemplation of the legislature and thus implicitly authorized by that body. *Id.* at 413, 443 P. 2d at 1010.

In *Ace Flying Service, Inc. v. Colorado Dept. of Agriculture, supra,* the plaintiff contracted with the defendant to spray a certain number of acres of state land with an insecticide at a stipulated price per acre. The legislature had specifically authorized the Department to enter into the contract. The plaintiff was allowed to spray only a portion of the land specified in the contract before the defendant repudiated it. The trial court dismissed the plaintiff's action for breach of contract on the basis of sovereign immunity. In reversing the dismissal, the Supreme Court of Colorado said:

"All contracts entered into by the State of Colorado or by any of the Departments in its behalf, are required to be awarded, pursuant to statute, to the lowest responsible bidder. Once entered into they are binding upon the state as well as upon the other contracting party. To hold that the state may enter into a contract by which the other party is compelled to expend large sums in acquiring material, machinery and personnel to enable it to perform its obligation, and then arbitrarily repudiate the contract relegating the injured party to the doubtful remedy of appealing to the legislature for justice in the form of a bill for relief, would be to sanction the highest type of governmental tyranny.

"The applicable principle is that when a state enters into authorized contractual relations it thereby waives immunity from suit. This is not a new doctrine in this country." *Id.* at 22, 314 P. 2d at 280.

In *George & Lynch, Inc. v. State, supra,* the State of Delaware brought an action against *George & Lynch, Inc.,* to recover payments improperly made under a road construction contract. The construction company counterclaimed alleging that monies were due it under other road construction contracts with the state. The trial court entered judgment in the state's favor on the counterclaim on the basis of sovereign immunity. On appeal the Supreme Court of Delaware reversed saying: "By 17 Del. C. § 132(b)(9), the State Highway Department is authorized to 'make and enter into any or all contracts, agreements or stipulations.' It must be assumed that the General Assembly, in granting to the State Highway Department the power to contract, intended that it should have power to enter into only valid contracts. A valid contract is one which has mutuality of obligation and remedy between the parties to it. 1 Williston on Contracts (3rd Ed.) § 1. It follows, therefore, that in authoriz-

ing the State Highway Department to enter into valid contracts the General Assembly has necessarily waived the State's immunity to suit for breach by the State of that contract.

"Any other conclusion would ascribe to the General Assembly an intent to profit the State at the expense of its citizens. We are unwilling to assume that the General Assembly intended the State to mislead its citizens into expending large sums to carry out their obligation to the State and, at the same time, deny to them the right to hold the State accountable for its breach of its obligations. To state the proposition is to demonstrate its injustice; indeed, so unjust is it that it might amount to taking the property without due process of law."

. . . .

"It follows, therefore, that a party contracting with an agency of the State authorized by law to enter into contracts has all the remedies under that contract which any private citizen has against another private citizen, including the right to sue for the breach thereof." *Id.* at 162-63, 197 A. 2d at 736-37.

In *Kersten Co. v. Department of Social Services, supra,* the defendant, a state agency, entered into an oral lease with the plaintiff, who sued for its breach. The defendant moved to dismiss on the ground of governmental immunity, and the trial court denied the motion. On appeal the Supreme Court of Iowa, overruling a prior case which otherwise would have required a reversal of the trial court's ruling *(Megee v. Barnes,* 160 N.W. 2d 815 (Iowa 1965)), affirmed. Noting that, one by one, states have defected from "the banner" to join jurisdictions aligning themselves on the side of governmental responsibility rather than governmental immunity, the Court said: "Today's decision forsakes that rationale and adopts the rule espoused by many jurisdictions and most graphically described by the Supreme Court of Washington when abrogating its charitable immunity rule in 1953, 'We closed our courtroom doors without legislative help, we can likewise open them.' " *Id.* at 119.

After examining the obligations which the Iowa Code imposed upon the defendant the Court concluded that "to a certainty the department cannot function without countless day-to-day contractual dealings. Of course, the State expects the other contracting parties to honor these obligations. It can—and does—seek redress when they fail to do so.

"Just as certainly *they* expect faithful performance by the State; but they have been left without adequate recourse when these expectations are unfulfilled. We do not consider a request for legislative allowance to be a satisfactory remedy for breach of a contractual duty. We agree with those courts which say the State, by entering into a contract, agrees to be answerable for its breach and waives its immunity from suit to that extent. To hold otherwise, these courts say, is to ascribe bad faith and shoddy dealing to the sovereign. They are unwilling to do so; and we are too." *Id.* at 119-20.

The argument that the defense of sovereign immunity should be retained in suits against the State on its contracts because a judgment against the State would be uncollectible unless the legislature accepted it and provided for its payment was considered and rejected by the Supreme Court of New Jersey in *P, T & L Constr. Co. v. Commissioner, Dept. of Transp.*, 55 N.J. 341, 262 A. 2d 195 (1970) and by the Supreme Court of Missouri in *Dicarlo Constr. Co. v. State*, 485 S.W. 2d 52 (1972).

In *P, T & L Constr. Co. v. Commissioner, Dept. of Transp., supra,* a suit against the State on a written contract for public construction, Weintraub, C. J., speaking for a unanimous court, said: "Whether appropriated moneys are still on hand, we do not know, but we think it is time to settle the larger question whether the courts should be open to a person who holds a contract with the State even though satisfaction of a favorable judgment would depend wholly upon the willingness of the Legislature to accept the judgment and provide for payment.

"If our coordinate branches made it plain that they would be indifferent to our judgments in such matters, we would indeed be loath to be party to the spectacle such a conflict of wills would create. But there is no reason to suppose that our efforts will be ignored. The immunity concept is judge-made. Its roots are hard to find, as others have carefully noted. . . . Obviously there should be an established form in which all such claims may be presented as of right and upon known principles. The judiciary of course is able to meet that need. This is not to say that another tribunal would be unsuitable. The point is that a court of claims has not been created, and until one is established, if it should be, the judiciary ought not to withhold its hand on a mere assumption that its coordinate branches would want it that way.

"We add that other jurisdictions have held, on one theme or another, that a State may be sued in its own courts on contracts it authorized." *Id.* at 55 N.J. 346, 262 A. 2d at 198.

In *Dicarlo Construction Co. v. State, supra,* after deciding "that when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting," the Court considered the State's assertion that "any judgment will be unenforceable and suit should not be maintainable for that reason." Citing and quoting with approval from *P, T & L Construction Co. v. Commissioner, Department of Transportation, supra,* the Missouri Court said:

"Courts usually do not examine the pocketbook of the defendant to determine whether a suit may be maintained. If a cause of action is stated and all necessary prerequisites to maintenance of such suit exist, the case is heard. Only if and when a judgment is rendered is attention given as to whether the judgment is collectible. The same should be true here. If, as we find, the State impliedly has consented to waive its sovereign immunity and to be sued on this contract, the plaintiff should be entitled to proceed with his suit and secure an adjudication thereof. The matter of collectibility will come later.

"We have no reason to believe that the General Assembly would not recognize as an obligation of the State any judgment finally rendered as a result of such litigation. On the contrary, we have every reason to believe that it would recognize and appropriate for such obligation. This procedure does not violate the separation of powers provided for in the Constitution. It is appropriate for the judicial branch to adjudicate whether the State is obligated as a result of a contract dispute. It remains for the General Assembly to appropriate the money if it be determined that the State is so obligated.

"This is a period when much is being said by members of the public as to the need for government to be responsive and responsible. The very antithesis of responsibility by government would be to say that it may contract with a citizen and assume obligations under the contract and then be permitted to disavow and say to the citizen that the State has breached the contract but you can't do anything about it because the government has not expressly consented to the maintenance of the suit. We have

every confidence that the General Assembly did not so intend." *Id.* at 57-58.

From the foregoing cases we see that the courts which have held a state implicitly consents to be sued upon any valid contract into which it enters were moved by the following considerations: (1) To deny the party who has performed his obligation under a contract the right to sue the state when it defaults is to take his property without compensation and thus to deny him due process; (2) To hold that the state may arbitrarily avoid its obligation under a contract after having induced the other party to change his position or to expend time and money in the performance of his obligations, or in preparing to perform them, would be judicial sanction of the highest type of governmental tyranny; (3) To attribute to the General Assembly the intent to retain to the state the right, should expedience seem to make it desirable, to breach its obligation at the expense of its citizens imputes to that body "bad faith and shoddiness" foreign to a democratic government; (4) A citizen's petition to the legislature for relief from the state's breach of contract is an unsatisfactory and frequently a totally inadequate remedy for an injured party; and (5) The courts are a proper forum in which claims against the state may be presented and decided upon known principles.

[2] We too are moved by the foregoing considerations. We hold, therefore, that whenever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract. Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant. *See Lyon & Sons v. Board of Education, supra.* Any other decision by this Court could only serve as a warning to one who changes his position to accept employment with the State that, if the State breaches his contract and discharges him without cause he will have no recourse to the courts to establish his claim for damages. We would not thus discredit our State whose reputation for integrity and fiscal responsibility is evidenced by the AAA rating of its bonds and the fact that it has not defaulted upon an obligation since its readmission into the Union in 1868.

[3] From the foregoing it follows that the trial court's denial of the State's motion to dismiss this action is affirmed. Plaintiff's suit is predicated upon a contract which was fully authorized by the State legislature. He may, therefore, prosecute his claim against the State.

In the event plaintiff is successful in establishing his claim against the State, he cannot, of course, obtain execution to enforce the judgment. *P, T & L Const. Co. v. Commissioner, Dept. of Transp., supra. See also Fitzgerald v. Palmer,* 47 N.J. 106, 219 A. 2d 512 (1966); 72 Am. Jur. 2d *States, Etc.* § 127 (1974). The validity of his claim, however, will have been judicially ascertained. The judiciary will have performed its function to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its constitutional duties.

We do not apprehend that this decision will result in any unseemly conflict between the legislative and judicial branches of the government. Nor do we anticipate that it will have a significant impact upon the State treasury or substantially affect official conduct. Past performance convinces us that when the State has entered into a contract, the officials who made it intended that the State would keep its part of the bargain. It has been the policy of this State to meet its valid obligations, and we foresee no change in that policy. The purpose of this decision is to implement the policy and to provide a remedy in exceptional situations where one may be required.

The legislature has already consented to be sued in many important contractual situations. For example, G.S. § 143-135.3 (Supp. 1975) authorizes civil actions on claims arising out of completed contracts for construction or repair work awarded by any state board. In addition, G.S. § 136-29(b) (1974) allows a road construction contractor to sue if his contract claim is denied by the State Highway Administrator and G.S. § 115-142(n) (1975) allows a teacher whose employment has been terminated to appeal to the superior court. Similarly G.S. § 153A-11 (1974) and G.S. § 160-11 (Supp. 1975) provide that counties and cities may contract and be contracted with and that they may sue and be sued. The General Assembly having consented to contract suits in these areas, we can perceive no sound reason why the doctrine of sovereign immunity should be a defense to any action for the breach of a duly authorized State contract.

At this point we wish to emphasize two important facts:

(1) We are not now concerned with the merits of the controversy between Dr. Smith and the State or its officials. We have no knowledge, opinion, or notion as to what the true facts are. These must be established at the trial. Today we decide only that plaintiff is not to be denied his day in court because his contract was with the State.

(2) This decision has no application to the doctrine of sovereign immunity as it relates to the State's liability for torts. That question is not involved in this case. While we continue to be aware of the many valid criticisms of governmental immunity from tort liability, which we noted in *Steelman v. City of New Bern, supra,* it may well be that if the State's immunity from tort liability is to be abolished or modified it should be done under rules, and perhaps within limits, fixed by the General Assembly. *See* Comment, *The Role of the Courts in Abolishing Governmental Immunity,* 1964 Duke L.J. 888. As to waiver of immunity, distinctions can be made between tort and contract liability.

The State is liable only upon contracts authorized by law. When it enters into a contract it does so voluntarily and authorizes its liability. Furthermore, the State may, with a fair degree of accuracy, estimate the extent of its liability for a breach of contract. On the other hand, the State never authorizes a tort, and the extent of tort liability for wrongful death and personal injuries is never predictable. With no limits on liability jury verdicts could conceivably impose an unanticipated strain upon the State's budget. Indeed, potential liability under the present open-end wrongful death statute alone (G.S. 28A-18-2 (Supp. 1975)) could create serious problems. For the extent to which the State has waived its immunity from tort claims, see G.S. 143-291 to G.S. 143-300.1 (1974).

Incidentally, we note that at least two states, Iowa and Delaware, which have abrogated sovereign immunity in actions for breach of its contracts have subsequently retained immunity from tort liability. *See Charles Gabus Ford v. Iowa State Highway Comm.,* 224 N.W. 2d 639 (Iowa 1974) and *Blair v. Anderson,* 325 A. 2d 94 (Del. 1974).

At this juncture we are constrained to point out that nothing in our present Constitution precludes the result we have reached.

The North Carolina Constitution of 1868, Article IV, Section 11 provided: "The Supreme Court shall have original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory: no process in the nature of execution shall issue thereon; they shall be reported to the next session of the General Assembly for its action."

Section 10 of Article IV provided: "The Supreme Court shall have jurisdiction to review upon appeal, any decision of the courts below, upon any matter of law or legal inference; but no issue of fact shall be tried before this court; and the court shall have power to issue any remedial writs necessary to give it a general supervision and control of the inferior courts.

The Constitutional Convention of 1875 renumbered section 11 above as section 9. Section 10 became section 8 after being amended to read as follows:

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference. And the jurisdiction of said court over 'issues of fact' and 'questions of fact' shall be the same exercised by it before the adoption of the Constitution of one thousand eight hundred and sixty eight, and the court shall have the power to issue any remedial writs necessary to give it general supervision and control over the proceedings of the inferior courts."

Thereafter sections 8 and 9 remained separate and unchanged until the general election on 6 November 1962 when the electorate ratified the rewrite of Article IV ("Judicial Department") of the constitution, submitted under N. C. Sess. Laws, ch. 313 (1961). In this revision sections 8 and 9 were combined as section 10(1) in words as follows:

"Sec. 10. Jurisdiction of the General Court of Justice.

"(1) Supreme Court. The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over 'issues of fact' and 'questions of fact' shall be the same exercised by it prior to the adoption of this Article, and the Court shall have the power to issue any remedial writs necessary to give it a general supervision and control over the proceedings of the other courts. The Supreme Court shall have original jurisdiction to hear claims against the State, but

its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next Session of the General Assembly for its action."

Obviously the first two sentences of Section 10(1) are former Section 8, wording slightly different but meaning unchanged; and the last sentence is former Section 9 unchanged.

In 1969, the General Assembly again proposed amendments to Article IV. *See* N. C. Sess. Laws, ch. 1258 (1969). These amendments, approved at the general election of 3 November 1970, became effective on 1 July 1971. In consequence, the jurisdiction of the Supreme Court is presently as stated in N. C. Const. art. IV, § 12 as follows:

"Sec. 12, *Jurisdiction of the General Court of Justice.*

"(1) *Supreme Court.* The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference. The jurisdiction of the Supreme Court over 'issues of fact' and 'question of fact' shall be the same exercised by it prior to the adoption of this Article, and the Court may issue any remedial writs necessary to give it general supervision and control over the proceedings of other courts."

As now written, Article IV, § 12(1) is identical with former § 10(1) (1962) *except that* the last sentence of § 10(1) is omitted. The omitted sentence was Section 11 of the Constitution of 1868, the provision which gave the Supreme Court original jurisdiction over claims against the State. This provision is no longer in the Constitution.

The provision of Section 12(1) which retains the jurisdiction of the Supreme Court over "issues of fact" and "questions of fact" as it had existed prior to the 1971 revision, that is, since 1875 at least, has no relation to the Court's prior original jurisdiction over claims against the State. As pointed out by Justice Connor in *Lacy v. State,* 195 N.C. 284, 141 S.E. 886 (1928), "This jurisdiction with respect to 'issues' or 'questions of fact' is exercised only in actions which are equitable in their nature, and in which relief is sought upon equitable principles." *Id.* at 286, 141 S.E. at 888. *See Realty Corp. v. Kalman,* 272 N.C. 201, 159 S.E. 2d 193 (1967); *Deal v. Sanitary District,* 245 N.C. 74, 95 S.E. 2d 362 (1956); *Worthy v. Shields,* 90 N.C. 192 (1884).

In construing the limits of its original jurisdiction over claims against the State prior to 3 November 1970, this Court repeatedly and expressly held that such jurisdiction did not include claims involving issues of fact. In *Lacy v. State, supra,* it is said: "This Court has held in all the proceedings instituted since the adoption of the Constitution of 1868, in which the orginal jurisdiction with respect to claims against the State has been invoked, that such jurisdiction extended only to the decision of issues of law involved in such claims. It has declined to consider or to determine issues of fact, or to make decisions upon claims which involved only such issues." *Id.* at 288, 141 S.E. at 889.

[4] From the foregoing discussion it is quite clear that our Constitution no longer gives the Supreme Court original jurisdiction over claims against the State. Since 1 July 1971 its jurisdiction over such claims has been the same as its jurisdiction over all other claims, that is, "to review upon appeal any decision of the courts below, upon any matter of law or legal inference." N. C. Const. art. IV, § 12(1) (1971). Under the present Constitution the Superior Court has original general jurisdiction throughout the State except as otherwise provided by the General Assembly. N. C. Const. art. IV, § 12(3) (1971).

Although defendants do not rely upon G.S. 7A-25, and it was not cited by either party or the Court of Appeals, we deem it necessary to adjudicate the effect of the 1971 revision of N. C. Const., art. IV upon G.S. 7A-25. This statute was enacted as N. C. Sess. Laws, ch. 108, § 1 (1967). As codified it now appears in Vol. 1B, N. C. Gen. Stats., ch. 7A, Art. 5 "Jurisdiction" (1969), and reads as follows:

"§ 7A-25. *Original jurisdiction of the Supreme Court.*— The Supreme Court has original jurisdiction to hear claims against the State, but its decisions shall be merely recommendatory; no process in the nature of execution shall issue thereon; the decisions shall be reported to the next session of the General Assembly for its action. The court shall by rule prescribe the procedures to be followed in the proper exercise of the jurisdiction conferred by this section."

At this point a review of the legislative history of G.S. 7A-25 seems appropriate. Except for the last sentence its wording is identical with that of N. C. Const. art. IV, § 11 (1868) and with a statute enacted by the General Assembly of 1868

as section 415 of the Code of Civil Procedure. At the same time the General Assembly also enacted, as section 416 of the Code of Civil Procedure, the following statute:

"Any person having any claim against the state may file his complaint in the office of the clerk of the supreme court, setting forth the nature and grounds of his claim. He shall cause a copy of his complaint to be served on the governor, and therein request him to appear on behalf of the state and answer his claim. The copy shall be served at least twenty days before application for relief shall be made to the court. In case of an appearance for the state by the governor, or any other authorized officer, the pleadings and trial shall be conducted in such manner as the court shall direct. If an issue of fact shall be joined on the pleadings, the court shall transfer it to the superior court of some convenient county for trial by a jury, as other issues of fact are directed to be tried, and the judge of the court before whom the trial is had shall certify to the supreme court, at its next term, the verdict and the case, if any, made up and settled as prescribed in cases of appeal to the supreme court. If the state shall not appear in the action by any authorized officer, the court may make up issues and send them for trial, as aforesaid. The supreme court shall in all cases report the facts found, and their recommendation thereon, with the reasons thereof, to the general assembly at its next term."

Between 1868 and 1967 the foregoing two statutes, unchanged, appeared respectively as sections 415 and 416 of the Code of Civil Procedure in Battle's Revisal (1873); as "Sec. 947. Claims against the State," and "Sec. 948. Manner of Prosecuting Claims against the State," in the Code of North Carolina (1883); as §§ 1537 and 1538 of the Revisals of 1905 and 1908; as sections 1409 and 1410 in the Consolidated Statutes (1919) and in the N. C. Code of 1935 and 1939; and as § 7-8 and § 7-9 of the General Statutes of North Carolina (1943).

Perhaps the most significant case involving these statutes is *Lacy v. State, supra.* That case involved a claim in contract against the State Highway Commission, filed in this Court under C.S. 1409 and C.S. 1410. In dismissing "the proceeding," the Court noted, *inter alia,* that the State was "not subject to an action on the contract"; that the only issue presented was one of fact and the Court determines no such issues. Justice Connor, writing the opinion of the Court, used the occasion to point out that, in purporting to prescribe the procedure by which the

Supreme Court would exercise its original jurisdiction to hear and decide claims against the State, the General Assembly had exceeded its constitutional authority. Justice Connor wrote:

"It is well settled that the General Assembly is without power to prescribe or to regulate the rules of practice or procedure in the Supreme Court, in accordance with which it shall exercise its appellate jurisdiction. The Court prescribes its own rules; these cannot be modified or regulated by statute. The same principle is applicable to the rules of practice and procedure in accordance with which the Court shall exercise its original jurisdiction with respect to claims against the State." *Id.* at 287-88, 141 S.E. at 889.

With specific reference to C.S. 1410 the Court continued: "Insofar as this statute provides for and prescribes the procedure by which a claimant may invoke the original jurisdiction of this Court, conferred by the Constitution, with respect to his claim against the State, it is valid, and enforceable in all respects; when, however, a proceeding has been duly instituted and filed in this Court, in accordance with the provisions of the statute, the procedure by which the Court will thereafter exercise its power to hear and decide upon the claim is not controlled by the statute. . . . When, however, in order to decide an issue or question of law involved, the Court deems it best to have issues of fact first determined, the Court may or may not follow the provisions of the statute with respect to a trial by jury of such issues. The statute is at most, in this respect, directory. It cannot be controlling." *Id.* at 288-90, 141 S.E. at 890.

In spite of the pronouncements in *Lacy v. State,* G.S. 7-9, which was a subsequent recodification of C.S. § 1410, remained in the books until both it and G.S. 7-8 were repealed by N. C. Sess. Laws, ch. 108, § 12 (1967), an enactment which rewrote Chapter 7A ("General Court of Justice"), Subchapter II ("Appellate Division of the General Court of Justice"), of the General Statutes and, *inter alia,* created the Court of Appeals. The repeal of G.S. 7-9 conformed the statutory law to the Lacy decision. However, since the Constitution in 1967 still gave the Supreme Court original jurisdiction over claims against the State, the General Assembly deemed it appropriate to reenact a statute in the words of the constitutional provision then in effect (last sentence of Sec. 10(1), art. IV) for inclusion in Chapter 7A of the General Statutes. The result was G.S. 7A-25 (1969).

The continued presence of G.S. 7A-25 in Chapter 7A of the General Statutes after the 1971 revision of N. C. Const. art. IV, which took away this Court's original jurisdiction to entertain claims against the State, prima facie created an anomaly. In our view, however, none was intended, and it is eliminated by N. C. Sess. Laws, ch. 1258 (1969), which proposed the revision of Article IV. Section 5 of that Act provided: "All laws and clauses of laws in conflict with this Act are repealed."

We hold that upon the ratification of the proposed revision of Article IV on 3 November 1970, G.S. 7A-25 was repealed. The jurisdiction which G.S. 7A-25 purported to give to this Court exceeded that granted to it in revised Article IV. The statute, therefore, is in conflict with N. C. Sess. Laws, ch. 1258 (1969) and repealed by Section 5 of that enactment. This was also the view of the North Carolina State Constitution Commission, which drafted the proposed revision of Article IV submitted to the electorate under authority of Chapter 1258 of N. C. Sess. Laws (1969). In its report of 16 December 1968 to the North Carolina State Bar and the North Carolina Bar Association in which it compared proposed Section 12(1) with its then existing counterpart, Section 10(1), the Commission stated: "The old language giving the Supreme Court long-unused jurisdiction to hear claims against the State is omitted from proposed Section 12(1). This type of claim is heard by the Industrial Commission under a statutory procedure."

Thus, we have no doubt both the Commission and the General Assembly intended that N. C. Sess. Laws, ch. 1258, § 5 (1969) should repeal G.S. 7A-25. However, we also conclude that, had it not been repealed, G.S. 7A-25 would be unconstitutional.

It is a well-established principle of constitutional law that when the jurisdiction of a particular court is constitutionally defined, the legislature cannot by statute restrict or enlarge that jurisdiction unless authorized to do so by the constitution. This principle is grounded on the separation of powers provisions found in many American constitutions, including N. C. Const. art. I, § 6 and art. IV, § 1 (1971). *See Marbury v. Madison,* 1 U.S. (Cranch) 137, 174-80, 2 L.Ed. 60, 72-74 (1803); *American Party of Arkansas v. Brandon,* 253 Ark. 123, 484 S.W. 2d 881 (1972) *(per curiam); Nethercutt v. Pulaski County Special School District,* 248 Ark. 143, 450 S.W. 2d 777 (1970); *People v. Carter,* ... Colo. ..., 527 P. 2d 875 (1974); *State ex*

rel. Buckwalter v. City of Lakeland, 112 Fla. 200, 150 So. 508 (1933); *Albert v. Parish of Rapides,* 256 La. 566, 237 So. 2d 380 (1970); *Board of Supervisors of Elections v. Attorney General,* 246 Md. 417, 229 A. 2d 388 (1967); *Sevinskey v. Wagus,* 76 Md. 335, 25 A. 468 (1892); *Ward v. Public Service Comm.,* 341 Mo. 227, 108 S.W. 2d 136 (1937); *O'Neill v. Vreeland,* 6 N.J. 158, 77 A. 2d 899 (1951); *Classic Pictures, Inc. v. Department of Ed.,* 158 Ohio St. 229, 108 N.E. 2d 319 (1952) *(per curiam); Thompson v. Redington,* 92 Ohio St. 101, 110 N.E. 652 (1915); *Bandy v. Mickelson,* 73 S.D. 485, 44 N.W. 2d 341 (1950); *Lane v. Ross,* 151 Tex. 268, 249 S.W. 2d 591 (1952); *Darnell v. Noel,* 34 Wash. 2d 428, 208 P. 2d 1194 (1949). *See also,* 16 Am. Jur. 2d *Constitutional Law* § 239 (1964) and cases cited in fn. 7; 21 C.J.S. *Courts* § 121 (1940) and cases cited; Second Decennial Digest Constitutional Law § 56 and cases cited; Fourth Decennial Digest Constitutional Law § 56 and cases cited.

This Court applied the foregoing principle in *Utilities Comm. v. Finishing Plant,* 264 N.C. 416, 142 S.E. 2d 8 (1965). In that case we considered the constitutionality of a state statute which purported to allow a party to bypass the superior court and to appeal directly to this Court from the decision of the Utilities Commission. In writing the opinion of the Court, Justice Bobbitt (later Chief Justice), said: "The jurisdiction of the Supreme Court is conferred and defined by the Constitution, not by the General Assembly. Under Section 10 of Article IV, the jurisdiction of the Supreme Court is to review on appeal decisions 'of the courts below.' This does not include jurisdiction to review on direct appeal the decisions of administrative agencies.

. . . .

"The conclusion reached is that, under the present provisions of Article IV, the appellate jurisdiction of the Supreme Court relates solely to appeals from decisions of 'the courts below,' and that the General Assembly has no authority to provide for appeal from decisions of administrative agencies to the Supreme Court without prior appeal to and review by a lower court within the General Court of Justice. Hence, G.S. 62-99 is held unconstitutional and void." *Id.* at 422, 142 S.E. 2d 12-13.

Thus *Finishing Plant, supra,* squarely held the General Assembly without authority to expand the appellate jurisdiction

of this Court beyond the limits set in the Constitution. *See also Rencher v. Anderson,* 93 N.C. 105, 107 (1885).

In summary, our conclusions are these: (1) Under the Constitution as revised in 1971, the Supreme Court is strictly an appellate court, its jurisdiction limited "to review upon appeal any decision of the courts below upon any matter of law or legal inference." N. C. Const. art. IV, § 12(1). (2) This Court now has no original jurisdiction over claims against the State, and the General Assembly has no authority to confer such jurisdiction upon it. N. C. Const. art. I, § 6. (3) G.S. 7A-25 (1969) was rendered null and void on 3 November 1970 when the electorate approved revised Article IV, submitted under N. C. Sess. Laws, ch. 1258 (1969), which deleted the provision granting the Supreme Court original jurisdiction of claims against the State. (4) The appropriate trial court of the General Court of Justice now has original jurisdiction to adjudicate claims against the State.

We now consider appellants' motion to dismiss the action against them as individuals. Again we note that their motion was based solely on the premise that the State is the real party in interest and protected by its sovereign immunity; that the individual defendants, in their dealings with plaintiff, were merely performing their official duties and were, therefore, protected by the State's sovereign immunity. The Court of Appeals paid scant attention to this aspect of the case and interpreted plaintiff's complaint as alleging only a claim for "monetary damages resulting from the State's alleged breach of contract." (By "monetary damages" we understand that court to have meant lost salary.) Having decided that by entering into "a statutorily authorized contract of employment for a specific number of years with plaintiff, the State had waived its immunity from suit for a breach thereof," the Court of Appeals merely affirmed the trial judge's denial of defendants' motion to dismiss. It did not discuss the allegations contained in paragraph 3 of our summary of the complaint in the preliminary statement of facts as bearing upon the question of defendants' individual liability.

In his briefs, filed in both the Court of Appeals and in this Court, plaintiff has contended that the allegations of paragraph 3 state a claim sounding in tort against the individual defendants in addition to his claim against the State for salary lost in consequence of the State's breach of its contract. Whether the Court of Appeals overlooked these allegations or deemed

them insufficient under G.S. 1A-1, Rule 8(a) or Rule 9(i) to state a claim for which relief can be granted in addition to damages for breach of contract to pay salary, we cannot say, of course. It is apparent, however, that the primary interest of both the trial judge and the Court of Appeals was in establishing a principle of law and not in requiring the plaintiff to provide the court with a plain statement of his claim.

In their rulings on the individual defendants' motion to dismiss, both courts have, in effect, held that plaintiff's allegations are sufficient to give defendants adequate notice of the transactions and occurrences he intends to prove.

In this regard, decisions of this Court assert generally that the official status of State officers, standing alone, does not immunize them from suit. *See Lewis v. White,* 287 N.C. 625, 643, 216 S.E. 2d 134, 146 (1975); *Pharr v. Garibaldi,* 252 N.C. 803, 115 S.E. 2d 18 (1960); *Schloss v. Highway Commission,* 230 N.C. 489, 492, 53 S.E. 2d 517, 519 (1949); *Pue v. Hood,* 222 N.C. 310, 315, 22 S.E. 2d 896, 900 (1942).

However, as this Court said in *Smith v. Hefner,* 235 N.C. 1, 7, 68 S.E. 2d 783, 787 (1952), "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable *unless it be alleged and proved* that his act, or failure to act, was corrupt or malicious (cites omitted), or that he acted outside of and beyond the scope of his duties." (Emphasis added.) As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. *Carpenter v. Atlanta & C.A.L. Ry.,* 184 N.C. 400, 406, 114 S.E. 693, 696 (1922). As to the personal liability of a governor, see 28 Am. Jur. 2d *Governor* § 11 (1968).

[5] Applying the foregoing statements to the present case, we are constrained to agree with the lower courts' denial of the individual defendants' motion to dismiss. The allegations of the complaint are in the broad and general terms permitted by G.S. 1A-1, Rule 8(a), and we cannot say that it appears beyond doubt that plaintiff can prove no set of facts in support of his claim that would entitle him to relief against the individual

defendants. *Sutton v. Duke,* 277 N.C. 94, 176 S.E. 2d 161 (1970). We emphasize, however, that such vague and conclusory pleading is not encouraged or commended by this Court. *Id.* at 105, 176 S.E. 2d at 167.

Obviously in the present posture of the case and in view of the general and inferential allegations of the complaint it would be unwise for this Court to attempt to provide and explore conceptual legal theories of liability or defense. This appeal was premature since ordinarily no appeal lies from a denial of a motion to dismiss. *North Carolina Consumers Power, Inc. v. Duke Power Co.,* 285 N.C. 434, 437, 206 S.E. 2d 178, 181 (1974); *Acorn v. Knitting Corp.,* 12 N.C. App. 266, 182 S.E. 2d 862 (1971).

However, we do deem it advisable to point out that the individual defendants are not parties to the employment contract upon which plaintiff bases his suit against the State anymore than the president of a corporation is a party to the contract he executes in his official capacity for the corporation. *See* 63 Am. Jur. 2d *Public Officers and Employees* §§ 319, 320 (1972); 19 Am. Jur. 2d *Corporations* §§ 1345, 1346 (1965). In the absence of circumstances which do not appear here, when a contract is made with a known agent, acting within the scope of his authority for a disclosed principal, the contract is that of the principal alone. *Jenkins v. City of Henderson,* 214 N.C. 244, 247, 199 S.E. 37, 39 (1938); 3 Am. Jur. 2d *Agency* § 294 (1962).

[6] Thus, when an action for breach of contract to recover lost benefits is brought against the State and the officials who acted for the State in the transaction which is the basis for the suit, the State alone will be liable for a breach of the contract. In such a case, to hold the officials liable, a plaintiff must state and prove more than a claim for breach of contract. *See* statements in *Pue v. Hood, supra,* and *Smith v. Hefner, supra.* In the present case what more does plaintiff intend to prove and under what law does he proceed? As of now we can only speculate.

If plaintiff, in view of our holding that he may sue the State for breach of contract, wishes to pursue his action against the individual defendants it would be helpful to all concerned if he would request and receive permission to amend his complaint to make a more definite statement of his claim. In any

event, the facilities of pretrial discovery and motion for summary judgment are still available to the individual defendants to test the merits of plaintiff's case as a matter of law.

Presumably the Court of Appeals allowed defendants' petition for certiorari only because, in refusing to dismiss this action against the State on the ground of its sovereign immunity, Judge Ervin had declined to follow the previous decisions of this Court. As the Supreme Court of Iowa said in a similar factual situation, "If trial courts venture into the business of predicting when this court will reverse its previous holdings . . . they are engaged in a high-risk adventure which we strongly recommend against. However, when their judgment proves prophetic, we should not refuse to affirm simply to demonstrate our final authority." *Kersten Co. v. Department of Social Services,* 207 N.W. 2d 117, 121 (Iowa, 1973).

[7] Defendants' final assignment of error is that the trial judge erred in denying their motion to change the venue of this action from Burke County to Wake. As to the individual defendants, G.S. 1-77(2) (1969) provides that actions against a public officer, or person especially appointed to execute his duties, for an act done by virtue of his office must be tried in the county where the cause, or some part thereof, arose. In *Coats v. Sampson County Memorial Hospital, Inc.,* 264 N.C. 332, 141 S.E. 2d 490 (1965), it is said: "Any consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a 'public officer or person especially appointed to execute his duties'? (2) In what county did the cause of action in suit arise?" *Id.* at 333, 141 S.E. 2d at 491.

Appellants correctly concede that they are public officers. Each "is charged with duties involving the exercise of some portion of the sovereign power." *See* 6 Strong's N. C. Index 2d *Public Officers* § 1 (1968). However, we do not agree with their contention that any potential cause of action against them necessarily arose in Wake County. As stated in *Coates v. Hospital, supra,* the broad general rule is that " 'the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " *Id.* at 334, 141 S.E. 2d at 492. "[A] cause of action may be said to accrue, within the meaning of a statute fixing venue of actions, when it comes into existence as an enforceable claim, that is, when the right to sue becomes vested." 77 Am. Jur. 2d *Venue* § 37 (1975).

In this case, the controversy concerning the tapes arose in Burke County, and it was there that plaintiff was allegedly discharged summarily, without cause, and without an opportunity to be heard. Plaintiff's right to sue accrued when he was dismissed. Since the dismissal came in Burke County, any potential cause of action arose there. As pointed out by Judge Parker in his opinion for the Court of Appeals, "The mere fact that plaintiff's discharge was thereafter affirmed by various State officials based in Raleigh does not entitle appellants, as a matter of right, to a change of venue to Wake County under the statute." *Smith v. State,* 23 N.C. App. 423, 428, 209 S.E. 2d 336, 339 (1974). The trial judge properly denied appellant's motion for a change of venue.

G.S. 1-77, however, does not apply to actions against the State. As to suits on contracts generally there is no venue statute specifically applicable to the State. This case, therefore, is governed by G.S. 1-82 (1969), which provides in pertinent part: "In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement. . . ." Thus, plaintiff, as a resident of Burke County, was entitled to institute this action there. We recognize that there may be reasons why any action against the State should be brought in Wake County, where its capital is located. If so, the General Assembly will undoubtedly so provide.

Finally, we reemphasize that nothing said in this opinion is to be construed as a commentary on the merits of the case, an evaluation of which is obviously impossible at this state of the proceedings. We hold only that plaintiff is entitled to have his claim against the State, as well as his claim against the individual defendants, adjudicated.

The decision of the Court of Appeals is affirmed.

Affirmed.

Justice LAKE dissenting.

The question before us on this appeal is not whether Dr. Smith was wrongfully discharged. He says he was. The Executive Department of the State Government says he was not. The only question now before us is, Do the courts of this State have jurisdiction to review the discharge of a State employee by the

Executive Department to determine whether it was a breach of contract and, if it was, to order the Executive Department to pay him damages out of the State treasury? It is my view that the courts of North Carolina, including this Court, have not been given that authority and so I dissent.

My dissent is based upon four sections of the Constitution of North Carolina, brought forward from our first Constitution through each intervening revision and reaffirmed by the people of the State when they adopted our present Constitution as recently as 1970.

These are:

Article I, Sec. 2: "*Sovereignty of the people.* All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole."

Article I, Sec. 6: "*Separation of powers.* The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other."

Article I, Sec. 12: "*Right of assembly and petition.* The people have a right * * * to apply to the General Assembly for redress of grievances; * * * *"

Article I, Sec. 35: "*Recurrence to fundamental principles.* A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty."

In *State v. Holden*, 64 N.C. 829 (1870), our predecessors on this Court, refusing to issue process against the Governor, said, "Each of these co-ordinate departments has it appropriate functions, and one cannot control the action of the other, in the sphere of its constitutional power and duty."

In *Person v. Watts*, 184 N.C. 499, 115 S.E. 336 (1922), Justice Adams, speaking for the Court, said concerning the constitutional requirement of separation of powers: "As to the wisdom of this provision there is practically no divergence of opinion—it is the rock upon which rests the fabric of our government. * * * The courts have absolutely no authority to control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government."

Quite obviously, the courts are equally without power to supervise the actions of the Executive Department within its constitutional sphere.

In *Wilson v. Jenkins*, 72 N.C. 5 (1875), Chief Justice Pearson, affirming the refusal of the lower court to issue a writ of mandamus directing the State Treasurer to pay interest coupons upon bonds issued in the name of the State—an alleged breach of a State contract—said: "[T]he courts have no power to compel, by *Mandamus*, the Public Treasurer to pay a debt which the General Assembly has directed him not to pay * * *." As Justice Adams also said in *Person v. Watts, supra:* "Judicial tribunals are not moot courts. It is their duty not to express opinions which can have no practical effect, but to decide questions of merit, to render judgment that may be enforced, to do practical work, and to put an end to litigation."

If, in the present case, a judgment be rendered that the Executive Department has wrongfully discharged Dr. Smith, its employee, in violation of his contract, and, therefore, the State must pay him a specified sum as damages, how will that judgment be enforced? Will execution be levied upon funds or lands of the State?

The majority opinion declares: "Thus, in this case, and in causes of action on contract arising after the filing date of this opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. *The State will occupy the same position as any other litigant.*" (Emphasis mine.) Two paragraphs later, the majority opinion declares: "*In the event plaintiff is successful in* establishing his claim against the State, *he cannot, of course, obtain execution to enforce the judgment.*" (Emphasis mine.) The majority evidently sees no inconsistency in the two statements.

But the question remains unanswered—How will the judgment be enforced? The majority opinion evades that question by declaring: "We do not apprehend * * * any unseemly conflict between the legislative and judicial branches of the government." What about an "unseemly conflict" between the Judicial Department and the Executive Department—the branch which is, here and now, denying our authority to adjudicate Dr. Smith's claim and order it to pay him damages? Would a conflict be "unseemly" if the other two branches of the State Government decline to concur in our view that the Judicial De-

partment has superior wisdom or higher ethical standards than the Executive Department in determining whether to discharge an employee of that department?

The majority opinion, after declaring that Dr. Smith cannot "obtain execution to enforce the judgment," says: "The validity of his claim, however, will have been *judicially* ascertained. *The judiciary will have performed its function* to the limit of its constitutional powers. Satisfaction will depend upon the manner in which the General Assembly discharges its *constitutional duties.*" (Emphasis mine.) This, in my opinion, simply begs the question and blandly ignores the principles repeatedly stated in decisions of our predecessors on this Court. It is not the function of the judiciary of this State to ascertain the merits of Dr. Smith's claim and the General Assembly has no constitutional duty to obey our unconstitutional order that damages be paid to him.

In *Lacy v. State,* 195 N.C. 284, 141 S.E. 886 (1928), a unanimous Court, speaking through Justice George Connor, said: "The claim upon which this proceeding was instituted arises out of a contract between the claimant and the State Highway Commission. The latter is an agency of the State, which is the real party to the contract, *and therefore is not subject to an action on the contract.*" (Emphasis mine.)

As Justice Adams said in *Person v. Watts, supra,* the function of the judiciary is to render judgments which it can enforce by its own process, not to announce its determination of ethical questions which the losing party to the controversy may lawfully ignore if it should see fit to do so.

As Justice Stacy, later Chief Justice, observed in his dissenting opinion in *State v. Bell,* 184 N.C. 701, 719, 115 S.E. 190 (1922): "The people of North Carolina have ordained in their Constitution * * * that the legislative, executive and supreme judicial powers of the Government should be and ought to remain forever separate and distinct from each other. * * * From this unique political division results our elaborate system of checks and balances. * * * In short, it is one of the distinct American contributions to the science of government; *and the judiciary—the department of trial and judgment—of all others, without hesitation or turning, should hold fast to the basic principle upon which this Government is founded.*" (Emphasis added.)

This is no longer a matter of jurisprudential speculation. The turmoil in our public school system, the ominous upswing in crime, the smouldering racial animosities, the deterioration of our election processes are eloquent in their testimony as to the results which follow from judicial usurpation of the power to amend the Constitution of the United States and to serve as a super-legislature. It serves no purpose for us to wring our hands over the excesses of the "Warren Court" if we, in a similar zest for putting into effect our concept of justice and the dictates of our conscience, embark upon a like course in disregard of "the basic principle upon which this Government is founded." The road to judicial dictatorship is also paved with good intentions.

A relatively minor flaw in the present decision is seen in the sentence: "Thus, in this case, and in causes of action on contract arising after the filing date of his opinion, 2 March 1976, the doctrine of sovereign immunity will not be a defense to the State. The State will occupy the same position as any other litigant." I assume this means that this decision will be applicable to, but only to, Dr. Smith's case and others in which it is alleged that the State broke its contract *after the date of this decision,* irrespective of when the contract was made.

If the doctrine of sovereign immunity, said, I think erroneously, to be judge-made law, was not correct when "made," it never has been a valid part of the law of North Carolina and should not be a defense to the State in an action for breach of contract, tried hereafter, regardless of when the breach is alleged to have occurred. If this doctrine was correct when "made," it entered into and became a part of the law of this State and to change it is an exercise of the legislative power, no part of which has been conferred upon this Court by the people of North Carolina. A pronouncement that yesterday the law was thus and so but tomorrow it will be otherwise is the classic example of the exercise of legislative power. Furthermore, for this Court to say, "Well, sovereign immunity always was bad law, but we will apply it to Joe Jones' claim for breach of contract when it comes up for trial next week because the alleged breach occurred last month, but we will not apply it to Dr. Smith's case which arose last year or to Sam Green's, where the breach occurs tomorrow," is gross and unconstitutional discrimination, which violates another provision of our Constitution, Article I, Section 19.

Another relatively minor error in the decision is the limitation of the demise of sovereign immunity to actions on contracts. If the courts of North Carolina have jurisdiction to hear and determine Dr. Smith's suit for alleged wrongful discharge from employment, why not Joe Jones' suit for trespass, negligent injury to person or property, or malicious prosecution?

The majority opinion says the General Assembly, by authorizing the Executive Department to enter into a contract, showed its intent to permit suit for its breach. Of course, the simple answer to this is that it just isn't true. It is certainly true that any contract of this State now in existence, or recently broken, if any has been broken, was made and authorized at a time when the members of the General Assembly and all the judges of the State's courts knew the doctrine of sovereign immunity was applied by the courts of North Carolina to suits against the State, except where the General Assembly expressly authorized suit to be brought. This decision simply cannot be supported by any implied legislative intent to authorize a discharged employee to sue for damages. Whatever may have been the case in our sister states, on whose decisions the majority opinion relies, the North Carolina General Assembly knew better. Since the Court decided *Wilson v. Jenkins, supra,* one hundred years ago, there has not, until this day, been any doubt that even the holder of a bond, issued in the name of the State, could not maintain a suit to compel its payment without permission of the General Assembly.

If any further refutation of the majority's theory of implied legislative intent to authorize suit on any authorized State contract were needed, it may be found in the majority opinion itself. As the majority opinion states, the General Assembly has "consented to be sued in many important contractual situations," G.S. 143-135.3, G.S. 136-29(b), G.S. 115-142(n), G.S. 153A-11 and G.S. 160-11 being cited as examples. It would indeed be strange legislative practice to adopt legislation, expressly authorizing resort to the courts for alleged breaches of specified types of authorized contracts, if the Legislature was under the impression that such suit could be brought for breach of *any* authorized contract.

The majority opinion says, "Any other decision by this Court could only serve as a warning to any person, whose services the State seeks to obtain, that he will change his position and rely upon 'the full faith and credit' of the sovereign State

of North Carolina at his peril, for it has reserved the right to breach his contract." The majority is unduly apprehensive about the effect of a contrary decision upon the credit of North Carolina. As noted above, this Court held, one hundred years ago, in *Wilson v. Jenkins, supra,* the holder of bonds issued in the name of North Carolina cannot sue thereon if, after the bonds are issued, the Legislature forbids their payment. Until today that decision has been the law of North Carolina. In the intervening century, hundreds of millions of dollars have been invested in North Carolina's bonds for construction of highways, schools, hospitals and State Government buildings. Despite *Wilson v. Jenkins, supra,* those bonds still outstanding are rated Triple A. The credit of this State rests upon a foundation much more solid than the expectations of the other party to its contract that he can sue to enforce it.

In *Steelman v. City of New Bern,* 279 N.C. 589, 184 S.E. 2d 239 (1971), the question before us was not the right of an injured person to sue the State, but his right to sue a municipality. It may well be that the "judge-made" extension of the doctrine of sovereign immunity to cities and towns was unsound, a point not now before us, for here we are dealing with the doctrine in its purest form, a suit against the State, itself, yet there we said unanimously:

> "It is true that the doctrine was first adopted in North Carolina by this Court. However, this judge-made doctrine is firmly established in our law today, and by legislation has been recognized by the General Assembly as the public policy of the State. See, *Galligan v. Town of Chapel Hill,* 276 N.C. 172, 171 S.E. 2d 427 (1969). See also G.S. 160-191.1 * * *
>
> "* * * The General Assembly has modified the doctrine but has never abolished it. *In fact a bill was introduced in the 1971 General Assembly to abolish governmental immunity in its entirety, but this bill failed to pass.* (Emphasis added.)
>
> "It may well be that the logic of the doctrine of sovereign immunity is unsound and that the reasons which led to its adoption are not as forceful today as they were when it was adopted. *However, despite our sympathy for the plaintiff in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should*

come from the General Assembly, not this Court." (Emphasis added.)

This was sound jurisprudence, in the opinion of every member of this Court, in 1971. What has happened in the last five years to make it unsound now in application to a much stronger case for sovereign immunity—a suit against the State itself?

I see no error in *Steelman v. City of New Bern, supra,* except its confusion of sovereign immunity with municipal immunity. It was not sovereign immunity but *municipal* immunity which was "judge-made" in England in the case of *Russell v. Men of Devon,* 2 T.R. 667, 100 Eng. Rep. R. 359 (1788), mistakenly, I think, said by us, in *Steelman v. City of New Bern, supra,* to have been the origin of the doctrine of *sovereign* immunity. Likewise, it was not *sovereign* immunity but *municipal* immunity which was first rejected by this Court in *Meares v. Wilmington,* 31 N.C. 73 (1848), and in *Wright v. Wilmington,* 92 N.C. 156 (1885), and then accepted in *Moffitt v. Asheville,* 103 N.C. 237, 9 S.E. 695 (1889). In *Steelman v. City of New Bern, supra,* we failed to note the distinction.

The doctrine of sovereign immunity is not, in my opinion, "judge-made" law, but the natural, inherent attribute of sovereignty. As our opinion in *Steelman v. City of New Bern, supra,* said, "In feudal England the monarchy was sovereign and could not be held liable for damage to its subjects." Why? Not, as we erroneously said in *Steelman v. City of New Bern, supra,* "on the theory that the king could do no wrong." Of course he could, but he could not be sued in *his* courts, because the courts had no jurisdiction the king did not see fit to confer upon them. The courts were his instrumentalities, not his superiors. A subject who deemed himself wronged by the king could petition the king for redress, but could not sue the king without the king's consent. Thus, sovereign immunity antedated *Russell v. Men of Devon* by at least five centuries and was not judge-made, but sovereign-made law. It was the common law of England, axiomatically, long before the American Declaration of Independence and so was brought into our law by G.S. 4-1 and, so far as I have been able to ascertain, was not rejected by any decision of this Court prior to today.

It is said the doctrine is contrary to the American concept of democracy. Not so! Sovereignty is not an un-American concept. What is American is the concept that the State, i.e., the

people in their collective capacity, is the sovereign. What is equally American is the concept that the courts, including this Court, are not the sovereign but the mere instruments of the sovereign, having no inherent powers by Divine Right nor by virtue of superior wisdom or purer ethics, but having only the jurisdiction conferred upon them by the sovereign. Our sovereign, the State of North Carolina, has conferred upon us no jurisdiction to entertain suits against it for damages for an alleged wrongful discharge of an employee of the Executive Department. By the present decision we are seizing that power in violation of the Constitution of North Carolina, Article I, Sec. 6, and, thereby, endangering the liberties of our people according to Article I, Sec. 35.

A contrary decision would not endanger the credit of the State or hamper the Executive Department unduly in the recruitment of employees. A contrary decision would not bar Dr. Smith from compensation for whatever wrong may have been done him, for the Constitution, in Article I, Sec. 12, expressly gives him the right "to apply to the General Assembly for redress of grievances," a branch of the State Government, incidentally, which is, at present, overwhelmingly controlled by members of a political party different from that of the Governor. It is idle to talk in this connection about delay in the legislative process. If Dr. Smith has been mistreated by a wrongful discharge, the Legislature, about to reconvene, can give him relief much more rapidly than the courts. Nor would a contrary decision by this Court preserve inviolate the doctrine of sovereign immunity. The sovereign can always consent to be sued. The policy-making arm of our sovereign is the General Assembly. Nothing whatsoever prevents it from repealing the doctrine of sovereign immunity in its entirety, or piecemeal, if it believes that course wise. Certainly, it will so act if the majority's fear of ruination of the State's credit and destruction of its ability to employ competent servants turns out to be well founded, instead of the mere nightmare I believe our history shows it to be.

I concur in that portion of the majority opinion which declares that this Court no longer has original jurisdiction to determine claims against the State and make recommendations to the General Assembly with reference to the payment thereof. Such jurisdiction was first conferred upon this Court by the North Carolina Constitution of 1868. See, *Lacy v. State, supra.* Thereby, our sovereign, the people of the State, recognized the

doctrine of sovereign immunity by limiting it mildly. This limitation upon the doctrine was withdrawn by the Amendment of Article IV of the Constitution by the people, our sovereign, in 1970, and is not contained in the present Constitution of North Carolina.

It is quite clear that prior to the Constitution of 1868 no court had jurisdiction to hear and determine a claim against the State of North Carolina for an alleged breach of contract. From 1868 to 1971, this Court, and this Court only, had original jurisdiction to hear such claims and determine *questions of law* relating thereto and it could do no more than make recommendations to the General Assembly for its action thereon. Since 1971 this Court has not even that jurisdiction. The withdrawal of that limited jurisdiction from this Court may not fairly and reasonably be deemed a grant to the Superior Court of jurisdiction to hear and *adjudicate* such claims.

CLAUDE S. KIDD, JR., THOMAS H. COLLINS, AND DAVID P. DILLARD v. C. F. EARLY AND WIFE, BESSIE D. EARLY

No. 69

(Filed 2 March 1976)

1. **Vendor and Purchaser § 1— option — contract to convey — specific performance**

An option is transformed into a contract to convey upon acceptance by the optionee in accordance with its terms and is then specifically enforceable if it is otherwise a proper subject for equitable relief.

2. **Vendor and Purchaser § 3— contract to convey — description of land**

A valid contract to convey land must contain, expressly or by necessary implication, all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. G.S. 22-2.

3. **Frauds, Statute of § 6; Boundaries § 10— description — patent or latent ambiguity**

When a description leaves the land in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty, it is patently ambiguous and parol evidence is not admissible to aid the description; a description is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made.

4. **Vendor and Purchaser § 3— contract to convey part of tract — description**

A contract to convey a part of a tract of land, to be valid, must definitely identify the portion to be conveyed or designate the means or source by which it can be positively identified.

5. **Vendor and Purchaser § 3— contract to convey — exception of part of land described**

A contract to convey, excepting a part of the land described, is valid provided the land excepted can be identified.

6. **Vendor and Purchaser § 3— option — sale of portion of tract — description — latent ambiguity**

A contract to convey 200 acres of a larger tract described as "the C. F. Early Farm" is saved from patent ambiguity by the further contract provision that the acreage is "to be determined by a new survey furnished by the sellers," and latent ambiguity in the description was removed when a survey was made showing the portion to be retained by the sellers.

7. **Vendor and Purchaser § 1— option to purchase — implied method of payment**

When an option to purchase real estate neither specifies the method of payment nor provides that the terms are to be fixed by a later agreement, the law implies that the purchase price will be paid in cash.

8. **Vendor and Purchaser § 2— option contract — effect of subsequent negotiations**

Since an option is a binding contract, it is not revocable by the optionor within the stated period, and subsequent negotiations which do not result in an agreement to vary the terms of the option will not constitute a rejection of it; therefore, an optionee did not invalidate his option by making a counter offer during the option period concerning the terms of payment.

9. **Vendor and Purchaser § 2— exercise of option — necessity for tender of payment**

Whether tender of the purchase price is necessary to exercise an option depends upon the agreement of the parties as expressed in the particular instrument.

10. **Vendor and Purchaser § 2— exercise of option — necessity for tender of payment**

Where the option requires the payment of the purchase money or a part thereof to accompany the optionee's election to exercise the option, tender of the payment specified is a condition precedent to the formation of a contract to sell unless it is waived by the optionor; on the other hand, the option may merely require that notice be given of the exercise thereof during the term of the option.

11. **Vendor and Purchaser § 2— exercise of option — tender of purchase price not required**

Tender of the purchase price was not a prerequisite to the exercise of an option in which the optionors agreed to convey to optionees,

upon demand within 30 days from the date of the option, a deed to the described premises upon payment of $600 per acre (acreage to be determined by survey furnished by sellers), with optionees to be credited with consideration paid for the option and to "have reasonable additional time for title examination," since (1) optionees could not know the acreage and full purchase price until the optionors provided the optionees with the survey they agreed to furnish, and (2) the import of the language referring to additional time for title examination is to give the optionees such additional time before they would be required to pay for the land.

12. Vendor and Purchaser § 2— option — notice of noncompliance by optionor — necessity for tender of payment

Notice from the optionors that they would not carry out the terms of the option made unnecessary a tender of payment by the optionees.

13. Rules of Civil Procedure § 56— summary judgment upon affidavits of movant

Summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate.

14. Vendor and Purchaser § 5— option contract — specific performance — summary judgment in favor of purchasers

There was no genuine issue of fact as to whether plaintiff purchasers were ready, willing and able to perform their part of an option-contract, and summary judgment against defendant sellers decreeing specific performance of the option-contract was appropriate, where plaintiffs' affidavits and supporting materials, if true, establish that upon tender of the deed, they were ready, willing, and able to pay defendants cash for the property; there are only latent doubts as to the credibility of these affidavits stemming from the fact that plaintiffs are interested parties; defendants have not produced any contradictory affidavits, have not pointed to any specific grounds for impeachment, and have not utilized Rule 56(f) to show why they could not justify their opposition to plaintiffs' motion; and the affidavit of a disinterested bank president strongly corroborates plaintiffs' affidavits and financial statements and tends to show that plaintiffs were able to perform.

ON plaintiff's petition for certiorari and defendants' appeal of right under G.S. 7A-30(2) to review the Court of Appeals' decision, 23 N.C. App. 129, 208 S.E. 2d 511 (1974), which affirmed the denial of plaintiffs' motion for summary judgment and reversed summary judgment in defendants' favor entered by *Lupton, J.*, at the 22 April 1974 Session of GUILFORD Superior Court, docketed and argued as Case No. 45 at the Spring Term 1975.

Action to enforce specific performance of a contract (option) to convey real property.

After the pleadings were filed on 4 December 1972 defendants submitted to plaintiff Kidd (Dr. Kidd) 19 interrogatories, which he answered on 29 December 1972. Thereafter plaintiffs took the deposition of defendant C. F. Early (Early), which was filed on 2 April 1973. Defendants moved for summary judgment on 31 October 1973. Plaintiffs moved for summary judgment on 8 November 1973 and filed affidavits in support of their motion. The pleadings, exhibits, Dr. Kidd's answers to the interrogatories, defendants' deposition, and the affidavit filed by plaintiffs are summarized below.

On 27 July 1972, by an "Exclusive Listing Contract," defendants gave Granger Westbrook, a real estate agent, the exclusive right for three months to sell "two hundred acres more or less" of defendants' farmland in Guilford County. The price specified was $600 per acre "on terms of all cash [to defendants] or upon such other terms and conditions as may be agreed upon later." The acreage was "to be verified by survey to qualified purchaser by sellers."

On 4 August 1972, in consideration of $500, defendants gave to Dr. Kidd, one of the plaintiffs in this action, and Mr. Howard Coble a thirty-day option to purchase the property. "The purchasers were given the privilege of renewal for an additional 30 days upon the payment of an additional $500.00."

On 1 September 1972, in consideration of $500, defendants renewed the first option by the execution of a second, the terms of which are practically identical with the first. The second, like the first, was executed on a printed form supplied by Westbrook. It is in form, words and figures as follows:

"OPTION
9-1-72

NORTH CAROLINA
Guilford County

In consideration of the sum of Five Hundred Dollars ($500.00) to us in hand paid this day by Howard Coble & Claude Kidd, the receipt of which is hereby acknowledged, we C. F. Early & Bessie D. Early, hereby irrevocably agree to convey to Howard M. Coble and Claude S. Kidd upon demand by him within 30 days from the date hereof, upon the terms and

conditions hereinafter set out, a certain tract or parcel of land located in Monroe Township, Guilford County, North Carolina, and described as follows: 200 acres more or less of The C. F. Early farm. To be determined by a new survey furnished by sellers.

We agree within the time specified, to execute and deliver to Howard M. Coble & Claude S. Kidd or assignee, upon demand by him, a good and sufficient deed for the above described premises upon payment by him to us of the sum of Six Hundred per acre dollars ($600.00) under the following terms and conditions:

In the event of the exercise of this option by Howard M. Coble & Claude S. Kidd, the payment of Five Hundred Dollars ($500.00) this day made shall be credited on the purchase price, and the said purchasers may have reasonable additional time for title examination. This option is placed through G. A. Westbrook, our real estate agent, and we agree to pay said agent .....% commission for handling said sale in the event..... ..... exercises his option hereunder.

This option being a 30 day	C. F. Early	(Seal)
extension of option drawn	Bessie D. Early	(Seal)
8-4-72		(Seal)
		(Seal)"

On 25 September 1972 Howard M. Coble orally assigned his interest in the option to plaintiff Kidd. Coble and Kidd acknowledged this oral assignment by the execution of a written "Acknowledgment of Agreement" on 25 October 1972. The consideration for this assignment was Dr. Kidd's promise to pay Coble $2,500 when he acquired title to the lands described in the option. On or about 25 September 1972 Kidd assigned one-third of his rights under the option to plaintiff Thomas H. Collins and one-third to plaintiff David P. Dillard.

In the deposition taken by plaintiffs, defendant Early gave the testimony which (except when quoted) is summarized below:

Defendants acquired the land known as the C. F. Early farm through two conveyances of adjoining tracts of land in Monroe Township, Guilford County: (1) Deed dated 5 December 1957 from King Roberts and wife, which described by metes and bounds 214.21 acres; (2) deed dated 5 April 1960 from

Lawrence Junior Gordon and wife, which described by metes and bounds 38.73 acres. These two adjoining tracts contained "some 250 or 260 acres," and defendants own no other land which contains 200 acres. The C. F. Early farm and a non-contiguous 12-acre tract are all the lands defendants own anywhere. It was on "200 acres more or less" of the C. F. Early farm that defendants gave the option to Coble and Dr. Kidd, the particular acreage "to be determined by new survey furnished by sellers [the defendants]."

In order to cut down the expense of the survey which defendants had agreed to furnish the purchasers, Early employed Jerry C. Callicut, a registered land surveyor, about 13 September 1972 to survey and map that portion of the farm which defendants intended to retain instead of the larger portion on which they had given the option. Early said, "By having the portion I was to retain surveyed, I was going to make a deed for the portion that was left." Mr. Westbrook had informed Early that, after surveying the small tract "they would subtract that from the others"; that this method of obtaining a description of the land to be conveyed was agreeable to Dr. Kidd; and that it was acceptable to the Federal Land Bank. Early had previously shown Dr. Kidd as best he could "what boundary lines there were going to be." The survey was completed and a map prepared on 4 October 1972 showing the land defendants were to retain. The map depicted by metes and bounds a tract of 40.52 acres.

After Early gave the option he talked to Westbrook about deferred payments. He first thought he should have as much as 50% down, with the balance "at bank interest." Westbrook told him he could get him the cash, but he did not tell him he had to take cash and he "did not know it until [he] received that registered letter."

Dr. Kidd went to the C. F. Early farm "the first of the week of when—well, the option was out the latter part," and he told Early they were going to buy this place. Early's comment was, "Good." However, when Dr. Kidd suggested he take a second deed of trust for $30,000, Early said: "Well, I'm not going to take a second deed of trust at no price. . . . As far as your money is concerned . . . I want to wait until I go see a CPA to know how to collect this. . . ." After Dr. Kidd's visit Early had a conversation with Westbrook. With regard to this conversation Early said, "I told Westbrook that I was going to

sell it in the way that I would have to pay the government the least money. . . . I found out I couldn't collect over 30%. So Westbrook got in touch with him [Dr. Kidd] and I told him [Westbrook] the terms, not over 30%, with five years to pay the rest at 7½%, with a first deed of trust."

On the following day, 28 September 1972, Kidd and Dillard executed and sent to Early an "Offer to Purchase" in which they agreed to pay $129,000 for the property on the following terms: $2,000.00 in "earnest money," to be held by Westbrook until the transaction was completed; $30,250 upon delivery of the deed; and $96,750 in five equal annual installments plus 4% interest on the unpaid balance. ($1,000 already paid for the option was to be credited.) Defendants objected to the offer, particularly to the provision that the unpaid balance would bear only 4% interest. At that time Early also told Westbrook he was not going to accept cash terms for the property.

In his deposition, verified 5 March 1973, Early said he would no longer accept his proposition of 30% down, balance to be secured by a first deed of trust, payable in five years at 7½% interest because, in his words, "Dr. Kidd hasn't been out there and talked to me, not at all."

On 29 September 1972, Dr. Kidd, acting on his own behalf and as the authorized agent of Collins and Dillard, sought to exercise the option by sending to defendants a letter which read in pertinent part:

"The option granted by you on September 1, 1972, for the purchase of 200 acres more or less of the C. F. Early farm in Monroe Township, Guilford County, North Carolina, is hereby exercised by delivery of a check to your joint order in the sum of $119,000 to my attorneys, Clark & Tanner, 227 Jefferson Building, Greensboro, North Carolina, to be held in trust for you and given over to you upon the occurrence of the following conditions:

(1) The furnishing of a new survey by you of the land being sold as provided in the option agreement;

(2) Delivery by you of a good and marketable warranty deed in fee simple absolute, free of all encumbrances, to the property covered by the option agreement.

"If the survey determines that the land covered by the option consists of more than 200 acres, an additional check will

be delivered for the amount in excess of 200 acres. . . . Please arrange to have the survey completed at the earliest possible date in order that this matter may be expedited. After delivery of the survey and preparation of the deed by your attorney a reasonable time will be taken for title examination prior to final closing by Clark & Tanner with you."

The night after he received the foregoing letter Early again told Westbrook he "was not going to accept the cash terms of the sale of the property." Subsequently, however, on 4 October 1972, on instructions from Early, Westbrook obtained a copy of the survey map from Callicut and delivered it to Dr. Kidd.

The check for $119,000 mentioned in Dr. Kidd's letter of 29 September 1972 was delivered to plaintiffs' attorney, but on 29 September, Dr. Kidd's checking account contained only approximately $17,173.37. However, in an affidavit filed 8 November 1973 in support of plaintiffs' motion for summary judgment, Frank Whitaker, Jr., President of the Federal Land Bank Association of Winston-Salem during September and October 1972, deposed, in brief summary as follows:

Prior to 1 October 1972 he had several conversations with Dr. Kidd "with regard to the Federal Land Bank financing a portion of the purchase price of a tract of land consisting of approximately 200 acres" which plaintiffs proposed to purchase from defendants. In the course of appraising the property he went to the C. F. Early farm where Mr. Early pointed out to him the approximate boundaries of the land he proposed to convey. He obtained copies of the descriptions in the deeds to defendants and later he was also furnished a survey map of the portion of the farm which defendants proposed to retain.

Based on his appraisal and on the financial status of plaintiffs as shown by the information submitted to him a short time prior to 1 October 1972, Mr. Whitaker was prepared to issue to plaintiffs a firm commitment to lend them $100,000 on or about 1 October 1972. The security for this loan was to be the tract of land plaintiffs proposed to buy from defendants, and the loan was conditioned upon plaintiffs obtaining "good title" to the property. The Federal Land Bank was satisfied to have the property described in the deed of trust securing the loan as the Early Farm less the property retained, which was shown on the Callicut map.

Assuming plaintiffs' financial condition remained as strong as it was in September 1972, Whitaker saw no reason why the Federal Land Bank would not issue the same commitment to plaintiffs if they reapplied for the loan.

Plaintiffs' application to the Federal Land Bank showed the following: As of 30 September 1972, Dr. Kidd had a net worth of $102,200; as of 1 October 1972, David Dillard had a net worth of $128,990; and as of 1 October 1972 Thomas Collins had a net worth of $30,410. Subsequent financial statements show that: On 12 November 1973, Dr. Kidd's net worth was $157,235; on 12 November 1973, David Dillard's net worth was $156,723; and on 9 November 1973, Thomas Collins' net worth was $32,536.

In their complaint, plaintiffs alleged that their exercise of the option was valid and that at all times subsequent to 29 September 1972, they have been ready, willing and able to purchase the tract in question. In their answer defendants specifically denied this allegation upon information and belief and alleged, *inter alia,* that the purported exercise of the option was invalid, that the description in the option agreement did not meet the Statute of Frauds and that the check proffered by plaintiffs did not constitute legal tender.

The trial court denied plaintiffs' motion for summary judgment and entered summary judgment for defendants. Upon plaintiffs' appeal the Court of Appeals, in a two-to-one decision, affirmed the trial court's denial of plaintiffs' motion for summary judgment and reversed the entry of summary judgment for defendants. Defendants appealed as of right to this Court and plaintiffs' petition for certiorari was granted.

Clark, Tanner & Williams by David M. Clark and Eugene S. Tanner, Jr., for plaintiff appellants.

Clark, Tanner & Williams by David M. Clark and Eugene S. Tanner, Jr., for plaintiff appellees.

Griffin, Post & Deaton by Hugh P. Griffin, Jr., and William F. Horsley for defendant appellants.

Sapp and Sapp by Armistead W. Sapp, Jr., and W. Samuel Shaffer II for defendant appellants.

SHARP, Chief Justice.

Defendants have consistently contended that they are entitled to summary judgment for the following reasons: (1) The description of the property contained in the option is insufficient to meet the requirements of the Statute of Frauds; (2) the purported option was void because the parties failed to agree on an essential element of the contract, that is, the method of payment, and specific performance is unavailable to enforce a contract unless there has been an actual "meeting of the minds" with regard to each element of the contract; and (3) the option could be exercised only by actual tender of cash which plaintiffs failed to do within the option period. If anyone of the foregoing contentions is valid, defendant will be entitled to summary judgment.

Upon motion a summary judgment must be entered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." G.S. 1A-1, Rule 56(c). The party moving for summary judgment has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him. *Caldwell v. Deese,* 288 N.C. 375, 218 S.E. 2d 379 (1975); *Railway Co. v. Werner Industries,* 286 N.C. 89, 209 S.E. 2d 734 (1974); *Page v. Sloan,* 281 N.C. 697, 190 S.E. 2d 189 (1972). The court should never resolve an issue of fact. "However, summary judgments should be looked upon with favor where no genuine issue of material fact is presented." *Kessing v. Mortgage Corp.,* 278 N.C. 523, 534, 180 S.E. 2d 823, 830 (1971). With these principles in mind we consider the questions presented by defendants' appeal.

(1) Does the description contained in the option-contract which plaintiffs seek to enforce meet the requirements of the Statute of Frauds?

[1] An option is not a contract to sell, but it is transformed into one upon acceptance by the optionee in accordance with its terms. *Lawing v. Jaynes* and *Lawing v. McLean,* 285 N.C. 418, 206 S.E. 2d 162 (1974). It then becomes specifically enforceable as a contract to convey if it is otherwise a proper subject for equitable relief. *Byrd v. Freeman,* 252 N.C. 724, 114 S.E. 2d 715 (1960); 81 C.J.S. *Specific Performance* § 47 (1953); 91 C.J.S. *Vendor and Purchaser* § 13 (1955).

[2] To be specifically enforceable an option-contract must meet the requirements of the Statute of Frauds (G.S. 22-2), which provides, in pertinent part, that all contracts to convey land "shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." A valid contract to convey land, therefore, must contain expressly or by necessary implication all the essential features of an agreement to sell, one of which is a description of the land, certain in itself or capable of being rendered certain by reference to an extrinsic source designated therein. *See Lane v. Coe,* 262 N.C. 8, 136 S.E. 2d 269 (1964); *Hollman v. Davis,* 238 N.C. 386, 78 S.E. 2d 143 (1953); *Searcy v. Logan,* 226 N.C. 562, 39 S.E. 2d 593 (1946); *Stewart v. Cary,* 220 N.C. 214, 17 S.E. 2d 29 (1941); *Hodges v. Stewart,* 218 N.C. 290, 10 S.E. 2d 723 (1940); *Smith v. Joyce,* 214 N.C. 602, 200 S.E. 431 (1939); 4 Strong's N. C. Index 2d *Frauds, Statute of* § 2 (1968); J. Webster, *Real Estate Law in North Carolina* §§ 119, 121, 122; T. Christopher, *Options to Purchase Real Property in North Carolina,* 44 N.C.L. Rev. 63, 67 (1966).

[3] When a description leaves the land "in a state of absolute uncertainty, and refers to nothing extrinsic by which it might be identified with certainty," it is patently ambiguous and parol evidence is not admissible to aid the description. The deed or contract is void. *Lane v. Coe, supra* at 13, 136 S.E. 2d at 273. Whether a description is patently ambiguous is a question of law. *Carlton v. Anderson,* 276 N.C. 564, 173 S.E. 2d 783 (1970). "A description is . . . latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *Lane v. Coe, supra* at 13, 136 S.E. 2d at 273.

[4] The description which we now construe reads: "a certain tract or parcel of land located in Monroe Township, Guilford County, North Carolina, and described as follows: 200 acres more or less of the C. F. Early farm. To be determined by a new survey furnished by sellers." The C. F. Early farm, according to Early, contains 250-260 acres. (The acreage specified in the deeds by which Early acquired the property is 252.94 acres.) Had the option merely described the land to be conveyed as "200 acres more or less of the C. F. Early Farm" there is no doubt that the description would have been patently ambiguous. A contract to convey a part of a tract of land, to be valid,

must definitely identify the portion to be conveyed or designate the means or source by which it can be positively identified. *See State v. Brooks,* 279 N.C. 45, 52, 181 S.E. 2d 553, 557 (1971); *Hodges v. Stewart, supra; Beard v. Taylor,* 157 N.C. 440, 73 S.E. 213 (1911); *Cathey v. Lumber Co.,* 151 N.C. 592, 66 S.E. 580 (1909); *Smith v. Proctor,* 139 N.C. 314, 51 S.E. 889 (1905).

[5] A contract to convey, excepting a part of the land described, is valid provided the land excepted can be identified. *See* 26 C.J.S. *Deeds* §§ 30(e), 139(c) (1956). Such a contract was made and enforced in *Byrd v. Freeman,* 252 N.C. 724, 114 S.E. 2d 715 (1960). In that case Freeman gave Byrd an option to purchase described lands (68 acres, more or less) except the Freeman dwelling and " 'ten acres, more or less on which the same is located,' to be 'run off by a surveyor and properly identified by courses and distances.' " On the same day the option was signed, Byrd and Freeman went upon the land and identified the physical boundaries of the tract to be retained by Freeman. Thereafter each party employed a surveyor and directed him to "run off" the lines which he pointed out to him. Freeman's surveyor produced a map showing a tract containing 11.5 acres; Byrd's suprveyor, a map showing 9.2 acres. Byrd, however, agreed to accept Freeman's survey and thereafter exercised his option in time and in accordance with its terms. Notwithstanding, Freeman refused to convey the property and Byrd sued for specific performance. Defendants defended on the sole ground that Byrd had not complied with the terms of the option. The jury answered that issue in favor of Byrd. Defendants made no contention that the description in the option was patently ambiguous and the court enforced the contract without question. *See also Redd v. Taylor,* 270 N.C. 14, 153 S.E. 2d 761 (1967).

[6] Defendants' first contention presents the narrow question whether a contract to convey 200 acres of a larger described tract (the C. F. Early farm) is saved from patent ambiguity by the provision that the acreage is "to be determined by a new survey furnished by the sellers."

As stated in 72 Am. Jur. 2d *Statute of Frauds* § 329 (1974), "There is a definite conflict in the results of cases determining the sufficiency under the Statute of Frauds of a description in a land contract which gives one of the parties the right to select the particular tract to be conveyed." The cases pro and

con are collected in the footnotes to Section 329 and in Annot., 46 A.L.R. 2d 894 (1956) and in the volumes of A.L.R. 2d, Later Case Service. *See also* 49 Am. Jur. *Statute of Frauds* § 350 (1943).

In *Calder v. Third Judicial Court,* 2 Utah 2d 309, 273 P. 2d 168 (1954), the Supreme Court of Utah considered a contract to convey 200 acres of land situated in Davis County, Utah. A part of this land was definitely described, but the larger portion was to be selected in one tract by the buyer (Merrill) within sixty days from a larger tract described in the contract and belonging to the sellers (Calder). In holding the contract valid and specifically enforceable the court noted that the tract from which the selection was to be made by Merrill was sufficiently described in the contract; that the contract specifically provided that Merrill was to select the land within a given time; and this provision, being for the benefit of the sellers, could be waived by them; and that nothing more had to be agreed upon between the parties. The court then adopted the rationale stated by the Supreme Court of Kansas in *Peckham v. Lane,* 81 Kan. 489, 106 P. 464, 466, 25 L.R.A., N.S., 967 (1910):

"'* * * No reason is apparent why a person may not make a valid contract that he will sell to another one of several pieces of real estate of which he is the owner, to be selected by himself. When an agreement to that effect is written out and signed, it is a complete contract, all of the terms of which are expressed in writing. The owner agrees that he will first make the selection and then make the conveyance. If he refuses to do either, a court may compel him to do both. * * * But he cannot avoid the obligation to which he has committed himself in writing, merely by refusing to act at all. This seems so obvious that the citation of authorities is hardly necessary. The principle, however, is illustrated with more or less fullness in the following cases: *Ellis v. Burden,* 1 Ala. 458, 466; *Carpenter v. Lockhart,* 1 Ind. 434; *Washburn v. Fletcher,* 42 Wis. 152; *Fleishman v. Woods,* 135 Cal. 256, 67 P. 276.'"

In *Delaney v. Shellabarger,* 76 Nev. 341, 353 P. 2d 903 (1960), the Supreme Court of Nevada held valid and enforceable a seller's contract to convey to purchaser any 520-acre tract which purchaser might choose out of a total of 3,518.91 acres which vendor owned. Relying upon *Peckham v. Lane, supra, Calder v. Third Judicial District Court, supra,* and other cited

cases, the court said: "The authorities are to the effect that a contract for the sale and purchase of a part of a larger parcel of land, which gives the purchaser the right to select the particular part, does not for this reason alone render the contract unenforceable." *Id.* at 344, 353 P. 2d at 904.

In *Peckham v. Lane* and the other cases cited above in which the courts relied on Peckham, the parties had not defined even generally the boundaries of the land to be conveyed. Here, however, the vendor had pointed out to the purchaser the outlines of the tract he would retain. Thus the reasoning in *Peckham v. Lane, supra,* is even more persuasive here. The large tract, "the C. F. Early farm," out of which defendants agreed to convey the 200 acres, more or less, was sufficiently described. *Light Co. v. Waters,* 260 N.C. 667, 133 S.E. 2d 450 (1963); *Dill v. Lumber Co.,* 183 N.C. 660, 112 S.E. 740 (1922); *Pate v. Lumber Co.,* 165 N.C. 184, 187, 81 S.E. 132, 133 (1914). Further, the option-contract description also provided the method by which an exact description of the land to be conveyed was to be obtained—a survey furnished by the sellers. The inclusion of this provision in the option in suit distinguishes it from the descriptions found wanting in *Manufacturing Company v. Hendricks,* 106 N.C. 485, 11 S.E. 568 (1890); *Carlton v. Anderson, supra;* and *State v. Brooks, supra,* cases upon which defendants rely to support their contention that the description in question is insufficient to meet the requirements of the Statute of Frauds.

On 29 September 1972, the date plaintiffs notified defendants they were exercising the option of 1 September 1972, defendants had employed a suveyor and directed him to make the survey. Both parties had copies of the surveyor's map on 4 October 1972 and knew not only the boundaries of that portion of the C. F. Early farm which defendants were to retain but that the tract contained 40.52 acres. It is entirely inappropriate that defendants should now contend that the option is void because the description in the option was patently ambiguous.

It is not a ground for objection that the survey was prepared subsequently to the execution of the option. At that time the parties, of course, knew that no survey had been made. They recognized the necessity for one and obviously contemplated that it would be made sometime in the future. *See* 72 Am. Jur. 2d *Statute of Frauds* § 378 (1974).

Once the lands to be retained by the sellers had been surveyed and the description of the property obtained, a conveyance of the C. F. Early farm, excepting the 40-52 acres by metes and bounds as shown by the survey, would operate as a conveyance of the remainder. 26 C.J.S. *Deeds* § 30(e) (1956). Here we note the statement in 26 C.J.S. *Deeds* § 140(7)(c): "Excepted property is described with sufficient certainty if the exact location thereof is left to the election of the grantor or is capable of subsequent ascertainment otherwise."

We hold that the description in the option-contract in suit was sufficient to satisfy the Statute of Frauds and that the latent ambiguity it contained has now been removed.

(2) Is the option agreement void because the parties failed to agree upon two essential elements of any valid option, the method and time of payment? Defendants contend that it is. Plaintiffs contend that the agreement was complete when signed and that, where no terms of payment are stated, the law will imply a payment in cash. With respect to payment the option provided:

"We agree within the time specified [30 days from 9-1-72], to execute and deliver to Howard M. Coble & Claude S. Kidd or assignee, upon demand by him, a good and sufficient deed for the above described premises upon payment by him to us of the sum of Six Hundred per acre dollars ($600.00) under the following terms and conditions:" Between the preceding colon and the next sentence in the printed form, on which the option was written by filling in the blanks, is an inch of space which is entirely blank. The sentence immediately following the blank specifies that if the option is exercised the consideration paid for it shall be credited on the purchase price and "the purchasers may have reasonable additional time for title examination."

It is undoubtedly true that if an offer to sell "necessitates or contemplates a further agreement of the parties in essential matters, the option is invalid." *Atkinson v. Atkinson,* 225 N.C. 120, 130, 33 S.E. 2d 666, 674 (1945). "The courts generally hold a contract, or offer to contract, leaving material portions open for future agreement is nugatory and void for indefiniteness." *Boyce v. McMahan,* 285 N.C. 730, 734, 208 S.E. 2d 692, 695 (1974). This does not mean, however, that the courts will not supply an essential term by implication under appropriate

circumstances. For example, in *Burkhead v. Farlow*, 266 N.C. 595, 598, 146 S.E. 2d 802, 805 (1966), we held that "[i]n any contract to convey land, unless the parties agree differently, the law implies an undertaking on the part of the vendor to convey a good or marketable title to the purchaser."

The following statements from 91 C.J.S. *Vendor & Purchaser* §§ 6 and 10 (1955) speak directly to the question we now consider: "The price to be paid for the property is an essential term [of an option agreement] and must be agreed on; but the option contract need not contain any expressions as to the manner and form of the payment." *Id.* § 6. "Where an option does not specifically fix the time for payment of the purchase price, the law construes the offer to be for cash on delivery and before title passes." *Id.* § 10.

There is an important distinction between cases in which the parties have purported to agree on a contractual provision and have done so in a vague and indefinite manner and cases in which they have remained silent as to a material term. In the latter case, the reasonable conclusion is that they understood the law would imply the omitted term. Since a sale on credit is never implied, absent a provision respecting the time of payment, a contract for the sale of realty will be construed as requiring payment in cash simultaneously with the tender or delivery of the deed. *See J. Calamari & J. Perillo, Contracts* § 23 (1970); L. Simpson *Contracts* § 46 (2d Ed. 1965); 91 C.J.S. *Vendor and Purchaser* § 99c. The foregoing rule was succinctly stated by the Supreme Court of Colorado in *Eppich v. Clifford*, 6 Colo. 493, 498 (1883):

"If the memorandum [with reference to a sale of realty] showed that the sale was upon a credit, but failed to state the terms of such credit, or if in the statement thereof it was indefinite or uncertain, specific performance would be refused; but the memorandum being entirely silent, a sale for cash will be presumed, in such actions, to have been intended." *See Vezaldenos v. Keller*, 254 Cal. App. 2d 816, 62 Cal. Rptr. 808 (1967); *Pearlstein v. Novitch*, 239 Mass. 228, 131 N.E. 853 (1921); *Duke v. Miller*, 355 Mich. 540, 94 N.W. 2d 819 (1959); *Douglas v. Vorpahal*, 167 Wis. 244, 166 N.W. 833 (1918).

That the foregoing rule has long been the law of this State we have no doubt. It is the view expressed by T. Christopher, *Options to Purchase Real Property in North Carolina,*

44 N. C. L. Rev. 63, 72: "The terms of payment need not be set out in great detail, but they should be clear. Where no terms are stated, it would seem that the contract should be interpreted to mean payment in cash since this would be in accord with common practice."

The fact that an unfilled blank on the printed form followed plaintiffs' agreement to deliver to Coble and Kidd or assignee, upon demand, a good and sufficient deed to the premises upon payment to defendants "the sum of *Six Hundred per acre dollars ($600.00)* under the following terms and conditions:" does not render the terms of the contract indefinite or indicate that the time and manner of payment were left open for further negotiation. (Only the words in italics are not a part of the printed form.) *Bank v. Corbett,* 271 N.C. 444, 156 S.E. 2d 835 (1967).

In *Bank v. Corbett,* the defendant, wife of C, as an inducement to the plaintiff bank to extend credit to her husband, signed a "Guaranty" which contained the following provision: "The amount of principal at any one time outstanding for which the undersigned shall be liable as herein set forth shall not exceed the sum of $_____" In disposing of the defendant's contention that the failure to insert in the guaranty a limitation of the guarantor's liability rendered the instrument void Justice Higgins, speaking for the Court, said: "The blank space and the antecedent wording provided the guarantor opportunity to limit her liability for her husband's debts. She executed the agreement without inserting any limitation. She cannot, thereafter, *ex parte,* alter the terms of the agreement. . . . Its terms are clear, free of ambiguity. Consequently, there is nothing for the Court to construe. The meaning becomes a question of law." *Id.* at 447, 156 S.E. 2d at 837. By the same token defendants in this case had the opportunity to require that the purchase price be paid in installments and to specify the time and manner of payment had they desired to do so. They executed the option without inserting any "terms and conditions." Thus, its terms are clear, free of ambiguity and its meaning becomes a question of law.

[7] We hold that when an option to purchase real estate neither specifies the method of payment nor provides that terms are to be fixed by a later agreement, the law implies that the purchase price will be paid in cash. Thus, the option-contract in this case was not void because of a failure by the parties to agree upon the terms of payment. There being no stipulation as

to the terms of payment in the option and no provision that they were open for future agreement by legal implication the purchase price was to be paid in cash.

Our conclusion that at the time of its execution the option met the requirements of the Statute of Frauds and bound defendants to convey the land if exercised in accordance with its terms, disposes of defendants' argument that subsequent negotiations between the parties—particularly Dr. Kidd's letter of September 28th in which he offered to pay $33,250 cash and $95,750 in five annual installments—amounted to a counter offer and a rejection of defendants' offer as contained in the option.

" 'An option . . . is a contract by which the owner of property agrees with another that he shall have the right to purchase the same at a fixed price within a certain time. It is in legal effect an offer to sell, coupled with an agreement, to hold the offer open for acceptance for the time specified, such agreement being supported by a valuable consideration, or, at common law, being under seal, so that it constitutes a binding and irrevocable contract to sell if the other party shall elect to purchase within the time specified.' " *Ward v. Albertson,* 165 N.C. 218, 221-22, 81 S.E. 168, 169 (1914). *See Sandlin v. Weaver,* 240 N.C. 703, 83 S.E. 2d 806 (1954); T. Christopher, *Options to Purchase Real Property in North Carolina, supra* at 63.

[8] Since an option is a binding contract, it is not revocable by the optionor within the stated option period, and subsequent negotiations which do not result in an agreement to vary the terms of the option, will not constitute a rejection of it. The optionee is not bound to accept the offer contained in the option, but his right of acceptance continues during the option period. *See Trust Co. v. Frazelle,* 226 N.C. 725, 40 S.E. 2d 367 (1946); 7 Strong's N. C. Index 2d *Vendor and Purchaser* § 2 (1968); 91 C.J.S. *Vendor and Purchaser* § 4 (1955). To hold that an optionee invalidated his option by making a counter proposal would seriously undermine the value of option agreements.

In his work on contracts, with reference to an optionee's counter offer, Professor Corbin writes: "If the original offer is an irrevocable offer, creating in the offeree a 'binding option,' the rule that a counter offer terminates the power of acceptance does not apply. Even if it is reasonable to hold that it terminates a revocable power, it should not be held to terminate rights

and powers created by a contract. A 'binding option' is such a contract (usually unilateral) . . . . A counter offer by such an offeree, or other negotiation not resulting in a contract, does not terminate the power of acceptance." 1 A. Corbin *Contracts* § 91 (1963).

We hold that the subsequent negotiations between the parties including plaintiffs' September 28th "offer to purchase," did not amount to a rejection of the option offer.

(3) Defendants' third contention is that, if the option be held valid, plaintiffs did not effectively exercise it and are therefore not entitled to specific performance. Defendants' argument is that if, by legal implication, the purchase price is to be paid in cash, plaintiffs could have exercised the option only by an actual tender of cash within 30 days from 1 September 1972, and this they did not do. If the option could only be exercised by an actual tender of cash is expired unexercised, for it is quite clear that plaintiffs have never tendered defendants the purchase price in cash.

[9, 10] Whether tender of the purchase price is necessary to exercise an option depends upon the agreement of the parties as expressed in the particular instrument. The acceptance must be in accordance with the terms of the contract. Where the option requires the payment of the purchase money or a part thereof to accompany the optionee's election to exercise the option, tender of the payment specified is a condition precedent to a formation of a contract to sell unless it is waived by the optionor. On the other hand, the option may merely require that notice be given of the exercise thereof during the term of the option. *See Parks v. Jacobs,* 259 N.C. 129, 129 S.E. 2d 884 (1963) *(per curiam); Kottler v. Martin,* 241 N.C. 369, 85 S.E. 2d 314 (1955) ; T. Christopher, *Options to Purchase Real Property in North Carolina, supra* at 82-84.

[11] Optionors in this case agreed to convey to optionees, upon demand within 30 days from the date of the option, a deed to the described premises upon payment of $600 per acre (acreage to be determined by survey furnished by sellers), and optionees to be credited with the consideration paid for the option and to "have reasonable additional time for title examination."

Construing this option we hold that it required the optionees to exercise their rights under it within 30 days, but did

not make payment of the purchase price a prerequisite to its exercise. In the first place, until defendants provided plaintiffs with the survey which they had agreed to furnish, plaintiffs could not know the acreage involved and therefore could not determine the full amount of the purchase price. *See Wachovia Bank & Trust Co. v. United States,* 98 F. 2d 609, 611 (4th Cir. 1938). Secondly, we note this significanct provision of the option: "In the event of the exercise of this option . . . the said purchasers *may have a reasonable additional time for title examination.*" (Emphasis added.) Additional time for title examination before they are required to do what? The only sensible answer: Before they are required to tender the cash. The clear import of this language is that, if plaintiffs exercised the option within the option period of 30 days, they would have a reasonable additional time for title examination before they would be required to pay for the land and that the purchase price would be paid in cash simultaneously with the delivery of the deed. *See McAden v. Craig,* 222 N.C. 497, 500, 24 S.E. 2d 1, 3 (1943); *Phelps v. Davenport,* 151 N.C. 21, 65 S.E. 459 (1909). Any other construction would render the provision meaningless.

Defendants' contention that the conclusion we have reached is precluded by *Trust Co. v. Medford,* 258 N.C. 146, 128 S.E. 2d 141 (1962) cannot be sustained. In *Medford* the option required the optionee to demand a deed within thirty days and to pay the purchase price in full at the end of thirty days. In the event of the exercise of the option, optionee was to have "reasonable additional time for title examination." Within the thirty days counsel for the optionee discovered a flaw in the title and "turned it down." Optionee employed another attorney who requested an extension of the option pending his further efforts to clear the title. The optionor declined to give the extension. By its terms the option expired on July 10th. It was not until September 2nd, fifty-three days after the option had expired, that the optionee gave notice of his election to exercise the option. In the meantime a building on the property had burned and the owner became entitled to $45,000 insurance. The real controversy in the case was who would "pick up" the $45,000. In sustaining the trial court's judgment of compulsory nonsuit from which the plaintiffs had appealed, this Court held that the optionee, "within 30 days from the date of the option was required to bind himself to go through with and complete the transaction provided the defendant could convey a good title.

His binding obligation (conditioned upon a good title) was required within the 30 days life of the option in order to effect any extension of time for title examination." *Id.* at 149, 128 S.E. 2d at 143-44. In *Medford,* the optionee failed to bind himself within thirty days; in this case the optionee exercised the option and became bound.

Since we conclude that plaintiffs exercised the option by written notification dated September 29, 1972, any question concerning actual tender is rendered academic by defendants' deposition. As set out in the preliminary statement of facts, in his deposition defendant testified that he had decided to sell the property in the way he would have to pay the government the least money, and he told Dr. Kidd during the last week of the option term that he had to wait until he had seen a CPA to know how to collect the purchase price. After doing so he instructed his broker to tell Dr. Kidd he would accept "not over 30% in cash, with five years to pay the rest at 7½%, with a first deed of trust." These terms, of course, bore no resemblance to the requirements of the option. In their brief, first filed in the Court of Appeals, defendants concede that they "would not accept all cash" and plaintiffs knew they would not do so.

[12] What we said in *Oil Co. v. Furlonge,* 257 N.C. 388, 393-94, 126 S.E. 2d 167, 171 (1962) is applicable here. "Notice from defendants that they would not carry out the terms of the option made unnecessary a tender of payment by the plaintiff. *Millikan v. Simmons,* 244 N.C. 195, 93 S.E. 2d 59; *Penny v. Nowell,* 231 N.C. 154, 56 S.E. 2d 428. As the Court said with reference to a similar situation in the latter case, 'such a tender would avail nothing according to the testimony of the record. The law does not require the doing of a vain thing. The disavowal was a waiver of the requirement.' " *See also Trust Co. v. Frazelle, supra; Johnson v. Noles,* 224 N.C. 542, 31 S.E. 2d 637 (1944); T. Christopher, *Options to Purchase Real Property in North Carolina, supra* at 82-83.

The record leaves no doubt that the parties intended a valid option contract. Plaintiffs paid, and defendants accepted, $500 for the original option of 4 August 1972 and another $500 for the renewal option of 1 September 1972. When Dr. Kidd told Early a day or two before he notified him on 29 September 1972 that plaintiffs were exercising the option, Early's comment was, "Good." However, he also said, "As far as your money is con-

cerned I want to wait until I can see a CPA to know how to collect this." It is also implicit in the record that this controversy grew out of defendants' belated consideration of the tax consequences of their sale of the property. Apparently it was only after they had signed the option that they became aware of the tax advantages of certain installment payments.

Finally, we consider whether plaintiffs are entitled to summary judgment. We note that the following facts are not in issue: (1) On 1 September 1972 defendants executed and delivered to Dr. Kidd the option in suit; (2) thereafter the parties made no agreement modifying the terms of the option although they negotiated with reference to the terms of payment; (3) plaintiffs sent and defendants received the letter of September 29th in which they stated that the option "is hereby exercised. . . . ; " (4) defendants refused to convey for cash, both before and after receiving the letter, and have continued to refuse; and (5) defendants caused the survey called for in the option to be made and delivered to plaintiffs.

On these uncontested facts we have held: (1) The option met the requirements of the Statute of Frauds and constituted an irrevocable offer of sale during the thirty days specified; (2) Dr. Kidd's letter of September 29th to defendants constituted an acceptance of the option and converted it into a contract to convey; and (3) the option required payment in cash upon tender of the deed.

Defendants allege no grounds for the cancellation or rescission of the option; nor do they contest plaintiffs' right to specific performance on the ground that to decree it would be inequitable. The defenses upon which they rely are legal, that is, that the option was void or, if valid, that it had not been exercised in accordance with its terms. " '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. (Cites omitted.)' " *Hutchins v. Honeycutt,* 286 N.C. 314, 318, 210 S.E. 2d 254, 256-57 (1974). Thus, it would appear that plaintiffs are entitled to summary judgment decreeing specific performance unless there is a genuine issue of fact as to whether plaintiffs were ready, willing and able at all times to perform their side of the bargain. *See Johnson v. Noles,* 224 N.C. 542, 31 S.E. 2d 637 (1944); *Ward v. Albertson,* 165 N.C. 218, 81 S.E. 168 (1914); 81 C.J.S. *Specific Performance* § 91 (1953).

Rule 56(c) of the North Carolina Rules of Civil Procedure provides in pertinent part that, upon motion, summary judgment shall be rendered forthwith "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with 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." As indicated, plaintiffs' readiness, willingness, and ability to pay the purchase price are material facts. If there exists a genuine issue as to them summary judgment would be impermissible, otherwise summary judgment for plaintiffs must be granted.

With regard to this issue the record shows the following: (1) Plaintiffs allege in their complaint that on 29 September 1972 they were ready, willing, and able to purchase the land described in the option. (2) In their answer defendants deny this allegation *on information and belief.* (3) Plaintiffs move for summary judgment supporting their motion (a) with their own affidavits, loan applications and financial statements, which showed their total net worth to have been $261,600 on September 29th and $346,494 in November 1973; and (b) with the affidavit of the president of the Federal Land Bank Association of Winston-Salem that he was and is prepared to issue plaintiffs a firm loan commitment of $100,000 "on security of the tract of land they propose to purchase" from defendants provided the title is good. (4) In opposition to the motion defendants failed to produce any counter affidavits or other evidentiary matter justifying their opposition as provided by G.S. 1A-1, Rule 56(e) and (f).

Rule 56(e) sets forth the content requirement for affidavits and provides, *inter alia:* "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, *if appropriate,* shall be entered against him." (Emphasis added.)

Rule 56(f) provides: "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to

be taken or discovery to be had or may make such other order as is just."

Since defendants failed to support their general denial of plaintiffs' readiness and ability to pay and failed to utilize Rule 56(f) with regard to this issue, the question in this case is whether summary judgment for plaintiffs was *appropriate. See Savings and Loan Assoc. v. Trust Co.*, 282 N.C. 44, 191 S.E. 2d 683 (1972).

Plaintiffs, as the moving party, have the burden of establishing that no genuine issue as to any material facts exists. *Savings and Loan Assoc. v. Trust Co., supra.* They also have the burden of persuasion with regard to the issue here. It follows, therefore, that the motion must be denied if the opposing party submits affidavits or other supporting material which casts doubts upon the existence of a material fact or upon the credibilitiy of a material witness, or if such doubts are raised by movant's own evidentiary material. 6 J. Moore, *Federal Practice* ¶ 56.15[4] (2d Ed. 1975) (hereinafter cited as Moore). However, not every failure of the opposing party to respond will require the entry of summary judgment. *Savings and Loan Assoc. v. Trust Co., supra.*

In an article by M. Louis, *A Survey of Decisions Under the North Carolina Rules of Civil Procedures*, 44 N. C. L. Rev. 729 (1972), it is pointed out that for summary judgment to be appropriate for the party with the burden of persuasion "he must still succeed on the strength of his own evidence" even though his affidavits and supporting material are not challenged as provided by sections (e) and (f) of Rule 56:

"Consequently the motion should ordinarily be denied even though the opposing party makes no response, if (1) the movant's supporting evidence is self contradictory or circumstantially suspicious or the credibility of a witness is inherently suspect either because he is interested in the outcome of the case and the facts are peculiarly within his knowledge or because he has testified as to matters of opinion involving a substantial margin for honest error, (2) there are significant gaps in the movant's evidence or it is circumstantial and reasonably allows inferences inconsistent with the existence of an essential element, or (3) although all the evidentiary or historical facts are established, reasonable minds may still differ over their application to some principle such as the prudent man

standard for negligence cases." *Id.* at 738-739. *See also* 10 C. Wright & Miller, *Federal Practice and Procedure* § 2725 (1973) (hereinafter cited as Wright & Miller).

Of the foregoing standards Nos. (2) and (3) have no application here. As to No. (1), plaintiffs' affidavits, the affidavit of the bank president, and plaintiffs' financial conditions are not self-contradictory or circumstantially suspicious and, as stated, they allow no reasonable inferences inconsistent with the conclusion that plaintiffs were, at all times, ready, willing and able to perform. Plaintiffs' pleadings, affidavits, and financial statements show their net worth was more than sufficient to meet the purchase price of the land. They are, however, interested in the outcome of the case and the financial condition of each is a matter peculiarly within his knowledge. Further, the affidavit of the bank president, without plaintiffs' supporting affidavits, is insufficient to show that they were at all times ready, willing and able to perform. Plaintiffs, therefore, are relying on their own testimony to establish their ability to pay.

If plaintiffs' interest necessarily raises a question of their credibility, and their testimony cannot, under any circumstances, be accorded credibility as a matter of law, summary judgment would be inappropriate. To date this Court has not ruled on the question whether a party with the burden of proving a material fact is entitled to summary judgment when (1) he relies upon his own testimony, which is not inherently incredible and is neither self-contradictory nor susceptible to conflicting inferences, to establish that fact; and (2) the opposing party does not support the general denial of that fact in his pleadings by affidavits under Rule 56(e) or (f). This is the specific question which we must now answer.

As all the commentators point out, "It is in the situation where the movant's facts, taken as true, would entitle him to summary jugdment, and the opposing party has neither shown any facts contradicting movant's, nor made any attack on the credibility of movant's witnesses, that there is special difficulty in determining whether an issue of credibilitiy is present." 6 Moore ¶ 56.15[4].

In 10 Wright & Miller § 2726, the authors say: "Questions of credibility have given the courts considerable difficulty. Clearly, if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeach-

ment are shown, summary judgment should be denied and the case allowed to proceed to trial, inasmuch as this situation presents the type of dispute over a genuine issue of material fact that should be left to the trier of fact. A problem arises, however, when there only are latent doubts as to credibility, as when some of the evidence necessary to establish that no genuine issue exists is presented by an 'interested' person or in affidavit form so that there has been no chance for the opposing party to cross-examine."

Noting that certain courts have taken a restrictive view of the summary judgument procedure, usually finding "a lurking issue" of credibility for the jury, especially when the evidence is based on affidavits, Wright & Miller say, "Fortunately . . . the general rule is that specific facts must be produced in order to put credibility in issue so as to preclude summary judgment." *Id.*

That courts are slow to grant summary judgment when a movant presents his own affidavit concerning facts which are peculiarly within his knowledge, and that movant's uncontradicted and unimpeached proofs do not import veracity merely because they are uncontradicted by the opposing party, is well established. "It is also clear that the opposing party is not entitled to have the motion denied on the mere hope that at trial he will be able to discredit movant's evidence; he must, at the hearing, be able to point out to the court something indicating the existence of a triable issue of material fact." 6 Moore ¶ 56.15[4].

From the foregoing discussion, it is quite clear that it would be futile to attempt to state a general rule which would determine whether a "genuine issue of fact" exists in a particular case. It is equally clear, however, that issues must be raised in the manner prescribed by the Rules of Civil Procedure, and G.S. 1A-1, Rule 56, prescribed the procedure applicable here.

In 1902 summary judgment procedure in actions on contracts in the District of Columbia was indistinguishable from that of our Rule 56. In disposing of the argument that it deprived the defendants of the right to a jury trial, the Supreme Court of the United States said:

"If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes

the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleadings as means to delay the recovery of just demands.

"Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial . . . . " *Fidelity & Deposit Co. of Maryland v. United States,* 187 U.S. 315, 320, 47 L.Ed. 194, 197-198, 23 S.Ct. 120, 122 (1902).

In equivalent language, in 1923, the Court of Appeals of New York sustained its summary judgment procedure ("rule 113") from a similar attack: "The rule in question is simply one regulating and prescribing procedure, whereby the court may summarily determine whether or not a *bona fide* issue exsists between the parties to the action. A determination by the court that such issue is presented requires the denial of an application for summary judgment and trial of the issue by jury at the election of either party. On the other hand, if the pleadings and affidavits of plaintiff disclose that no defense exists to the cause of action, and a defendant, as in the instant case, fails to controvert such evidence and establish by affidavit or proof that it has a real defense and should be permitted to defend, the court may determine that no issue triable by jury exists between the parties and grant summary judgment." *General Investment Co. v. Interborough Rapid Trans. Co.,* 235 N.Y. 133, 142-43, 139 N.E. 216, 220 (1923).

The foregoing analyses are, of course, "fully applicable to Rule 56," a fact which Wright & Miller noted in stating (1) that most courts have simply said, "The rule was not intended to deprive a party of a jury trial"; (2) that the federal courts take great care not to deny the non-moving party a full trial once it is shown that a genuine issue of fact exists or that the judgment ultimately might depend on the credibility of witnesses; and (3) that once the court determines that there are no disputed material facts, it does not deprive the opposing party of his right to jury trial by entering a judgment on the basis of a determination of the governing legal issues. 10 Wright & Miller § 2714. *See* 6 Moore ¶ 56.06[1].

Nothing in our State Constitution nor in our decisions precludes summary judgment in favor of a party with the burden of persuasion when the opposing party has failed to respond to

the motion in the manner required by Rule 56(e) or (f) and no "genuine issue as to any material fact" arises out of movant's own evidence or the situation itself challenges credibility. Under these circumstances Rule 56(e) provides that summary judgment *shall be entered.*

Cutts v. Casey, 278 N.C. 390, 180 S.E. 2d 297 (1971) does not control decision here. In that case, which involved a motion for a directed verdict upon conflicting evidence on a strenuously contested issue of fact, neither a directed verdict nor a motion for summary judgment could have been appropriate.

The purpose of Rule 56 is to prevent unnecessary trials when there are no genuine issues of fact and to identify and separate such issues if they are present. To this end the rule requires the party opposing a motion for summary judgment—notwithstanding a general denial in his pleadings—to show that he has, or will have, evidence sufficient to raise an issue of fact. If he does not, "summary judgment, if appropriate, shall be entered against him." To hold that courts are not entitled to assign credibility as a matter of law to a moving party's affidavit when the opposing party has ignored the provisions of sections (e) and (f) would be to cripple Rule 56. *See* 10 Wright & Miller § 2740.

[13] We hold that summary judgment may be granted for a party with the burden of proof on the basis of his own affidavits (1) when there are only latent doubts as to the affiant's credibility; (2) when the opposing party has failed to introduce any materials supporting his opposition, failed to point to specific areas of impeachment and contradiction, and failed to utilize Rule 56(f); and (3) when summary judgment is otherwise appropriate. This is not a holding that the trial court is required to assign credibility to a party's affidavits merely because they are uncontradicted. To be entitled to summary judgment the movant must still succeed on the basis of his own materials. He must show that there are no genuine issues of fact; that there are no gaps in his proof; that no inferences inconsistent with his recovery arise from his evidence; and that there is no standard that must be applied to the facts by the jury. Further, if the affidavits seem inherently incredible; if the circumstances themselves are suspect; or if the need for cross-examination appears, the court is free to deny the summary judgment motion. Needless to say, the party with the burden of proof, who moves for summary judgment supported only

by his own affidavits, will ordinarily not be able to meet these requirements and thus will not be entitled to summary judgment.

[14] We now apply the foregoing principles to the facts of this case. As previously indicated, plaintiffs' affidavits and supporting materials, if true, establish the material fact that, upon tender of the deed, they were ready, willing, and able to pay defendants cash for the property. As to the credibility of these affidavits there are only latent doubts, that is doubts which stem from the fact that plaintiffs are interested parties. Defendants, however, have not produced any contradictory affidavits, have not pointed to any specific grounds for impeachment, and have not utilized Section (f) to show why they could not justify their opposition to plaintiffs' motion. Further, the affidavit of the disinterested bank president strongly corroborates plaintiffs' affidavits and financial statements and tends to show that plaintiffs were able to perform.

Here we again note that plaintiffs were not required to have the cash in hand on the day they exercised the option. By its terms they had a reasonable time thereafter to examine the title and that, of course, also gave them a reasonable time to close their approved loan. After defendants repudiated the contract plaintiffs were not required to liquidate their assets or to borrow money in order to keep cash on hand. "Thereafter, the tender of the balance of the purchase price and a demand for the deed was unnecessary. It is enough that plaintiff is ready, able, and willing and offers to perform in his pleading." *Johnson v. Noles,* 224 N.C. 542, 547, 31 S.E. 2d 637, 640 (1944). As long as their combined assets remained sufficient to enable them to raise the money within a reasonable time they could properly rely on the court's decree to give them a reasonable time to do so.

In any decree for specific performance of a contract to convey, the court will protect the rights of the vendor by requiring the vendee to comply with his part of the contract within a reasonable time, to be fixed by the court, before vendor parts with his deed. If the vendee fails to comply with the decree his right to specific performance will be denied and the action dismissed. *Bateman v. Hopkins,* 157 N.C. 470, 73 S.E. 133 (1911). For this reason, "the latent doubts" as to the credibility of plaintiffs' affidavits (raised by their interest in the action) have little, if any, significance. Further, the institution of this

suit, was an objective indication of plaintiffs' readiness and willingness to perform.

The record does not indicate the grounds upon which the trial court granted defendants' motion for summary judgment but, on plaintiffs' showing, it could not have been on the ground that they were not ready, willing, and able to pay the purchase price in cash. Obviously the judge granted the motion on the theory that the option was invalid. Indeed, on appeal, defendants' only argument with reference to plaintiffs' cross-motion for summary judgment is that it was correctly denied because plaintiffs "have failed to show that the contract is complete or enforceable."

We hold, therefore, that plaintiffs' affidavits and supporting materials have shown their readiness, willingness, and ability to perform their part of the option-contract, and defendants having failed to respond thereto as provided by Section (f) of Rule 56, under the circumstances of this case, summary judgment against defendants decreeing specific performance of the option-contract was appropriate, and the trial court erred in not entering it.

That portion of the decision of the Court of Appeals which sustained the trial judge's denial of plaintiffs' motion for summary judgment is reversed with directions that the case be remanded to the Superior Court for entry of the decree of specific performance in accordance with this opinion.

Affirmed in part; reversed in part.

STATE OF NORTH CAROLINA v. JOHN THOMAS ALFORD AND SHERMAN EUGENE CARTER

No. 4

(Filed 2 March 1976)

1. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty constitutional**

Imposition of the death penalty upon a conviction of first degree murder is constitutional.

2. **Jury § 7; Constitutional Law § 29— exclusion of blacks from jury — no prima facie case of systematic exclusion**

Defendants failed to make out a *prima facie* case of arbitrary or systematic exclusion of blacks from the jury where they showed

only that all prospective black jurors were peremptorily challenged by the district attorney and that both defendants were black.

3. Criminal Law § 15— pretrial publicity — no change of venue

The trial court did not abuse its discretion in denying defendants' motion for change of venue based on allegedly adverse pretrial publicity in the news media since, with the exception of the coverage of defendants' arrest, the articles complained of were of a very general nature and likely to be found in any jurisdiction to which the trial might be moved, the coverage of the arrest only indicated that defendants were charged with a crime but in no way intimated they were guilty, the record does not indicate that any prospective juror had read the newspaper articles or had seen or heard any other news releases pertaining to these cases, and nothing in the record shows that any juror had been influenced in any manner by the publicity.

4. Homicide § 20— photographs of deceased — admissibility for corroboration

The trial court in a first degree murder prosecution properly allowed into evidence two photographs of deceased for the purpose of corroborating the testimony of an expert witness who testified as to cause of death.

5. Criminal Law § 66— pretrial lineup — in-court identifications of defendants based on observation at crime scene

In-court identifications of defendants by four eyewitnesses to the crime were not tainted by a lineup which took place two weeks after the crime since the lineup consisted of young black males of approximately the same height and build, all similarly dressed, defendants were young black males, and there was no evidence of any suggestion on the part of police officers or any other person that would taint or color the identification of defendants; moreover, the trial court properly concluded that the in-court identifications of defendants were of independent origin based solely on what the witnesses saw at the scene of the crime.

6. Searches and Seizures § 1; Homicide § 20— weapon in plain view — warrantless seizure — admissibility

The trial court in a first degree murder and robbery prosecution properly allowed into evidence a weapon used in perpetration of the crimes where an officer burst into an apartment for the purpose of arresting an outlaw therein, when the officer entered he found the outlaw and defendant Alford, he knew that Alford and defendant Carter were wanted for murder and armed robbery, he was justified in arresting Alford and searching for Carter, and the officer was entitled to seize objects in plain view, including the weapon in question, which were connected with the defendants.

7. Searches and Seizures § 1; Homicide § 20— cigarette lighter in plain view — warrantless seizure — admissibility

The trial court in a first degree murder and armed robbery prosecution did not err in allowing into evidence a cigarette lighter identified by one of the robbery victims as being exactly like the one taken from him during the robbery, since the lighter was seized by an

officer as it lay in plain view in an apartment believed to be that of defendants and into which the officer entered with an arrest warrant for defendant Carter.

8. **Criminal Law § 34— cross-examination of defendant — question concerning prior offense proper**

The trial court in a first degree murder and armed robbery prosecution did not err in allowing the district attorney to ask one defendant if he stole guns which had been introduced into evidence, since there was ample evidence to justify the district attorney to ask the question in good faith.

9. **Criminal Law § 102— district attorney's jury argument — supported by evidence**

The district attorney's argument to the jury that the guns used in perpetration of the crimes charged had been stolen from a hardware store half a block away from defendants' apartment was supported by the evidence.

10. **Criminal Law § 102— district attorney's jury argument — propriety**

The district attorney's argument to the jury in a first degree murder and armed robbery prosecution was in substantial accord with the evidence, was not unduly prejudicial, and was permissible.

11. **Homicide § 21; Robbery § 4— first degree murder — armed robbery — auto parts store employees — sufficiency of evidence**

Evidence was sufficient for the jury in a first degree murder and armed robbery prosecution where such evidence tended to show that defendants entered an auto parts store at 3:00 p.m., four witnesses identified defendants as the two men who entered the store and committed the crimes, the men robbed the witnesses and emptied the cash register, and they shot at close range and killed a customer in the store.

12. **Criminal Law § 92— consolidation of cases of two defendants — prejudice to testifying defendant — benefit to nontestifying defendant**

The trial court committed prejudicial error in denying defendant Alford's motion for a separate trial where defendant Alford testified, declared his innocence and presented evidence of alibi; defendant Carter did not testify but had given a pretrial statement confessing his participation in the crime; the statement implicated one Larry Waddell in the crime but did not mention defendant Alford; the State did not offer the statement into evidence, not wishing to weaken its case against Alford; Alford did not call Carter as his witness since Carter could have refused to testify, relying on the Fifth Amendment to the U. S. Constitution, and Alford was thereby effectively deprived of evidence which would have corroborated his alibi testimony; and Carter benefited by the consolidation of the cases for trial as the State elected not to use his confession.

Justice HUSKINS dissenting.

State v. Alford

APPEAL by defendants under G.S. 7A-27(a) from *Thornburg, J.*, at the 1 April 1975 Criminal Session of MECKLENBURG Superior Court.

Defendants were charged in separate bills of indictment, proper in form, with murder in the first degree of Gregory Leonard. On pleas of not guilty, the cases were consolidated for trial over objection of defendants. The jury returned verdicts of guilty of first degree murder as to each defendant. Defendants appealed from judgments imposing sentences of death.

Evidence for the State tended to show the following: On 6 November 1974 around 3:00 p.m., Gregory Leonard, his wife and son stopped by Viking Imports Foreign Car Parts & Accessories, Inc. (Viking Imports), an auto parts store in Charlotte, North Carolina, to purchase some items for their car. Upon returning to his car and discovering that he had left one of his purchases on the counter, Mr. Leonard reentered the store. He was followed by two black men wearing green toboggans, subsequently identified by four employees of Viking Imports as defendants. Defendants, brandishing pistols, ordered the employees to "hit the floor," stating, "this is a holdup." As the employees stretched out on the floor, they heard a voice ask, "What for," and heard a shot. Defendants continued to threaten the employees with death if they moved or looked up. They then searched the employees' pockets, took their money, personal possessions, and emptied the cash register. Defendants, threatening death, next demanded to know where the safe was located, but were told that no safe existed. The employees were then forced into a bathroom while the defendants searched in vain for a safe and left. When the employees ventured out of the bathroom, they found Mr. Leonard dead of a gunshot wound, inflicted at a very close range.

Defendant Alford testified and offered evidence tending to show that he had been playing basketball with a group of friends from 1:30 p.m. until approximately 6:00 p.m. on 6 November 1974. Several witnesses testified to defendant Alford's good character.

Defendant Carter offered the testimony of his mother who only identified two pictures of defendant Carter.

Other facts necessary to decision are included in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas B. Wood for the State.

James L. Roberts for John Thomas Alford; and John G. Plumides for Sherman Eugene Carter, defendant appellants.

MOORE, Justice.

[1] Defendants first challenge the constitutionality of North Carolina's death penalty. Questions raised by this assignment of error have been considered and found to be without merit in *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975); *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *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). We adhere to those decisions.

[2] Defendants next contend that their rights under the Fourteenth Amendment to the United States Constitution were violated by the systematic exclusion of blacks from the trial jury. In *State v. Cornell,* 281 N.C. 20, 187 S.E. 2d 768 (1972), we said:

> "If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. [Citations omitted.] . . .
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> * * *
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> "A person has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded. [Citations omitted.]"

The basis for this assignment of error lies in the fact that all prospective black jurors were peremptorily challenged by

the district attorney, and that both defendants were blacks. There is no suggestion in the record that the district attorney had previously followed practices which prevented blacks from serving on the juries in his district. The United States Supreme Court has squarely ruled against the contentions here urged by defendants. In *Swain v. Alabama,* 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965), the Court, in part, stated:

> ". . . The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor thereby subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. . . .
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> ". . . But defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time. . . ."

Defendants have failed to make out a *prima facie* case of arbitrary or systematic exclusion of blacks from the jury. This assignment of error is overruled.

[3] Defendants moved for a change of venue under G.S. 15-135 (now G.S. 15A-957) due to adverse pretrial publicity in the news media. Defendants assign the denial of this motion as error. In support of the motion, defendants introduced as exhibits the following newspaper articles and television newscasts:

> (1) A Tuesday, 11 March 1975, article in the Charlotte Observer discussing the trial of Larry Waddell for the murder of a dry cleaning store owner in which the widow's testimony accusing Waddell is recounted and in which Alford's name is mentioned as a defense witness and the fact that he was arrested with Waddell is noted.
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> (2) A Wednesday, 12 Marsh 1975, article in the Charlotte Observer which stated that Waddell, after conviction, fled the jurisdiction.
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> (3) A 17 March 1975 editorial by Tom Wicker in the Charlotte Observer discussing the popularity of the death penalty.

(4) A Channel 9 broadcast on 19 November 1974 showing the capture of Waddell who had been declared an outlaw and the arrest of defendants Carter and Alford who were found in the same apartment and other broadcasts carrying coverage of the crime.

(5) A general article in the Charlotte Observer discussing the toughening attitude of the North Carolina Senate toward armed robbery.

(6) A general article in the Charlotte Observer on 9 March 1975 discussing the effect of news publicity on the jurors' deliberations.

A motion for change of venue is addressed to the sound discretion of the trial judge and his ruling will not be overturned in the absence of an abuse of discretion. *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971); *State v. Brinson,* 277 N.C. 286, 177 S.E. 2d 398 (1970); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967). With the exception of the coverage of defendants' arrest, the articles are of a very general nature and likely to be found in any jurisdiction to which the trial might be moved. The coverage of the arrest only indicates that the defendants were charged with a crime. It in no way intimates that defendants were guilty. The record does not indicate that any prospective juror had read the newspaper articles or had seen or heard any other news releases pertaining to these cases. Nothing in the record shows that any juror had been influenced in any manner by this publicity. No abuse of discretion has been shown. This assignment is overruled.

[4] Dr. Hobard Wood, a medical expert qualified to testify as to the cause of death, testified that he examined the body of Gregory Leonard on 7 November 1974 and performed an autopsy thereon. He further testified that the deceased had died as a result of a gunshot wound in the upper right lateral chest area and that there was powder residue around the wound indicative of a very close range of fire possibly down to near contact or contact range. Dr. Wood then identified two photographs of the deceased, one as being the person upon whom he performed the autopsy, and the other showing the location of the wound. Upon the introduction of these photographs, the court instructed the jury that the photographs were admitted for the sole purpose of illustrating or explaining the testimony of the witness.

Defendant assigns as error the introduction of these photographs. We find no merit in this assignment. The photographs were admissible to illustrate and explain the testimony of Dr. Wood, they were properly authenticated, and the jury was properly instructed that they were admitted for the sole purpose of illustrating and explaining the testimony of the witness. They were competent for that purpose. *State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974); *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Duncan,* 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652 (1972), *rev'd as to death penalty,* 409 U.S. 1004, 34 L.Ed. 2d 295, 93 S.Ct. 453 (1972); *State v. Doss,* 279 N.C. 413, 183 S.E. 2d 671 (1971), *rev'd as to death penalty,* 408 U.S. 939, 33 L.Ed. 2d 762, 92 S.Ct. 2875 (1972).

[5] Defendants contend that the trial court erred in permitting the in-court identifications of defendants since such in-court identifications were tainted by and were the product of impermissibly suggestive lineup procedures. This lineup took place two weeks after the Viking Imports robbery. At that time four of the eyewitnesses identified Alford and two identified Carter. Defendants, relying on *State v. Rogers,* 275 N.C. 411, 168 S.E. 2d 345 (1969), *cert. den.,* 396 U.S. 1024, 24 L.Ed. 2d 518, 90 S.Ct. 599 (1970), claim that the two-week delay in itself invalidates the identifications. *Rogers* does not invalidate any lineup that occurs two weeks after the crime, but simply considers the time lapse as one of the factors in determining whether the lineup was impermissibly suggestive. Here, the court found, after *voir dire* examination, that the lineup consisted of young black males of approximately the same height and build, all similarly dressed, and also found that there was no evidence of any suggestion on the part of the police officers or any other person that would taint or color the identification of the defendants. In addition to its approval of the lineup procedures, the court further concluded that the in-court identifications of the defendants were of independent origin, based solely on what the witnesses saw at Viking Imports on 6 November 1974. A brief review of the evidence fully supports this conclusion.

Johnny Rollins, one of the eyewitnesses, testified that the two men who came into Viking Imports on the afternoon of 6 November 1974 were defendants Carter and Alford. Carter had a .45-caliber pistol in his hand, and Alford had a smaller

blue steel weapon in his hand. Alford was standing ten to twelve feet in front of Rollins and Carter was standing directly in front of him. He observed Carter for a period of two to four seconds and had a full look at Carter's face.

Bruce Wells, another eyewitness, testified that he had known Carter three and a half years and had been in school with him at South Mecklenburg High School. He saw Carter walk in through the front door and Alford walk in behind him. When they entered, Wells was some ten feet from Alford. The lighting was very good, he had 20-20 vision, he was able to see Alford, who came as close as five or six feet to him, for about fifteen seconds, and he observed Carter for about ten seconds.

Another eyewitness, Wayne Paul Perkins, testified that he was standing behind the counter and saw Gregory Leonard come in followed by two black males, one of whom went to the right of him and one to the left in front of the counter and pulled pistols. One had a Colt .45 automatic, nickel-plated pistol and the other a small caliber black pistol. He identified Alford. He stated that the lighting conditions in Viking Imports were very good, his vision is 20-20, he was within ten to twelve feet from Alford and observed him from five-to-six or seven seconds.

Glenn Ray Hooks, another eyewitness, testified that he was working in the stockroom at Viking Imports on the date in question when Alford came over and stuck a gun in his face. Hooks stated he has good vision, the room was well lighted, he was within about one foot of Alford and observed him for several seconds.

Each of these witnesses testified that the identification of the defendants was based solely on what he saw at Viking Imports on 6 November 1974.

We hold that the trial court's findings as to the validity of the eyewitnesses' in-court identifications were amply supported by competent evidence and therefore conclusive on this Court. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972); *State v. Morris*, 279 N.C. 477, 183 S.E. 2d 634 (1971). This assignment of error is overruled.

[6] Defendants objected to the introduction of State's Exhibit No. 2, a .45-caliber pistol identified as being in the hands of defendant Carter during the holdup, and State's Exhibit No. 3,

a 9 millimeter pistol identified as being in the hands of defendant Alford during the holdup and later determined to be the pistol which fired the fatal shot. These objections were overruled. Defendants assign this as error, contending that Officer Whiteside was unlawfully in the apartment where the weapons were found and the court erred in admitting evidence that was a product of an illegal search and seizure.

At the time Officer Whiteside went to an apartment leased to Deborah Dorothea Hasty on 19 November 1974, he knew that one Larry Waddell, charged with the capital crime of murder and a declared outlaw, was in this apartment. Under G.S. 15-48, an officer is empowered to take such power with him as he thinks fit and necessary for searching for and apprehending an outlaw. We hold then that when Officer Whiteside was informed that Larry Waddell was in the apartment in question he was well within his rights to burst into the apartment for the purpose of arresting Waddell. When he entered, he saw one individual who was identified as Waddell and another identified as Alford. Upon discovering Alford there and knowing that Alford and Carter were wanted for murder and armed robbery, he and the officers with him were justified in arresting Alford and searching for Carter. Officer Whiteside then went up the stairs where he observed Carter through an open door, coming out from between mattresses on a bed. At that time the 9 millimeter pistol was in plain view on a dresser. The seizure by the police of the pistol, which was in plain view during their search for Carter who, under the existing conditions, was aware of their presence and could use such weapon to make good his escape, was entirely justified. These facts are similar to those in *State v. Curry,* 288 N.C. 660, 675, 220 S.E. 2d 545, 555 (1975), where we stated:

> "Upon this record, the officers were lawfully in the Ronald Johnson house, having reason to believe that Bowles and Stevens might be therein. Under the circumstances, the seizure by the officers of these weapons in a house wherein men charged with first degree burglary and armed robbery might well have been hiding cannot be deemed unreasonable. The admission of the weapons in evidence and the overruling of the defendants' objection to the testimony of the State's ballistics expert witness concerning them cannot be deemed error."

We therefore hold that by being lawfully on the premises the officers were entitled to seize such evidentiary objects connected with these defendants as were in plain view. *State v. Allen,* 282 N.C. 503, 194 S.E. 2d 9 (1973); *State v. Simmons,* 278 N.C. 468, 180 S.E. 2d 97 (1971); *State v. Hill,* 278 N.C. 365, 180 S.E. 2d 21 (1971); *State v. McCloud,* 276 N.C. 518, 173 S.E. 2d 753 (1970); *State v. Virgil,* 276 N.C. 217, 172 S.E. 2d 28 (1970).

There is also no merit in the assignment of error concerning the introduction of the .45 automatic pistol. This pistol was found as the result of a search under a valid search warrant in the room in which Carter had previously been arrested.

[7] Defendants also object to the introduction of a cigarette lighter, identified by one of the robbery victims as being exactly like the one taken from him during the robbery, on the ground that it was illegally seized. This cigarette lighter was found on the day following the robbery during a search of an apartment believed to be the apartment of defendants. Armed with an arrest warrant for defendant Carter, Officer Hamlin went to this apartment and knocked at the door. The door was partially open and Officer Hamlin went in looking for Carter. When he first entered, he saw a cigarette lighter on a couch in the living room. Officer Hamlin did not search for evidence but left the premises after he determined that defendant Carter was not in the apartment. This lighter was in plain view as he entered the premises with the lawful arrest warrant for Carter. ". . . The law does not prohibit a seizure without a warrant by an officer in the discharge of his official duties where the article seized is in plain view. [Citations omitted.] . . ." *State v. Howard,* 274 N.C. 186, 162 S.E. 2d 495 (1968); *State v. Allen, supra; State v. Simmons,* 278 N.C. 468, 180 S.E. 2d 97 (1971); *State v. Hill, supra; State v. McCloud, supra; State v. Virgil, supra.* This assignment is overruled.

[8] Defendants contend the court erred in allowing the district attorney to ask Alford if he stole the guns, which had been introduced into evidence, from Builders Hardware. There is no merit to this contention. The evidence discloses that two of the pistols found in the apartment where defendants were arrested had in fact been stolen from Builders Hardware and that this place of business was just across the street from the apartment where defendants were living.

Although a defendant may not be asked if he has been accused, arrested, or indicted for a particular crime, *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), he may be asked if he in fact committed a crime. As we said in *Williams:*

> "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 (1842); *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 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."

See also State v. Mack, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972).

Here, there was ample evidence to justify the district attorney in good faith to ask Alford if he had stolen the pistols. This assignment is overruled.

[9] By their tenth assignment of error, defendants contend that the court erred "in permitting the District Attorney to refer in his argument to the jury to evidence that was not in the record, and in permitting him to use language that was calculated to arouse passions of the jury." Specifically, defendants object to the statement of the district attorney to the jury that "there has been the evidence come out that the two guns were stolen from Builders Hardware. The two defendants lived half a block away." Officer Whiteside testified that the two weapons in question, the Colt .45 and the 9 millimeter caliber pistol, were new weapons belonging to Builders Hardware and were taken from Builders Hardware in a robbery on 21 October 1974. The evidence further disclosed that the apartment at 137 South Irwin Street, where defendants lived, was across the street from Builders Hardware. Obviously, the district attorney's argument was based on evidence introduced at the trial.

[10] Defendants further assign the following portion of the district attorney's argument to the jury as error:

> ". . . I want you to think, what kind of a man and what kind of men, could walk into a store and within thirty seconds of walking into a store, could walk up to a person that they had never seen before and blow his heart out while his wife and his child sat in an automobile outside the door. Here's a twenty-four year old boy lying on the ground with blood running out of his mouth, and these two here with guns in their hands, walking around to the men who are in that store and taking a pistol, one by one, and holding it to their heads and saying, 'Look at me, m——— f———. I want to kill you.' By G——, if that doesn't make your blood run cold, I can't stand it. I'm in here speaking for that man out there, that preacher whose boy was lying on that floor dead, and these two walking around the room holding their guns on these people, telling them, 'I'm going to kill you. I want to kill you,' and at the same time they had already killed one man."

In this jurisdiction, wide latitude is given to counsel in the argument of contested cases. Moreover, what constitutes an abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970), *rev'd as to death penalty,* 403 U.S. 948, 29 L.Ed. 2d 860, 21 S.Ct. 2290 (1971); *State v. Christopher,* 258 N.C. 249, 128 S.E. 2d 667 (1962); *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466 (1949). Ordinarily, exceptions to improper remarks of counsel during argument must be taken before verdict. *State v. Noell, supra; State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Hawley,* 229 N.C. 167, 48 S.E. 2d 35 (1948); *State v. Tyson,* 133 N.C. 692, 45 S.E. 838 (1903). Such exceptions, like those to the admission of incompetent evidence, must be made in apt time or else be lost. This general rule has been modified in recent years so that it does not apply to death cases where the argument of counsel is so prejudicial to defendant that the prejudicial effect of such argument could not have been removed from the jurors' minds by any instruction the trial judge might have given. *State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970); *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967); *State v. Dockery,* 238 N.C. 222, 77 S.E. 2d 664 (1953). In instant case, no objections were made to the district attorney's remarks during the course of the trial

but exceptions were entered after verdict. After careful review, we hold that the argument made by the district attorney was in substantial accord with the evidence, was not unduly prejudicial, and was permissible. This assignment of error is overruled.

[11] Defendants next assign as error the court's refusal to allow the defendants' motion for nonsuit at the close of the State's evidence, and the court's refusal to grant a motion for a directed verdict of not guilty. A motion for a directed verdict of not guilty and a motion for nonsuit challenge the sufficiency of the evidence to go to the jury. *State v. Wiley,* 242 N.C. 114, 86 S.E. 2d 913 (1955). Under the circumstances here, the motion for a directed verdict of not guilty and the motion for judgment of compulsory nonsuit have the same legal effect. *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305 (1967). Upon such motions, the court must find that there is "substantial evidence . . . both that an offense charged . . . has been committed and that the defendant committed it," before it can overrule the motions. *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). *See State v. Morgan,* 268 N.C. 214, 150 S.E. 2d 377 (1966); *State v. Roux,* 266 N.C. 555, 146 S.E. 2d 654 (1966). In deciding this question, the trial judge must consider the State's evidence in the light most favorable to the State without considering the evidence of defendant in conflict therewith. Eyewitnesses positively identified the defendants as the two men who participated in the robbery and the killing of Mr. Leonard. Alford offered evidence tending to show that he did not participate in the robbery or in the murder and, in fact, was not present at Viking Imports on this occasion. It is for the jury to determine the truth and credibility of the evidence. *State v. Arnold,* 284 N.C. 41, 199 S.E. 2d 423 (1973); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Bell,* 270 N.C. 25, 153 S.E. 2d 741 (1967). This assignment is overruled.

[12] Finally, Alford assigns as error the denial of his motion for a separate trial. Alford concedes that ordinarily such motions lie within the sound discretion of the trial judge. In *State v. King,* 287 N.C. 645, 215 S.E. 2d 540 (1975), defendants were charged in separate bills of indictment with first degree murder. There we said:

> " . . . Under such circumstances, the trial judge was authorized by G.S. 15-152 (repealed by Sess. Laws 1973, c. 1286, s. 26, effective July 1, 1975) in his discretion to

order their consolidation for trial. *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972); *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966); *State v. Hamilton,* 264 N.C. 277, 141 S.E. 2d 506 (1965); *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245 (1964)."

Alford contends, however, that the defenses of the defendants in this case were antagonistic. Alford testified as a witness, declaring his innocence and claiming an alibi, in support of which he offered several other witnesses. Evidence of his good character and lack of any serious criminal record was also introduced.

Carter, on the other hand, elected to remain silent and vigorously cross-examined Alford's alibi witnesses. Carter's reason for remaining silent is apparent when his pretrial statement to the officers is read, a copy of which was attached to Alford's motion for a severance and is as follows:

"I, Sherman Eugene Carter, am 18 years of age and my address is 415 Wood. . . . Pl, Charlotte, N. C. I have been advised and duly warned by Ronald T. Guerette, who has identified himself as Charlotte City Policeman, of my right to the advice of counsel before making any statement, and that I do not have to make any statement at all, nor incriminate myself in any manner.

"I hearby expressly waive my right to the advice of counsel, and voluntarily make the following statement to the aforesaid person, knowing that any statement I make may be used against me at the trial or trials for the offense or offenses concerning which the following statement is herein made.

"I declare that the following statement is made of my own free will without promise or 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 whomsoever.

"He (Larry Waddell) picked me up and asked me to go with him. This was the afternoon that we went to the Viking Auto Parts on Morehead. He was walking at this time. This was at the corner of Tuckasagee & Walnut. We walked to the Viking Auto Parts, and he told me 'Let's go rob a place.' He had the gun in his pants and he gave it to

me. Before we went in, he gave me a .45 automatic. I had not seen the gun before that. He had the other gun. The black gun. We went into the store at the same time. He said 'Freeze, don't anybody move.' And I went to the cash register by running around the counter. I got the money out of the cash register. It was open I think. Larry took the wallets and watches from the people. I came from around the counter and passed Larry and as I got to the door I heard a pop. I left running and Larry was behind me. We ran down Cedar towards the tracks and then down the tracks, towards Summit. We stopped on Summit to divide the money. We threw the wallets in the bushes as we ran down ~~Summit~~ the tracks. I went to the Club on Trade (Big Brothers). About 2 or 3 mins. later a friend told me someone got killed and that the police were looking for me. That night I saw Larry over at a friends house. I asked him did he do it, did you kill the man and he would not say nothing. Since this day I have not been able to forget it. It bothered me because a man was killed. All I've got to say is I'm sorry.

"I Sherman is very sorry that it had to happen. And if I had to do it over again I would not do it.

"I have read this statement consisting of 2 page(s), and I affirm to the truth and accuracy of the facts contained therein.

"This statement was completed at 1:00 A.M., on the 20 day of November, 1974.

s/ SHERMAN EUGENE CARTER
Signature of Person giving voluntary statement"

Carter did not take the stand and the State did not offer the statement in evidence, relying on other evidence of Carter's participation in the crimes and apparently not wishing to weaken its case against Alford. Neither did Alford attempt to introduce the statement. Under these circumstances, Alford could have called Carter as his witness but Carter could have refused to testify, relying on his rights under the Fifth Amendment to the United States Constitution. Hence, Alford was effectively deprived of evidence which would have corroborated his alibi testimony. Carter, on the other hand, benefited by the consolidation of the cases for trial as the State elected not to

use his statement. Under these circumstances, we believe Alford was entitled to a separate trial. As Justice Sharp (later Chief Justice) said in *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968):

> " . . . [W]hether defendants jointly indicted would be tried jointly or separately was in the sound discretion of the trial court, *and, in the absence of a showing that a joint trial had deprived the movant of a fair trial,* the exercise of the court's discretion would not be disturbed upon appeal. [Citations omitted.] . . . " (Emphasis added.)

We believe Alford has made such showing in the present case.

In *Chambers v. Mississippi,* 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973), the Supreme Court of the United States was faced with a similar situation. In that case, defendant Chambers called one McDonald to introduce that witness's written confession to the crime for which Chambers was standing trial. However, on cross-examination by the State, McDonald repudiated the confession and asserted an alibi. Chambers' subsequent attempt to cross-examine McDonald as an adverse witness, with regard to the confession and alibi and other oral confessions made by McDonald, was denied by the trial court on the basis of the Mississippi rule that a party may not impeach his own witness. The trial court also excluded as inadmissible hearsay evidence the testimony of three other witnesses offered by defendant as to oral confessions allegedly made to each of them by McDonald shortly after the murder for which Chambers was being tried. The Court, in an opinion by Mr. Justice Powell, concluded that the combined effect of these two evidentiary rules violated Chambers' due process right to a fair trial, including the right of confrontation guaranteed under the Sixth Amendment. The Court reaffirmed that "few rights are more fundamental than that of an accused to present witnesses in his own defense," and that the right of cross-examination and confrontation are vital to the "accuracy of the truth-determining process." Specifically, the Court held that the trial court erred in excluding the hearsay statements by McDonald because enough assurances of trustworthiness existed in the circumstances surrounding the statements and in the fact that McDonald was present and available for cross-examination by the State.

In *Truman v. Wainwright,* 514 F. 2d 150 (5th Cir. 1975), a case involving motions for a separate trial, the Court held

that "due process is violated when a defendant is 'effectively prevented from exploring' his accusation that another person committed the crime for which he stands accused." In *Maness v. Wainright,* 512 F. 2d 88 (5th Cir. 1975), a case involving similar motions, the Court concluded that on the basis of *Chambers* the question that must be asked in these cases is whether defendant's defense was "less persuasive" to such a degree that we must conclude that his right to a fair trial was violated.

Unquestionably, in instant case, there was substantial evidence against Alford, including his identification by four eyewitnesses. However, there is no doubt that his alibi defense was "less persuasive" than it would have been had it been strengthened by the introduction of Carter's statement or testimony. Under the circumstances of the joint trial, Alford was precluded from introducing this statement or this testimony. Now that Carter has been convicted, Alford can call him as a witness. If Carter then attempts to deny his confession or refuses to testify, the situation as discussed in *Chambers* arises and Alford can proceed as suggested in that case. We therefore hold that his defense was so prejudiced as to amount to a denial of due process and his right of confrontation. *Truman v. Wainwright, supra; Maness v. Wainwright, supra.* By reason of the denial of his motion for a separate trial, Alford is entitled to a new trial.

A careful review of the record leads us to these conclusions:

1. Alford is entitled to a new trial and it is so ordered.

2. In the trial of Carter, we find no error.

Justice HUSKINS dissenting.

Analysis of the decisions cited in the majority opinion leads me to conclude that defendant Alford's conviction should be upheld.

In awarding defendant Alford a new trial, the majority rely primarily on *Chambers v. Mississippi,* 410 U.S. 284, 35 L.Ed. 2d 297, 93 S.Ct. 1038 (1973). In that case, defendant was convicted of murdering a policeman who was killed in the aftermath of a barroom brawl involving a sizeable crowd. After Chambers' arrest, one McDonald confessed to the crime. At Chambers' trial, the State was able to produce little hard evi-

dence of defendant's guilt, and Chambers' defense depended in large part on being able to show that McDonald had shot the policeman. When the State failed to call McDonald, defendant called him for the defense and introduced McDonald's confession. On cross-examination by the State, McDonald repudiated his previous confession as having been part of a scheme by one Stokes to obtain Chambers' release, whereupon they would all share in the proceeds of a lawsuit Chambers would bring against the city. The State "voucher" rule prevented Chambers from impeaching McDonald, since Chambers had called McDonald as his own witness. The trial court also excluded the proffered testimony of three different witnesses who would have testified that McDonald had admitted to them that it was he, not Chambers, who shot the policeman. Exclusion was based on the ground that these out-of-court confessions violated the hearsay rule. The United States Supreme Court held that the combined effect of these two State evidentiary rules prevented Chambers from introducing testimony which strongly implicated McDonald, rather than Chambers, as the murderer, and that this "denied [Chambers] a trial in accord with traditional and fundamental standards of due process."

I do not question the soundness of the legal principles enunciated in *Chambers*. I do, however, disgree with the majority's application of *Chambers* to the case at bar. The holding of the United States Supreme Court in *Chambers* was closely tied to the particular facts of that case—facts which were, in my opinion, sufficiently different from those in the instant case to remove it from the ambit of *Chambers*. In *Chambers*, as the Supreme Court emphasized, the State's case against defendant was very weak. Defendant called a witness who had earlier confessed to the crime with which defendant was charged, and when this witness repudiated his prior confession, defendant tried, but was not permitted, to impeach the witness with his earlier statement. This having failed, defendant nevertheless persisted, again unsuccessfully, in his efforts to bring before the jury the fact that the repudiating witness had previously confessed not only to the police, but to three other persons as well.

In the instant case, as the majority concedes, there was "substantial evidence against Alford, including his identification by four eyewitnesses." Moreover, defendant at no time sought to call Carter as a witness, nor did he offer as evidence Carter's

written confession which tended to implicate one Larry Waddell as the second perpetrator of the robbery-murder. Unlike *Chambers,* there is no way of knowing what would have transpired had Alford called Carter or sought to introduce his prior confession. Thus, in its present posture, this case, unlike *Chambers,* is not one in which *"the [trial] court . . . excluded evidence* that strongly pointed the finger of guilt at [another] *while the evidence against [defendant] was minimal."* *Maness v. Wainwright,* 512 F. 2d 88 (5th Cir. 1975) (emphasis added). Nor is it a case, again unlike *Chambers,* "where *the court prohibited* the defense from making a plausible argument that someone else committed the crime, or where *a serious and continued effort by the defense* to get its theory of the case before the jury was frustrated." *Truman v. Wainwright,* 514 F. 2d 150 (5th Cir. 1975) (emphasis added). Actually, in both of these 5th Circuit cases the court held *Chambers* inapplicable on the facts there involved.

In view of the strength of the State's case against defendant Alford, and absent any attempt by him to call the confessing witness to testify or introduce into evidence the confession itself, I cannot read *Chambers* so broadly as to be dispositive of this case.

For the reasons stated, I respectfully dissent from that portion of the majority opinion awarding defendant Alford a new trial. I vote to affirm.

SECURITY INSURANCE GROUP OF HARTFORD, A CORPORATION v. LUCILLE CROOM PARKER AND NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY

No. 75

(Filed 2 March 1976)

Insurance § 90— automobile liability policies — non-owned vehicle — business or occupation exclusion — private passenger automobile exception

Where, at the time of an accident, the insured driver was operating a truck heavily loaded with corn she was delivering to the mill from a farm which she and her husband operated, and the truck had been loaned to her husband by another, operation of the truck was excluded from non-owned automobile coverage of "Combination" and "Family" automobile policies issued to the driver and her husband by the "business or occupation" exclusion thereto since (1) the hauling of

corn was a business or occupation within the meaning of the exclusion whether or not it was the principal or primary business of the insured and (2) a truck capable of hauling heavy loads of corn could not as a matter of law be a "private passenger automobile" within the meaning of that exception to the business or occupation exclusion.

ON *certiorari* to review the decision of the Court of Appeals, reported in 24 N.C. App. 452, 210 S.E. 2d 741 (1975), affirming the judgment of *Martin, J.*, entered at the May 13, 1974 Session of RUTHERFORD Superior Court.

This case was docketed and argued as No. 123 at the Spring Term 1975.

These background facts are not in dispute: On November 17, 1966, in Rutherford County at about 4:00 p.m., Robert Yelton, a minor, was riding as a guest passenger in a Ford automobile owned by Marjorie Dobbins but being operated by her son, Gregory Dobbins. The Dobbins' car was traveling north on U. S. Highway 74 when it ran off the road and wrecked causing injury to both Gregory Dobbins and Robert Yelton and damage to the car. According to Dobbins and Yelton a 1961 International truck being operated by Lucille Parker and owned by J. D. Roland, failed to stop at a stop sign on a street intersecting with U. S. Highway 74, entered onto the highway directly in front of the Dobbins' automobile and caused Gregory Dobbins to lose control of the car. There was no contact between the car and the International truck. Lucille Parker has no recollection of the incident.

On May 28, 1969, Robert Yelton filed suit against Marjorie and Gregory Dobbins, Lucille Parker and J. D. Roland alleging that he was injured by their joint negligence. The complaint was later amended to add and state a claim against Floyd E. Parker, husband of Lucille Parker, as an additional defendant. Defendants Dobbins filed cross-action for Gregory's personal injury and Majorie's property damage against Lucille Parker and J. D. Roland. This action was submitted to a jury which found: (1) Robert Yelton was injured by the negligence of Gregory Dobbins and Lucille Parker; (2) Lucille Parker was not the agent of J. D. Roland; and (3) damages in favor of Robert Yelton in the sum of $20,000. Judgment was entered accordingly and the Court of Appeals, *Yelton v. Dobbins*, 6 N.C. App. 483, 170 S.E. 2d 552 (1969), found no error in the trial.

At the time of the accident Security Insurance Group of Hartford (Security), plaintiff here, was the automobile liability insurer for the Dobbins. North Carolina Farm Bureau Mutual Insurance Company (Mutual) was the automobile liability insurer for J. D. Roland with policy limits of $5,000 for each injury. Mutual also insured Floyd and Lucille Parker under the provisions of a "Combination Automobile Policy" and a "Family Automobile Policy" the terms of which give rise to the issues in this case and will hereinafter be more fully set out.

On the Yelton judgment Mutual, because of its insuring agreement *with Roland,* paid its policy limits of $5,000 on behalf of Lucille Parker who, all the evidence showed, was operating Roland's truck with his permission. Security, on behalf of the Dobbins, paid the balance due on the judgment. Through proper notation on the judgment pursuant to the Uniform Contribution Among Tort-Feasors Act, N. C. Gen. Stat. 1B-1 *et seq.,* particularly § 1B-7, Security preserved its right of contribution and the lien of the judgment to the extent of $5,000 against Lucille Parker. Execution against Lucille Parker for $5,000 plus interest and costs was returned unsatisfied.

On June 18, 1970, Security filed this action seeking to enforce its right of contribution against Lucille Parker. It alleged that Mutual provided additional liability coverage pursuant to its "Family Automobile Policy" and its "Combination Automobile Policy" issued to the Parkers. These policies are referred to in the record as "Policy No. 111790" apparently because they were issued on the basis of certain declarations which were so designated.

This case was heard without a jury by Judge Harry C. Martin. The evidence of the plaintiff consisted of the pleadings, judgment, notation on the judgment, and the opinion of the Court of Appeals in Yelton's lawsuit against Dobbins, Parker and Roland together with Mutual's "Policy No. 111790." In all of these pleadings the vehicle operated by Lucille Parker was referred to consistently as an "International truck," once as a "loaded truck," and once as "hauling a very heavy load." One of these pleadings which plaintiff introduced into evidence was the answer of Floyd Parker to the amended complaint in Yelton's suit in which Parker admitted that, "Lucille Croom Parker at the time of the accident complained of, was delivering corn to the Yelton Milling Company at Rutherfordton, N. C." There is, furthermore, this recitation of facts in the Court of Appeals'

opinion rendered in the Yelton suit and offered here by the plaintiff:

> Parker denied negligence and offered evidence which, in substance, tended to show that she was hauling shelled corn on the date in question. She was driving a 1961 International truck with a red cab and black side boards. In traveling from her farm in Old Fort to Yelton Milling Company where she was carrying the corn, she traversed U. S. Highway #74 Bypass . . . .

The defendant's evidence consisted of the testimony of Lucille Parker. She testified that on the date of the accident she was operating a 1961 International truck owned by J. D. Roland. Roland had loaned the truck to her husband in order to haul grain. She was in the process of hauling grain from Old Fort, where she and her husband leased a farm, to the Yelton Milling Company. She testified:

> My husband and I, on November 17, 1966, were engaged in the business of farming, the farm house and property was in Old Fort, but we leased and rented property other than on the farm. I was hauling corn for my husband and me on November 17, 1966 to the Yelton Mill and the particular load was coming from a field we had rented from George Burleson on Highway 221 North, in Marion, McDowell County. When I say, "we had rented," I mean my husband, and I, Floyd Parker.
>
> * * *
>
> As to how I happened to be operating Mr. Roland's truck on November 17, 1966, he let my husband borrow it to haul the grain to the mill . . . . My husband and I engaged in no business other than farming in November, 1966.
>
> As to whether my husband [and] I have any other occupation other than the business of farming in 1966, I don't recall that far back. My husband had worked part-time some in carpenter work and farmed too, but I don't recall the particular year.
>
> On November 17, 1966, when this wreck happened, my husband was not engaged in any other occupation on that day. As to whether I was engaged in any other occupation on that day than farming, just being a housewife was all.

* * *

At all times before I heard about the accident having happened and while I was operating it, the Roland truck was loaded with corn, I guess it was. From my house to Yelton Mills the truck I was operating was loaded with about three hundred bushels of corn.

On cross-examination she was asked about her testimony in a deposition taken on January 3, 1969. She admitted that when asked on deposition about her husband's occupation she answered that he did a number of things including construction, welding and farming, and that in *January, 1969, at the time of the deposition,* she was doing the farming since Mr. Parker was working in construction in Florida. She admitted that when asked whether or not she and her husband were in the farming business as partners on November 17, 1966, her answer was "No" in the sense that a husband and wife are not, in her view, partners although they do "share and share alike, I believe." She said:

> In addition to whatever I did about farming, I was a housewife. I helped my husband as a housewife in farming and my household duties too. I never got paid anything for hauling this grain. I did it to help my husband. I was a housewife helping my husband.

On redirect examination Mrs. Parker testified that she and her husband did share in the income or profit from the farming operation. On recross-examination she said:

> I didn't get paid for hauling the corn. I didn't get paid by the hour or load or anything. I testified I was a housewife helping my husband. I did anything I could to help with the farming operation too.

She also testified that on November 17, 1966, she and her husband owned a one and one-half ton, 1964 Chevrolet truck; a one-ton, 1960 Ford truck; and a 1962 Ford pick-up.

In the declarations used to obtain Mutual's "Combination" and "Family" automobile policies, Floyd E. Parker is named as the insured. The declarations list two vehicles, a 1964 "Chevrolet Stake ½" and a 1964 "Ford Stake 100" as "commercial" vehicles covered by the "Combination Automobile Policy." The declarations further list a 1962 Ford "pick-up ½" as a "busi-

ness and pleasure" vehicle covered by the "Family Automobile Policy." Both policies provide liability coverage for the operation of automobiles not owned by the Parkers. The "Combination" policy reads in pertinent part:

> V. Use of Other Automobiles.
>
> If the named insured . . . owns a private passenger automobile covered by this policy . . . [liability coverage] applies with respect to any other automobile subject to the following provisions:
>
> * * *
>
> (d) This insuring agreement does not apply:
>
> * * *
>
> (3) . . . to any automobile while used in a business or occupation of such named insured or spouse except a private passenger automobile . . . .

"A private passenger automobile" is defined in this policy as "a private passenger, station wagon or jeep type automobile, and . . . any automobile the purposes of use of which are stated in the declarations as 'pleasure and business'."

The "Family Automobile Policy" also insures against liability "arising out of the ownership, maintenance or use of the owned automobile *or any non-owned automobile.*" (Emphasis added.) Excluded, however, from such coverage is:

> a non-owned automobile while maintained or used by any person while such person is employed or otherwise engaged in
>
> (1) the automobile business of the insured . . . .
>
> (2) any other business or occupation of the insured, but this exclusion . . . does not apply to a private passenger automobile operated . . . by the named insured . . . .

"Private passenger automobile" is defined in this policy "as a four wheel private passenger, station wagon or jeep type automobile." "Named insured" is defined as the person named in the declarations and the spouse of such person.

With this evidence before him Judge Harry Martin found in pertinent part as follows:

> 8. That at the day and time of the accident complained of in the action brought by Roland D. Yelton, the

defendant Lucille Croom Parker was driving . . . a non-owned automobile.

9. That at the time of the accident complained of, the business and occupation of Lucille Croom Parker was that of housewife; that at the time of the accident complained of Floyd Parker, the husband of Lucille Croom Parker, was employed in the construction industry and his business and occupation was that of welder; that, at the time of the accident complained of, neither Floyd Parker nor Lucille Croom Parker was engaged in *the* business or occupation of farming, of growing or hauling corn. (Emphasis added.)

* * *

13. That, in regards to the "Combination Automobile Policy" the Court finds that Floyd and Lucille Parker did "own a private passenger automobile covered by this policy."

* * *

15. That Lucille Croom Parker did not recall for what purposes J. D. Roland used his motor vehicle which Lucille Croom Parker was driving on the day of the accident complained of, and that the Court finds that the defendants did not prove that the motor vehicle of J. D. Roland, which was being driven by Lucille Croom Parker at the time of the accident complained of, was not a private passenger automobile.

Judge Martin concluded: "That the plaintiff . . . [has proved] a prima facie case for coverage under both the 'Combination Automobile Policy' and the 'Family Automobile Policy' both . . . being part and parcel of [Mutual's] Policy 111790; that the defendants . . . have failed to carry the burden of proving any exclusion to the aforesaid policy." He ordered that plaintiff recover of the defendants the sum of $5302.50 plus interest.

Both defendants filed exceptions to each of the foregoing findings and conclusions and gave notice of appeal to the Court of Appeals. Only defendant Mutual, however, perfected its appeal by filing appropriate assignments of error based in part upon the exceptions noted. The Court of Appeals affirmed, remarking:

We have read the narration of [Lucille Parker's] testimony carefully and with interest. Whether we would find the

> facts differently from those found by the trial judge is not the question. The trial judge had the opportunity to listen to and view the witness. These opportunities, like those afforded a jury, are essential to a determination of the weight and credit to be given to the testimony. A reviewing court has only the cold record. Here the defendant had the burden to satisfy the trial judge by the greater weight of the evidence that the loss came within the policy exclusion. This it failed to do, and the trial judge found in favor of coverage. If, upon this same evidence, a jury, under correct instructions, had answered the issue as did the trial judge, should the verdict be upset? We think not. 24 N.C. App. at 454, 210 S.E. 2d at 742.

We allowed defendant Mutual's petition for further review.

Morris, Golding, Blue & Phillips, by William C. Morris, Jr., for defendant appellant.

Hamrick, Bowen & Nanney, by Fred D. Hamrick, Jr., and Louis W. Nanney, Jr., for plaintiff appellee.

EXUM, Justice.

The Court of Appeals erred in affirming the judgment of the trial court.

Whether Mutual's "Combination" and "Family" policies are construed as separate policies or a single policy of insurance, plaintiff has made out a prima facie case of coverage under the "Family" insuring agreement which provides insurance against liability "arising out of the . . . use of . . . any non-owned automobile." Defendant Mutual in its brief and on oral argument concedes that the truck being operated by Lucille Parker was a "non-owned automobile" as that term is used in the insuring agreement. *Seaford v. Insurance Co.*, 253 N.C. 719, 117 S.E. 2d 733 (1961), supports this concession. Since, however, extended coverage for non-owned vehicles in the "Combination" insuring agreement is provided only if the insured "owns a private passenger automobile covered by *this policy*" (emphasis added), existence of such coverage depends upon whether the words "this policy" refer only to the "Combination" coverages or to both the "Combination" and "Family" coverages.

We need not decide this question. Assuming, *arguendo,* there is coverage under both insuring agreements, the exclusions from coverage, while not identical, are essentially the same in both. Extended coverage for a non-owned automobile is excluded in both the "Combination" and "Family" agreements if the "automobile" is being used at the time in question in *a,* or *any,* business or occupation of either Floyd or Lucille Parker unless the vehicle being so used is a "private passenger automobile" as that term is defined in the policies.

The question, therefore, is whether there is legal error in the trial court's conclusion that defendants failed to prove, the burden being upon them to do so, *Kirk v. Insurance Co.,* 254 N.C. 651, 119 S.E. 2d 645 (1961), the "business or occupation" exclusion from non-owned automobile coverage. In our opinion there is. The conclusion is based upon Findings 9 and 15, which, for reasons hereinafter stated, must be set aside. Both of these findings seem to be based upon a misapprehension of applicable law. Facts so found "will be set aside on the theory that the evidence should be considered in its true legal light." *Helms v. Rea,* 282 N.C. 610, 620, 194 S.E. 2d 1, 8 (1973), and cases cited. Finding 9, moreover, is not supported by any evidence and must be set aside on that ground alone.

The only evidence pertaining to Finding 9 came from the testimony of Lucille Parker. She testified, quite clearly, that at the time of the accident she and her husband "were engaged in the business of farming . . . in no business other than farming"; her "husband was not engaged in any other occupation"; and other than farming she was engaged in being a housewife. She testified that *at other times* her husband had done a number of other things including construction and welding and that in January, 1969, *at the time of her deposition* he was working in construction in Florida. The trial court's finding that he was so employed at the time of the accident is apparently based on a misunderstanding of Lucille Parker's testimony on cross-examination.

Finding 9 also indicates that the trial court ignored plaintiff's own evidence which was to the effect that Lucille Parker at the time of the accident was driving a truck heavily loaded with corn which she was delivering to the Yelton Milling Company at Rutherfordton. It seems obvious that one hauling a heavy load of corn does not do so for the pleasure of it. Such a venture must be, it seems to us, in connection with some busi-

ness enterprise. Thus when plaintiff rested its case the only question remaining relative to the "business or occupation" exclusion, leaving aside for the moment the exception to that exclusion, was whether hauling corn was *a*, or *any*, business or occupation of either Floyd or Lucille Parker.

In Finding 9 the trial court seems to have assumed that the "business or occupation" exclusion is satisfied only if the business engaged in was *the principal, the primary,* or *the only* business of the insured. He seems to have found that since Lucille Parker was primarily a housewife and Floyd Parker primarily in the construction business neither were or could be engaged in the business of farming or growing or hauling corn within the meaning of the exclusion.

The "business or occupation" exclusion, however, does not refer necessarily to the principal or primary business or occupation of the insured. In *Seaford v. Insurance Company, supra,* the plaintiff, a textile worker, was at the time in question operating a tractor-trailer truck on a one-time trip for the benefit of his employer in the textile business. He sought to establish coverage under "non-owned automobile" provisions of a policy similar to those here considered. In affirming a judgment on the pleadings for defendant insurance company we held that because of the "business or occupation" exclusion there was no coverage. We said, 253 N.C. at 724, 117 S.E. 2d at 736-737:

> In *Allstate Ins. Co. v. Hoffman,* 21 Ill. App. 2d 314, 158 N.E. 2d 428, where the Court there had to pass on the identical question here presented, it is said: "It is not uncommon for an insured to have a business in addition to his regular and customary occupation which he may pursue primarily or even wholly for purposes other than pecuniary gain; but such collateral business would nonetheless constitute a business or an occupation while so pursued. Since the policy contains no restrictive provisions as to the business or profession of the insured, it would seem that coverage or non-coverage is to be determined by the terms and provisions of the policy and not by reference to the particular business or occupation of the insured described in the policy." Also to the same effect are *Dickey v. Fire & Life Assur. Corp.,* 328 Pa. 541, 195 A. 875; *Voelker v. Indemnity Co.,* D.C.N.D. Ill., 172 F. Supp. 306, affirmed 260 F. 2d 275 (7th Cir.).

> The conclusion is that the insurance company's position is sound and supported by authority, and even though the insured had other employment upon which he depended primarily for his livelihood, the tractor-trailer was being used in "business or occupation" while the plaintiff was on the trip in the employ of Paul Leo Bennett.

Suppose defendant's evidence would support a finding that Lucille Parker was primarily a housewife and her husband worked primarily in construction and welding on the day of the accident. If then the evidence is believed that she or her husband or both *also* leased a farm upon which they raised corn and on the occasion in question she was hauling corn from this farm to the mill in a truck loaned her husband, the "business or occupation" exclusion is established unless the truck in which the corn was hauled is a "private passenger automobile" as that term is defined in the agreements.

This brings us to Finding 15. By this finding it appears the trial court thought the International truck might be a "private passenger automobile" and defendant, by failing to offer evidence that it was not, failed to prove the "business or occupation" exclusion. Assuming, *arguendo,* that defendant had the burden to prove the non-existence of the exception to the exclusion, see 19 G. Couch, Cyclopedia of Insurance Law § 79:384 (2d ed. R. Anderson 1968) (also citing cases *contra),* we hold that under no circumstances and notwithstanding the use to which it might be put can this kind of truck capable of hauling heavy loads of corn be a "private passenger automobile" as that term is defined in these agreements. *Seaford v. Insurance Co., supra; Marshall v. Washington National Insurance Co.,* 246 N.C. 447, 98 S.E. 2d 345 (1957); *Taft v. Maryland Casualty Co.,* 211 N.C. 507, 191 S.E. 10 (1937); *King v. Woodward,* 464 F. 2d 625 (10th Cir. 1972); *See Corcoran v. The State Automobile Insurance Assoc.,* 256 Minn. 259, 98 N.W. 2d 50 (1959).

In *Seaford* the exclusion from non-owned automobile coverage applied when the vehicle was used in any occupation of the insured except when the vehicle being operated was "a private passenger automobile." The vehicle in question was a tractor-trailer unit. After deciding that such a vehicle was an "automobile" within the extended coverage provisions we nevertheless affirmed a judgment on the pleadings dismissing plaintiff's action upon the ground that the truck was being operated in a

"business or occupation" of the insured. The Court must have assumed without discussion that a tractor-trailer type vehicle could not be a "private passenger automobile." In *Marshall* we held, as a matter of law, that a pick-up truck could not be a "private passenger automobile of the pleasure type" as that term was used in an accident insurance policy although the evidence was that the pick-up truck was the only vehicle owned by the insured at the time he took out the policy and that it was used essentially for personal and pleasurable purposes. We said, "The defendant had the right to prescribe the type of vehicle it desired and was willing to cover in this limited coverage insurance policy. The use to which the insured put the truck could not and cannot change the plain meaning of the language of the policy or extend its coverage." 246 N.C. at 448, 98 S.E. 2d at 346. In *Taft,* we held that a Ford truck pulling a four-wheel, 20-foot trailer, although being used at the time for pleasure, could not, as a matter of law, be a "passenger automobile" as that language was used in the insurance policy sued on. Considering a policy with an exclusion identical to those here, the Tenth Circuit Court of Appeals, applying Oklahoma law, held, "a GMC pick-up truck being used for the transportation of a load of strawberries is not a private passenger automobile." *King v. Woodward, supra* at 628.

At this trial there seems to have been no genuine issue of material fact nor any real challenge to the credibility of defendant Mutual's evidence. Regarding the credibility of the witness Lucille Parker, we note that she testified against her own interest. Defendant, however, prior to trial never moved under Rule 56 for summary judgment. Had this pre-trial motion been made and had defendant upon the hearing made the same showing which it made at trial, the motion would have been well taken. *Kidd v. Early,* 289 N.C. 343, 222 S.E. 2d 392 (1976).

Since, however, there is no evidence to support Finding 9 and since both Findings 9 and 15 seem to have been made by the trial court under a misapprehension of applicable law, these findings are set aside and the judgment vacated. The case is remanded to the Court of Appeals to be returned to the Superior Court for a new trial. *Helms v. Rea, supra.*

New trial.

STATE OF NORTH CAROLINA v. ROZELL OXENDINE HUNT

No. 6

(Filed 2 March 1976)

1. **Homicide § 21— murder by poisoning — 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, with the intent to kill the victim and pursuant to a preconceived plan to do so, purchased rat poison containing arsenic, that she poured it into tea prepared specially for his consumption and served the tea to him, that the victim drank the tea and almost immediately became ill and died within a few hours, and that the victim's body was exhumed some six months after his death and an autopsy showed the cause of death to be arsenic poisoning.

2. **Constitutional Law § 31— right to offer evidence**

The trial court did not refuse to allow defendant to put on evidence where the court, in the absence of the jury, informed defendant that, though her counsel had advised that she not put on any evidence, she did not have to follow the advice of her counsel; the probable nature of the testimony of witnesses whom defendant had under consideration was discussed in this conference between the court, defendant and her counsel, and defendant concluded her best chance lay in not calling them to the stand; and defense counsel announced in open court that defendant chose not to put on any evidence. Art. I, § 23 of the N. C. Constitution.

3. **Constitutional Law § 29; Jury § 7— prospective jurors — inquiries as to death penalty views**

The trial court in a first degree murder case properly permitted the district attorney to question prospective jurors concerning their beliefs with reference to capital punishment.

4. **Criminal Law § 163— objections to review of evidence and statement of contentions**

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.

5. **Criminal Law § 113— characterization of victim as common law husband — harmless error**

In this homicide prosecution, the trial court's characterization of the victim as the "common law husband" of defendant, if unsupported by evidence and thus erroneous, was harmless beyond a reasonable doubt.

6. **Criminal Law § 118— contentions of defendant who offered no evidence**

In this homicide prosecution, the trial court did not err in instructing the jury that defendant, who offered no evidence, contended

that the jury ought not to believe what the State's witnesses have said about the matter.

7. **Criminal Law § 73 —statement by deceased — res gestae**

In this prosecution for first degree murder by poisoning, statement by the victim after he drank allegedly poisoned tea and became ill that he felt like he was poisoned was admissible as part of the *res gestae.*

8. **Homicide § 20— homicide by poisoning — bottles of similar poison — admissibility**

In this prosecution for first degree murder by poisoning, a bottle of rat poison purchased by an SBI agent was properly admitted to illustrate the testimony of a witness as to the kind of bottle of rat poison purchased and used by defendant on the date of the victim's death; furthermore, the court properly admitted into evidence a second bottle of the same kind of rat poison purchased by the SBI agent and testimony by a chemist that the liquid in the bottle contained arsenic.

APPEAL by defendant from *Chess, J.*, at the 10 June 1974 Criminal Session of ANSON.

Under an indictment, proper in form, the defendant was convicted of murder in the first degree and was sentenced to death. The deceased was Joe Hunt, referred to in the judge's charge as her common law husband.

The evidence for the State, the defendant offering none, was to the following effect:

On the morning of 31 August 1973, the defendant, Joe Hunt and Brenda Jacobs, an 18 year old girl who lived with the Hunts, went shopping in Wadesboro. Leaving Joe Hunt in the grocery store, the defendant and Brenda went to the drugstore where Brenda saw the defendant purchase a small bottle of liquid rat poison, which the defendant put in her pocket.

Upon their return to their home, Joe Hunt went into the garden to gather okra for lunch. While he was out of the house, Brenda, in another room, looked through the door into the kitchen and saw the defendant pour half of the bottle of rat poison into a jug of tea specially prepared for Joe Hunt and put the jug in the refrigerator. Two jugs of tea were prepared, the one used for Joe Hunt's tea being identified by a dent in its side.

Lunch was then prepared and the defendant served Joe Hunt tea from the jug into which she had poured the poison. Brenda drank her tea from the other jug. The defendant drank

none. Joe Hunt drank a substantial quantity of the poisoned tea. Prior to doing so he was in good health.

After lunch they all lay down for a rest and then got up and went to the tobacco pack house to work in their tobacco. Joe Hunt became ill and vomited several times, saying he felt like he was poisoned. During the afternoon and through the night his condition grew worse. His hands and toes drew up in knots. The defendant made no attempt to help him. Early the following morning, he was carried to the hospital in Wadesboro and, the doctor in charge being unable to determine the nature of his illness, he was transferred to a hospital in Charlotte where he died that day, the day following his drinking of the poisoned tea. He was buried in Rowland, Robeson County.

Brenda observed Joe Hunt's body in the casket prior to the funeral and testified that the State's Exhibit No. 1, a photograph, fairly portrayed the appearance of his body prior to burial. This photograph was placed in evidence to illustrate Brenda's testimony. She described the rat poison, so purchased and used by the defendant, as a white liquid and the bottle in which it was contained as bearing the picture of a "skeleton" and red lettering. She did not know what became of that bottle. Upon being shown a bottle of Singletary's rat poison, introduced in evidence to illustrate her testimony, and purchased by police officers at the above mentioned drugstore, Brenda said it was the same kind of bottle, the same size and color, and bearing the same markings as the bottle which she saw the defendant purchase and from which she saw the defendant pour a liquid into the tea prepared for and drunk by Joe Hunt. Singletary's rat poison contains a large proportion of arsenic.

Prior to this occasion, the defendant told Brenda she, the defendant, had tried to kill Joe Hunt by poison on more than one occasion but it "looked like every time she tried to kill Joe that God had made a way for him to live," and Joe Hunt "was a hard man to kill."

Some six months after the death of Joe Hunt, Brenda made a statement to agents of the State Bureau of Investigation concerning the above narrated events, which statement was introduced in evidence to corroborate her testimony, it being substantially the same as her testimony. Following the making of this statement by Brenda, the body of Joe Hunt was exhumed from the grave in Rowland and an autopsy was performed on

17 April 1974. A photograph of the body taken when it was exhumed and the casket opened and another photograph taken at the time of the autopsy were introduced in evidence to illustrate the testimony of Agent Hawley of the State Bureau of Investigation, who was present at the exhumation and at the autopsy and to illustrate the testimony of the medical examiner who performed the autopsy. Each of these witnesses testified that these respective photographs correctly represented the appearance of the body so exhumed and upon which the autopsy was so performed. The three photographs of the body, before burial, after exhumation and at the autopsy, were exhibited to the jury. The body was then returned to the same grave in the Rowland cemetery.

In the course of the autopsy, the liver was examined and the presence therein of 3.4 mg per cent arsenic was ascertained, the normal arsenic range in the human liver being 0.001-0.01 mg per cent. In the opinion of the Chief Medical Examiner of the State, who performed the autopsy, Joe Hunt died of arsenic poisoning.

The State having rested its case, the defendant, through her court-appointed counsel, elected not to introduce any evidence. Thereupon, the defendant and her counsel retired from the courtroom for a conference. Upon their return to the courtroom, the trial judge, out of the hearing of the jury, inquired of the defendant as to whether she had discussed the matter with her counsel. She replied that she had done so and said, "I have witnesses I want to testify." The court further inquired as to whether she would put on evidence, stating to the defendant that her counsel advised that she not do so. The defendant replied, "I don't want to put none on either but I have witnesses." The court then advised the defendant that she did not have to follow the advice of her counsel if she did not wish to and then said, "With that knowledge, do you wish to voluntarily instruct your attorney you do not wish to put on any evidence?" To that the defendant replied, "No, Sir, 'cause I ain't got none to put on." The defendant's counsel then stated that the defense chose not to put on any evidence and rested, renewing his motion for a judgment of nonsuit, which motion was denied.

Attorney General Rufus L. Edmisten by Assistant Attorney General Charles J. Murray for the State.

Henry T. Drake for defendant.

LAKE, Justice.

The defendant's motions for a directed verdict and for a judgment of nonsuit are the same in legal effect and the test of the sufficiency of the evidence to withstand each such motion is the same. *State v. Glover,* 270 N.C. 319, 154 S.E. 2d 305 (1967); G.S. 15-173. It is well established that in considering such a motion the evidence for the State must be deemed to be true and must be considered in the light most favorable to it, the State being entitled to the benefit of all inferences in its favor which may reasonably be drawn therefrom. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 366 (1971); *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967); *State v. Bruton,* 264 N.C. 488, 142 S.E. 2d 169 (1965). All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State, must be taken into account and must be so considered by the court in ruling upon the motion. *State v. Cutler, supra; State v. Walker,* 266 N.C. 269, 145 S.E. 2d 833 (1965); *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777 (1964). The motion should be denied when, upon such consideration of the evidence, there is substantial evidence to support a finding that an offense charged in the bill of indictment has been committed and the defendant committed it. Strong, N. C. Index 2d, Criminal Law, §§ 104, 106.

[1] The evidence in the present case, so considered, is ample to support findings that the defendant, with intent to kill Joe Hunt and pursuant to a preconceived plan to do so, purchased rat poison containing arsenic, that she poured it into tea prepared specially for his consumption and served the tea to him, that Joe Hunt drank the tea into which the defendant had poured such poison, and that he, almost immediately, became ill and died within a few hours, the cause of his death being arsenic poison. "A murder which shall be perpetrated by means of poison * * * shall be deemed to be murder in the first degree and shall be punished with death." G.S. 14-17.

There is no merit whatever in the contention of the defendant that the evidence is not sufficient to support a finding that the Joe Hunt, whose body was exhumed and found to contain arsenic poisoning in sufficient quantity to cause death, and which did cause his death, was the same Joe Hunt whose tea was prepared, poisoned and served to him by the defendant. The testimony of Brenda Jacobs was that the Joe Hunt so

poisoned by the defendant died and was buried in Rowland, Robeson County, and that the State's Exhibit 1 is a photograph fairly and accurately representing the appearance of his body as it lay in the casket prior to burial. The testimony of Ronald Hawley, agent of the State Bureau of Investigation, is that he was present when the body of Joe Hunt was exhumed from the grave in Rowland and when the casket was opened and that the State's Exhibit 4 is a photograph correctly portraying the appearance of the body of Joe Hunt when the casket was first opened. The testimony of Dr. Page Hudson, Chief Medical Examiner of North Carolina, is that he performed the autopsy upon the body brought to his office by Agent Hawley, which body was identified by Agent Hawley as that of Joseph Hunt, and that the State's Exhibit 5 is a photograph of the body so brought to him, and that this body contained arsenic poisoning, which poisoning was, in the opinion of Dr. Hudson, the cause of death. The three photographs were properly exhibited to the jury and formed a sufficient basis to support its conclusion that the body upon which the autopsy was performed was the body of the man to whom the defendant so administered poison. The record does not indicate the slightest suggestion by the defendant at the trial to the contrary. The motion for judgment of nonsuit and the motion for a directed verdict of not guilty were properly overruled.

[2] Obviously, the defendant was entitled to offer evidence in her defense at the trial, either through her own testimony or through the testimony of other witnesses. Constitution of North Carolina, Art. I, § 23. Of course, she would have been entitled to a new trial had the court, as the defendant asserts in her brief, refused to allow the defendant to put on evidence. There is, however, no merit in this contention for the reason that the record clearly shows the contrary.

At the conclusion of the State's presentation of the evidence, the trial judge asked if there were any evidence for the defendant. Defendant's trial counsel replied, "No, Sir." Thereupon, the defendant and her counsel retired from the courtroom for a conference and upon their return, the trial judge, out of the presence of the jury, conferred with the defendant and her counsel. The record shows clearly that the court informed the defendant that, though her counsel had advised that she not put on any evidence, she did not have to follow the advice of her counsel. The record indicates that in this conference between

the court, the defendant and her counsel, the probable nature of the testimony of witnesses whom the defendant had under consideration was discussed and the defendant concluded her best chance lay in not calling them to the stand. Thereupon, her counsel announced in open court that the defendant chose not to put on any evidence. This assignment of error is overruled.

[3] There was no error in the trial court's permitting the District Attorney to question prospective jurors concerning their beliefs with reference to capital punishment. *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed. 2d 776 (1968); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). In the Crowder case, we said, "In order to insure a fair trial before an unbiased jury, it is entirely proper in a capital case for both the State and the defendant to make appropriate inquiry concerning a prospective juror's moral or religious scruples, beliefs, and attitudes toward capital punishment." Furthermore, the record discloses that no juror was challenged for cause by reason of his or her views on the subject of capital punishment. The record indicates that only three jurors were challenged by the State, all of them peremptorily. This assignment of error is without merit.

[4] The defendant's Assignments of Error 12, 13 and 14 are without merit. These relate to alleged errors by the court in the court's review of the evidence and of the contentions of the defendant, inherent in her plea of not guilty, in the court's charge to the jury. As to these assignments of error, it is sufficient to note that there is no indication in the record that any of the alleged inaccuracies was called to the attention of the court before the jury retired. The law requires that this be done in order to give the trial judge an opportunity to correct any alleged inaccuracy in his review of the evidence and statement of the contentions of the parties. In *State v. Virgil,* 276 N.C. 217, 230, 172 S.E. 2d 28 (1970), this Court, speaking through Justice Huskins, said, "[I]t is the general rule that objections to the charge in reviewing the evidence and stating the contentions of the parties must be made before the jury retires so as to afford the trial judge an opportunity for correction, otherwise they are deemed to have been waived and will not be considered on appeal." In support of this principle, see the following cases there cited: *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); *State v. Butler,* 269 N.C. 733, 153 S.E. 2d 477 (1967); *State v. Case,* 253 N.C. 130, 116 S.E. 2d

429 (1960); *State v. Rhodes,* 252 N.C. 438, 113 S.E. 2d 917 (1960); *State v. Holder,* 252 N.C. 121, 113 S.E. 2d 15 (1960); *State v. Shumaker,* 251 N.C. 678, 111 S.E. 2d 878 (1960); *State v. Grundler,* 251 N.C. 177, 111 S.E. 2d 1 (1959); *State v. Moore,* 247 N.C. 368, 101 S.E. 2d 26 (1957); *State v. Saunders,* 245 N.C. 338, 95 S.E. 2d 876 (1957).

[5] We have, however, carefully reviewed this portion of the judge's charge to the jury and we find therein no significant inaccuracy. It is true that the court in its review of the evidence referred to Joseph Hunt as the "common law husband" of the defendant, whereas the record on appeal does not disclose their relationship except that they were living together with Brenda Jacobs, "Gene Lindsey * * * and all of Rozell's and Joe's children" in a five room house. The defendant's counsel on appeal was not her trial counsel. Like us, his knowledge of what occurred at the trial is limited to the printed record. Whether the trial judge's understanding of the relationship between the defendant and the deceased had basis in some reference thereto in the presence of the jury at the trial, we are unable to determine. It is, however, clear that his characterization of it in the charge evoked no objection from the defendant's trial counsel and, apparently, he did not deem the judge's statement prejudicial.

If there was no evidence to support it, the judge's characterization of the relationship in his charge was, of course, error, but, in view of the evidence in the record, we think it inconceivable that a different verdict would have been reached had the judge merely referred to the deceased as the husband of the defendant. The error, if any, was clearly harmless. New trials are not given, even in capital cases, where there is no reasonable basis for supposing that, but for the error, a different result would have been reached. *State v. Bryant,* 283 N.C. 227, 195 S.E. 2d 509 (1973); *State v. Fletcher and Arnold,* 279 N.C. 85, 100, 181 S.E. 2d 405 (1971); *State v. Paige,* 272 N.C. 417, 424, 158 S.E. 2d 522 (1968); *State v. Rainey,* 236 N.C. 738, 74 S.E. 2d 39 (1953).

[6] After reviewing the evidence and stating the contentions of the State, the court instructed the jury, "On the other hand the defendant says and contends that you ought not to find her guilty from all the evidence in the case, and that you ought not to believe what the State's witnesses have said about it, and at the very least you should have a reasonable doubt in your

mind as to her guilt, and that you ought to find her not guilty." At the time, no objection was interposed to this statement of the contentions of the defendant by her trial counsel. In this Court, she contends that it was error for the trial judge to instruct the jury that the defendant contended that the jury ought not to believe what the State's witnesses have said about the matter, the defendant not having testified at all. As Justice Huskins, speaking for this Court, said in *State v. Lee,* 277 N.C. 205, 176 S.E. 2d 765 (1970): "Upon his plea of not guilty Lee could hardly contend otherwise than that the testimony of the State's witnesses should not be believed. He could not very well contend that their testimony represented the truth of the matter. For the judge to so charge is no distortion of the defendant's position. While the able and patient judge in this instance might well have stated no contentions at all on Lee's behalf and rested on a single explanation of the effect of Lee's plea of not guilty, his attempt to give a logical contention for Lee in face of the overwhelming evidence of guilt will not be held for error."

The defendant's Assignments of Error 3, 5, 8 and 9 relate to the admission of evidence.

[7] Brenda Jacobs testified that before she, the defendant and Joe Hunt left the house, after the noon meal at which he drank the allegedly poisoned tea, Joe Hunt became ill and after reaching the pack house vomited on two occasions and said he felt like he was poisoned. The defendant moved to strike the testimony as to this statement by Joe Hunt. She now assigns the overruling of this motion as error.

Quite obviously, the statement by Joe Hunt could not be admitted on the theory that it was a dying declaration, since there is nothing to indicate that Joe Hunt apprehended that he was in danger of death. Stansbury, North Carolina Evidence (Brandis Revision), § 146. However, the statement was clearly admissible as part of the *res gestae.* As stated in Stansbury, North Carolina Evidence (Brandis Revision), §§ 158 and 161: "[T]he *res gestae* phrase is used to describe situations in which words accompany and are connected with non-verbal conduct or external events, and carries the general idea of something said while something is happening or is being done. * * * [A] person's statements as to his own *then existing* pain or other physical discomfort * * * are admissible whenever such mental or physical condition is relevant and the evidence is not subject to exclusion because of some other rule." *Munden v. Insurance*

Co. 213 N.C. 504, 196 S.E. 872 (1938); *State v. Jeffreys,* 192 N.C. 318, 135 S.E. 32 (1926); *State v. Harris,* 63 N.C. 1 (1868). There was no error in the denial of the motion to strike the testimony of Brenda Jacobs concerning this statement by the deceased.

[8] Likewise, we find no error in permitting the State to introduce in evidence Exhibits 3 and 7, two bottles of Singletary's Rat Poison, and evidence as to the arsenic content in the liquid contained in Exhibit 7. The death of the deceased by poison was, apparently, not suspected by the authorities until Brenda Jacobs made a statement to an agent of the State Bureau of Investigation six months after the alleged crime. An agent of the Bureau then purchased from the drugstore of Charles Kiser, in Wadesboro, the two bottles, Exhibits 3 and 7, which Mr. Kiser, who sold them to the agent, testified were Singletary's Rat Poison, and that on 31 August 1973, the date of the alleged purchase of rat poison by the defendant, he, Mr. Kiser, carried in stock "Singletary's Rat Poison of the same kind as is now contained in State's Exhibits 3 and 7." Brenda Jacobs, on recall, testified this was the same druggist from whom she saw the defendant purchase the bottle of rat poison on 31 August 1973.

Brenda Jacobs testified that after she observed the defendant pouring half of the contents of the bottle of rat poison purchased by the defendant into the tea prepared for consumption by Joe Hunt, she, Brenda Jacobs, never saw that bottle again and did not know what the defendant did with it. After examining State's Exhibit 3, front and back, she testified, "It is the same poison Rozell bought," the same kind of poison, the same kind of bottle and the same kind of markings thereon. Thereupon, the court admitted Exhibit 3 into evidence to illustrate the testimony of Brenda Jacobs as to "the kind, size and color of the bottle of rat poison," if the jury found that it did so illustrate her testimony. On cross-examination, Brenda Jacobs testified that she did not know the name of the rat poison so purchased by the defendant but Exhibit 3 bore the same kind of writing that was on the bottle so purchased by the defendant and she remembered "that red writing on it and * * * the skeleton head." Brenda Jacobs had previously testified that the substance poured by the defendant into the tea, prepared by the defendant for consumption by Joe Hunt, was "white liquid rat poison, the same rat poison she bought that morning."

We find no error in the admission in evidence of the State's Exhibit 3 to illustrate the testimony of Brenda Jacobs as to the kind of bottle so purchased and used by the defendant on 31 August 1973. The testimony of Brenda Jacobs sufficiently accounts for the inability of the State to offer in evidence the bottle actually used by the defendant six months before the alleged crime was brought to the attention of the police officers.

The record discloses no objection by the defendant to any of the testimony by Brenda Jacobs concerning the similarity in appearance of the State's Exhibit 3 and the bottle so purchased and used by the defendant on 31 August 1973, nor does it show any objection by the defendant to the introduction of State's Exhibit 3 into evidence or to the handing of it to the jury for their inspection. Consequently, had there been error in the admission of this evidence, the defendant waived it. *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534 (1970); *State v. McKethan,* 269 N.C. 81, 152 S.E. 2d 341 (1967); Stansbury, North Carolina Evidence (Brandis Revision), § 27.

There was, likewise, no objection interposed to the testimony of Dr. Arthur McBay, Chief Toxicologist in the office of the Chief Medical Examiner of the State, to the effect that on previous occasions he had analyzed bottles of Singletary's Rat Poison and had found it contained three and one-half per cent arsenic trioxide, such bottles bearing labels identical to those on the State's Exhibit 3. Again, there was no objection to the the testimony by McBay that the State's Exhibits 3 and 7 contained a white sediment, which, in his opinion, was "probably the arsenic trioxide which is described on the label," the liquid in the bottle being incapable of holding in solution any more of this substance. R. D. Cone, a chemist for the State Bureau of Investigation, testified, without objection, that he made an analysis of the liquid contained in the State's Exhibit 7 and found the solution in that bottle to contain arsenic. At the conclusion of the testimony of this witness, the State's Exhibit 7 was offered in evidence and admitted over the defendant's objection. We find no merit in the defendant's assignments of error relating to the admission in evidence of the State's Exhibits 3 and 7 and the testimony relating thereto.

Other assignments of error made by the defendant in the statement of her case on appeal are not brought forward into her brief and no argument or citation of authority in support thereof appears therein. These assignments are, therefore,

deemed abandoned. Rule 28, Rules of Practice in the Supreme Court (old rules). See also, Rule 28(a), Rules of Appellate Procedure (new rules), 287 N.C. 671, 741.

In fairness to counsel appointed to represent the defendant on her appeal to this Court, it is to be observed that he was not her counsel at the trial. He has properly combed the record in search of an error sufficient to justify the granting of a new trial and has presented to this Court the matters hereinabove discussed. Because of the seriousness of the offense charged and the sentence of death imposed, we have carefully examined the entire record and all of the assignments of error, including those abandoned. The evidence in the record, if true, as the jury found it to be, discloses a coldly calculated and executed murder by poison. The statute of this State, G.S. 14-17, declares that such a murder "shall be deemed to be murder in the first degree and shall be punished with death." The judgment of the Superior Court is in accord with the statute and the record discloses no error in the trial of the defendant which would justify the granting of a new trial.

No error.

STATE OF NORTH CAROLINA v. MARION COX AND RUDOLPH NOLLY

No. 30

(Filed 2 March 1976)

1. **Homicide § 20— photographs of deceased — admissibility**

The trial court in a second degree murder case did not err in allowing into evidence a photograph of the deceased as he appeared in the hospital on the day he died, though the trial court gave no limiting instruction, since no request for such instruction was made; moreover, the photograph was not inadmissible because it was not made at the time of the crime or because it was gory or gruesome.

2. **Criminal Law §§ 73, 79, 95; Constitutional Law § 31— statement of companion in crime — admissibility as part of res gestae**

In a second degree murder prosecution the trial court did not err in allowing a State's witness to testify that after four intruders entered a rooming house, the scene of the crime, one defendant "drawed back" to hit him with an ax but one of the other intruders said, "Rudy, don't kill him right now," since such testimony was competent as part of the *res gestae;* moreover, the rule of *Bruton v. U. S.*, 391

U.S. 123, that the extrajudicial confession of one defendant who does not testify, implicating the other defendant, cannot be admitted into evidence was not applicable to exclude the testimony, since the intruder's statement was not a confession and since the intruder was not on trial as a codefendant.

3. **Criminal Law § 73— declarations as part of res gestae**

Declarations are competent as part of the *res gestae* if the declaration (1) is of such spontaneous character as to preclude the likelihood of reflection and fabrication, (2) is made contemporaneously with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom, and (3) has some relevancy to the fact sought to be proved.

4. **Criminal Law § 66— in-court identification of defendants — observation at crime scene as basis**

Evidence was sufficient to support the trial court's determination that the in-court identification of defendants by two witnesses was based on observation at the crime scene and that the credibility of the witnesses and the weight of their identification testimony was for the jury where such evidence tended to show that the witnesses observed defendant Cox in the well lighted room of the boarding house for 30-45 minutes while he held a gun on them, one witness observed defendant Nolly both with and without a mask as he entered the room and beat his victim, and the other witness recognized defendant Nolly's voice and observed him with and without a mask as he beat his victim.

DEFENDANTS appeal from judgments of *Lewis, J.*, 14 July 1975 Schedule "B" Criminal Term, MECKLENBURG Superior Court.

In separate bills, drawn in conformity with G.S. 15-144, defendants were charged with the murder of Donald Hendrix on 27 March 1975 in Mecklenburg County. The trial judge submitted only murder in the second degree, voluntary manslaughter or not guilty as permissible verdicts. The jury convicted Marion Cox of voluntary manslaughter and Rudolph Nolly of second degree murder. Cox was sentenced to twenty years and Nolly to life imprisonment. Each defendant appealed and both appeals were docketed in the Court of Appeals. We allowed defense motions to bypass the Court of Appeals in the Cox case and to transfer Nolly's appeal to this Court where it should have been docketed initially. Both appeals were argued in this Court on 11 February 1976.

The State's evidence tends to show that on 27 March 1975 at about 10:30 p.m., Leon Caldwell and Donald Hendrix, who was fifty-two years old and physically disabled, were watching television in Caldwell's room on the second floor of a Charlotte

rooming house. Another roomer named Willie Camp was downstairs drinking beer and listening to a jukebox with Don Massey, Timmy Reeves and Patricia Stevenson.

Timmy Reeves opened the front door in response to a knock and four armed men entered the house. They asked to see "Don" and one of them, later identified as Theodore Teeter, said to one of the others, "Buck, watch the door." The man referred to as "Buck" held his .22 caliber rifle on Camp, Reeves, Massey and Stevenson while the other three intruders went upstairs. "Buck" had a blue and white scarf around his face from the nose down and had on a maroon or blue leather jacket. The faces of all four men were masked in some fashion—by the use of a woman's stocking, a scarf or, later, a black plastic garbage bag.

The three men who went upstairs burst into the room occupied by Caldwell and Hendrix, beat both occupants and pushed them downstairs. The intruder wearing a tan jacket, black hat and a stocking mask over his face beat Hendrix in the face, saying, "Where's the dope?" Hendrix replied that he had no dope. Hendrix was then kicked, struck with a chair and a crutch, and then taken through the den to the kitchen and out to the back porch. Camp, Caldwell, Massey, Reeves and Stevenson were forced to empty their pockets and were instructed to tell Hendrix to reveal where the dope was hidden "or else they were going to have to kill him." The man in the tan jacket lifted an ax to strike Camp, but another in the group said, "No, Rudy, don't kill them now." The man in the tan jacket then went into the kitchen, removed his stocking mask and substituted a mask fashioned from a black plastic garbage bag. He then returned to the porch and began beating Hendrix with the ax.

The four intruders were in the house about forty-five minutes. When another knock was heard at the door, Camp ran to open it and ran on out to call the police. The four assailants then left through the back door.

The police arrived about 11:30 to find puddles of blood in several places, the downstairs in disarray, and Donald Hendrix lying in the back yard badly beaten. Hendrix later died as a result of the "blunt force trauma" inflicted during the attack upon him.

Theodore Teeter was identified as the accomplice who, during the commission of the crime, had referred to defendant

Cox as "Buck" and defendant Nolly as "Rudy." Willie Camp later identified a photograph of Cox, and Leon Caldwell identified a photograph of Teeter. Timmy Reeves picked out a photograph of both Cox and Teeter. At the trial, Camp identified Cox as "Buck" and Nolly as "Rudy." Camp stated he had known defendant Nolly for seven or eight years and recognized his voice.

Leon Caldwell at trial identified defendant Nolly as the man in the tan jacket who hit Hendrix with the ax and Cox as the man who held the rifle on those downstairs. He said he was in Cox's presence for forty-five minutes and that he had never seen Nolly before the incident.

Timmy Reeves positively identified Cox in open court as the man who held the rifle on the people downstairs. Reeves said he observed Cox from a distance of eight feet for about thirty minutes, had known Cox previously, and had seen him several times during the summer of 1974. He said he based his in-court identification "on the fact that I saw him, Cox, that night." Reeves said he didn't know the man in the tan jacket and never really got a good look at him.

Don Massey identified Cox in open court as the man wearing the blue scarf and dark leather jacket who held a rifle on the people downstairs. He said he observed Cox under good lights for thirty minutes and was able to identify Cox by his eyes, hair, profile and face.

Evidence for defendant Cox, including his own testimony, tends to show that he was at the home of his sister with his sister and his girl friend on the night of 27 March 1975. Cox denied being at the rooming house where Hendrix was killed, and denied ever having known Camp, Caldwell, Reeves, Massey or the deceased. He testified he injured his ear on 18 or 19 March 1975, went to a hospital for treatment, and had to wear a gauze patch on the injured ear for two weeks thereafter. The State's witnesses who identified him as one of the intruders testified they noticed nothing unusual, such as a gauze patch, about the ears of the man who held the rifle on them.

It was stipulated that defendant Cox was incarcerated in the North Carolina correctional system between 9 January and 24 November, 1974, a period embracing the summer months during which Timmy Reeves testified he saw Cox in Charlotte several times.

Defendant Nolly did not testify but offered in evidence the transcript of the testimony of State's witness Leon Caldwell on voir dire. Caldwell's testimony tends to show that on 27 March 1975 he and Donald Hendrix were watching television about 10:30 p.m. when he heard a loud booming noise downstairs. When he opened his door there was a man in the hall with a tan jacket on and "that man is Rudolph Nolly." Nolly had a gun in his hand and began beating Caldwell. "I saw into his face then, and later he had a black plastic bag covering his face. This was when he was swinging the ax and the bag completely slid off his face. I noticed sideburns and a slight moustache on Nolly. I looked at some photographs when I went down to the police department and I selected three people from the photographs. One was Nolly, one was Teeter and one was Cox."

In his cross-examination on voir dire Caldwell stated that the man with the gun standing at the door when he opened it had a bandana and a scarf that covered his nose "and I didn't notice anything unusual about his ears." He said the officers told him with respect to the photographs, "it is up to you to pick them, if there is any that you recognize on those photographs, please point them out and I will pick them up." He said he was shown six, eight or ten photographs and identified the pictures "but I just didn't know which one of them was Rudy Nolly and which one was Marion Cox."

Lawrence W. Hewitt, attorney for defendant appellant Cox.

Michael J. Blackford and Donald M. Tepper, attorneys for defendant appellant Nolly.

Rufus L. Edmisten, Attorney General; Charles M. Hensey, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

[1] Both defendants objected to the introduction of a photograph of the deceased Donald Hendrix as he appeared in the hospital on the day he died. However, the assignment of error based on this exception is brought forward and discussed in the brief of defendant Cox only. Accordingly, under Rule 28, Rules of Appellate Procedure, this assignment is deemed abandoned by defendant Nolly. Our discussion relates only to the appeal of Marion Cox.

State's witness Willie Lee Henry testified that the deceased Donald Hendrix was his brother; that he saw his brother at the hospital on the night he died, and that State's Exhibit 2 was a photograph of his brother "the way I saw him over at the hospital." Defendant Cox argues (1) the photograph was not properly identified and authenticated, (2) it was irrelevant because it was made after the body had been removed to the hospital, and (3) the trial court failed to instruct the jury that it was admitted for illustrative purposes only. These are the bases for Cox's first assignment of error.

We find no prejudicial error in any of these respects. The photograph was identified by the witness as a photograph of his brother which depicted the way he looked at the hospital the night he died. Photographs are not inadmissible because they were not made at the time of the event, *State v. Lester*, 289 N.C. 239, 221 S.E. 2d 268 (1976), *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), or because they are gory or gruesome, *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972). See 1 Stansbury, North Carolina Evidence § 34 (Brandis rev. 1973). While it is true that the trial judge gave no limiting instruction, this was not error because there was no request for such instruction. *State v. McKissick*, 271 N.C. 500, 157 S.E. 2d 112 (1967); *State v. Cade*, 215 N.C. 393, 2 S.E. 2d 7 (1939). In any event, no possible prejudice resulted from the introduction of this photograph because Cox never really contested the fact that Hendrix died as the result of an assault made upon him at the rooming house on 27 March 1975. His defense was alibi. This assignment is overruled.

[2] Willie Camp, a State's witness, testified over objection that after the four intruders had entered the rooming house, one of them named Theodore Teeter said, "Watch the door, Buck," referring to Marion Cox who was known by that nickname. Over objection Camp further testified that during the robbery and assault on the deceased Donald Hendrix, Rudolph Nolly "drawed back" to hit him with the ax and Theodore Teeter said, "Rudy, don't kill him right now." Admission of this evidence constitutes Cox's third and Nolly's fourth assignments of error.

There is no merit in these assignments. This testimony was competent as part of the res gestae. "Exclamations or declarations spontaneously evolved by the event and relevant to the inquiry are a part of the res gestae, and testimony thereof is

competent as an exception to the hearsay rule." 3 Strong, N. C. Index 2d, Evidence § 35 (1967), and cases there cited.

[3] Declarations are competent as part of the res gestae if the declaration (1) is of such spontaneous character as to preclude the likelihood of reflection and fabrication, (2) is made contemporaneously with the transaction, or so closely connected with the main fact as to be practically inseparable therefrom, and (3) has some relevancy to the fact sought to be proved. *Hargett v. Ins. Co.*, 258 N.C. 10, 128 S.E. 2d 26 (1962); *Little v. Brake Co.*, 255 N.C. 451, 121 S.E. 2d 889 (1961); *Coley v. Phillips*, 224 N.C. 618, 31 S.E. 2d 757 (1944); 1 Stansbury's North Carolina Evidence, Hearsay § 164 (Brandis rev. 1973).

In *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968), the prosecuting witness testified over objection that during defendant's assault upon her with intent to commit rape, the occupants of the nearby Vance Apartments "up to the third floor had raised their window and was yelling for him to . . . turn that woman aloose." Held: This testimony was competent as part of the res gestae. So it is here.

[2] Defendants rely on legal principles enunciated in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968), followed and applied by this Court in *State v. Fox*, 274 N.C. 277, 163 S.E. 2d 492 (1968), that the extrajudicial confession of one defendant who does not testify, implicating the other defendant, cannot be admitted into evidence. Those principles are not relevant in the factual context of this case. Here, Teeter's statement is not a confession. Moreover, Teeter is not on trial as codefendant. In *Bruton* the confession made by a codefendant was the result of an in-custody interrogation long after the crime was committed. The same distinctions were present in the *Fox* case. Thus *Bruton* and *Fox* are not authority for excluding the evidence challenged here. These assignments are therefore overruled.

[4] Defendants contend their in-court identification by State's witnesses Willie Camp and Leon Caldwell should have been suppressed. They argue that these witnesses had no adequate opportunity to observe defendants, thus rendering their testimony so weak and unreliable that it should have been excluded. Cox's fourth and Nolly's third and fifth assignments of error are based on these contentions.

Before admitting the evidence challenged by these assignments, the trial judge conducted an examination of the witnesses

in the absence of the jury. On that voir dire Leon Caldwell, speaking with reference to his opportunity to observe defendant Nolly, testified that when he opened the door there was a man in the hall with a tan jacket on; that the man rushed in and commenced beating him; that he saw the man's face then and "that man was Rudolph Nolly"; that initially Nolly had a stocking mask over his face but later changed to a black plastic bag; that when Nolly was swinging the ax in the assault upon Donald Hendrix, "the bag completely slid off his face"; that he noticed sideburns and a slight moustache; and that downstairs, while sitting on the sofa, he saw Nolly beating Hendrix on the well lighted back porch. Leon Caldwell also testified that he later identified a photograph of Nolly at the law enforcement center. (This part of his testimony was contradicted by the investigating officer.)

With respect to his opportunity to observe defendant Cox, Leon Caldwell testified on voir dire that he was forced to sit on the sofa with the other captives for more than thirty minutes during which he observed Cox while Cox held a rifle on them. The room was well lighted by a 75-watt bulb. Cox was wearing a bandana and a dark blue scarf with dots on it that covered only his mouth and nose. He had on tennis shoes and a dark coat and was about 5 feet 8 inches tall. Caldwell further testified that he picked out a photograph of Cox from ten to twenty photographs he observed in the law enforcement center. (The investigating officer had no record or recollection of such identification.)

The witness Willie Camp testified on voir dire that he had known defendant Nolly for seven or eight years—"we were brought up in Brooklyn together"; that he had been around Nolly long enough to know Nolly's voice and to recognize it; that on the night in question Nolly was dressed in jeans and a long-sleeved shirt and had a stocking mask over his face which he later replaced with a black plastic bag; and that he observed Nolly's face when the plastic bag fell off while he was beating Hendrix. With respect to defendant Cox, Willie Camp testified, "I have seen him on Seventh Street standing around. . . . I saw him that night about 45 minutes," and pointed to Cox as the man he saw in the rooming house the night Donald Hendrix was killed. He said Cox was known by the name of "Buck" on the street.

The trial judge made detailed findings of fact and concluded that the identification of defendants by Leon Caldwell and Willie Camp was independent in origin and based on personal observation of defendants for thirty to forty-five minutes during the robbery and assault on Donald Hendrix. The evidence was therefore admitted over objection.

Defendants concede that ordinarily the credibility of witnesses and the weight to be given their testimony is exclusively a matter for the jury. Even so, they argue that this rule does not apply when the only testimony justifying submission of the case to the jury is inherently incredible and in conflict with the physical conditions established by the State's own evidence. Defendants contend the testimony of Caldwell and Camp falls in that category and rely on *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), as authority for their position. This requires an examination of the *Miller* case.

In *Miller* the State's evidence was ample to show that the building of the Hall Oil Company in Charlotte was broken and entered by two or more men on the night of 28 September 1966 and that its safe, containing money and other valuables, was then damaged in an effort to force it open. The exterior of the building and surrounding grounds were well lighted by nearby street lights, floodlights at the front and back, and spotlights attached to the eaves. The building was 286 feet from a Texaco service station with a vacant lot between. The only evidence tending to identify defendant as one of the perpetrators of the offense was the testimony of a sixteen-year-old witness who identified defendant in a lineup as one of the persons he had seen at the scene of the crime. The witness was never closer than 286 feet to a man he saw running along the Hall Oil Company building. The witness had never seen the man theretofore and testified he saw this man run once in each direction, stop at the front of the building, peep around it and look in the witness's direction. The witness could not describe the color of the man's hair or eyes, or the color of his clothing, except that his clothes were dark. We held that the uncontradicted testimony as to the physical facts disclosed that the witness's observation of defendant was insufficient to support the subsequent identification of defendant with that degree of certainty which would justify submission of the case to the jury. Our holding was based on the general rule that evidence which is inherently impossible or in conflict with indisputable physical

facts or laws of nature is not sufficient to take the case to the jury. *Jones v. Schaffer,* 252 N.C. 368, 114 S.E. 2d 105 (1960).

The holding in *Miller* is sound and we reaffirm it. But it has no application where, as here, "there is a reasonable possibility of observation sufficient to permit subsequent identification." *State v. Miller, supra.* In such event, the credibility of the witness and the weight of his identification testimony is for the jury.

Here, the witness Caldwell had an opportunity to view Nolly with his mask on and with it off. He observed Nolly while the attack was being made upon Hendrix. He observed Cox in a well lighted room for more than thirty minutes while Cox held a rifle on him and others. Although Cox's mouth and nose were covered, his eyes, forehead, ears, head shape and hair were readily visible. The witness Camp had known Nolly for seven or eight years and recognized his voice. He also saw Nolly's face when the plastic bag fell off. Thus the record discloses plenary, competent evidence *corroborated by the physical facts and attendant circumstances,* and by other State's witnesses as well, to support the findings of the trial judge. Such findings are conclusive when supported by competent evidence, and no reviewing court may set aside or modify them. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Taylor,* 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), cert. denied, 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967).

When viewed correctly, the assignments of error under discussion and the arguments supporting them go only to the weight of the identification testimony of Caldwell and Camp and not to its competency. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); 2 Strong, N. C. Index 2d, Criminal Law, § 104 (1967), and cases there cited. The identification testimony of Caldwell and Camp was competent and properly admitted. The assignments challenging its competency are overruled.

The bills of indictment upon which defendants were tried charge murder in the first degree. G.S. 14-17; G.S. 15-144. The State's evidence is sufficient to show murder committed in the perpetration of a robbery and support a felony murder conviction. For reasons not appearing in the record, the capital

charge was not submitted to the jury. In light of the vicious and brutal manner in which Donald Hendrix was beaten to death, it would appear that justice has been tempered with mercy and defendants have no just cause to complain of the verdicts rendered or the sentences pronounced thereon.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. RICHARD M. NORWOOD, JR.

No. 79

(Filed 2 March 1976)

1. **Kidnapping § 1— sufficiency of indictment**

An indictment alleging that defendant "unlawfully, wilfully, did feloniously and forcibly kidnap" a named person was sufficient to charge the offense of kidnapping, it being unnecessary for the indictment to allege that the victim was forcibly carried away against her will.

2. **Burglary and Unlawful Breakings § 3— burglary indictment — felony intended**

While an indictment for burglary must specify the particular felony which defendant intended to commit at the time of the breaking and entering, the felony intended need not be set out as fully and specifically as would be required in an indictment for the actual commission of the felony, it being enough to state the offense generally and to designate it by name.

3. **Burglary and Unlawful Breakings § 3— burglary indictment — sufficiency**

Indictment was sufficient to charge the crime of first degree burglary where it alleged that at 2:00 a.m. on a specified date defendant feloniously and burglariously broke and entered the dwelling house occupied by a named person "with intent to kidnap the said" person.

4. **Criminal Law § 42— kidnapping — handcuffs used by defendant — admissibility**

The trial court in a kidnapping case properly admitted into evidence handcuffs which defendant placed on the victim's wrists where the victim identified them as the handcuffs used by defendant, notwithstanding the victim did not say they were in substantially the same condition as when defendant used them.

State v. Norwood

APPEAL by defendant under G.S. 7A-27(a) from *Canaday, J.*, 28 July 1975 Session of ORANGE Superior Court, docketed and argued as case No. 109 at the Fall Term 1975.

Defendant was tried upon two bills of indictment. One charged that about 2:00 a.m. on 4 June 1975 defendant feloniously and burglariously broke and entered the dwelling house occupied by Susan Brogden "with intent to kidnap the said Susan Brogden." The other alleged that, in Orange County, on 4 June 1975, defendant "unlawfully, wilfully, did feloniously and forcibly kidnap Susan Brogden."

The testimony of the prosecuting witness, Susan Brogden, tended to show the facts summarized below:

Miss Brogden, aged 22, had known defendant for approximately four years prior to 4 June 1975. The two had lived together "off and on" from about Easter 1972 until August 1974, when she attempted to terminate their association finally. During the preceding two and one-half years during which they "went steady" theirs had been "an up and down, sort of tempestuous relationship"—characterized by much quarreling, several fights, and numerous temporary separations.

After their separation Miss Brogden and defendant continued to have difficulties. On several occasions he pressed her to renew their relationship. Once he came to the house in which she was then living and removed some of her clothes. He was persuaded to return them by her threats to go to the police. Sometime later, when the two encountered each other in a Chapel Hill bar, defendant began to argue with Miss Brogden about returning to him. A fight ensued in which he hit her and pulled her hair.

As a result of this encounter Miss Brogden brought criminal charges against defendant for assault. He was placed in jail and later released on bail. Upon his release he immediately went to the house where Miss Brogden was living with a friend. Unknown to Miss Brogden he spent the night there in another room. When she left for work the next morning on her bicycle he followed her, insisting that she drop the charges against him, asking her to return to him, and throwing rocks at her. None of the rocks hit her.

The chronology of subsequent events is not clear. It seems, however, that shortly thereafter Miss Brogden moved into a

house of her own, a farmhouse. Defendant went there four times in an unsuccessful effort to persuade her to return to him. On one of these occasions he hit and choked her. She again swore out a warrant charging him with assault, and this charge was pending in the District Court in June 1975.

On the night of 3 June 1975 defendant telephoned Miss Brogden and asked her to drop the assault charges against him. She refused. Before retiring that night she latched the screen door to her house and propped a chair against the hardwood inner door, which would not lock.

Between 2:00 and 2:30 a.m. Miss Brogden was awakened by the sound of breaking glass. She heard the hardwood door being pushed open, and she saw defendant enter the house. He approached her carrying a .22 rifle. After handcuffing her hands behind her back he pulled her from the bed and told her she was coming with him. Although she was wearing only a nightgown defendant refused to allow Miss Brogden to dress. He told her he would hit her with the gun if she screamed. Then, carrying the rifle, defendant grasped her by the left arm and walked her a block and a half to his car. There he directed her to get into the back seat. He then got into the driver's seat, put the rifle down beside him, and told her if she was not in court to testify "they" wouldn't do anything to him. For that reason, he said he thought he would just get rid of her; that he was going to throw her into a well and leave her. He told her this several times and she became hysterical.

After driving several miles, defendant turned into a dirt road near the Haw River and stopped the car near a one-lane bridge known as "Chicken Bridge." After producing a paper bag containing a second pair of handcuffs he told Miss Brogden he was going to handcuff her ankles as well as her hands and throw her into the river.

Fearing for her life, Miss Brogden told defendant that she would not only drop the charges against him but she would also come back to live with him. When he accused her of lying she assured him she really loved him, but she was just not yet ready to settle down. At this point defendant put the rifle and the additional pair of handcuffs into the trunk of the car and then removed the handcuffs from Miss Brogden's wrists. He directed her to get into the front seat, and there they had sexual relations. Afterwards defendant drove to the bridge and stop-

ped. In a joking manner he said he did not believe what she had said and that he was going to throw her off the bridge. She told him that she had been truthful and that he would not have to drown her. Defendant replied that he could not have lived with himself had he done anything like that to her.

From the bridge defendant drove to a deserted farmhouse where he showed her the well into which he had threatened to put her. The well was covered with box springs over which the hood of a car had been placed. He lifted up the hood and had Miss Brogden look down into the well. From there he drove her to his house trailer about eight miles from Chapel Hill. Arriving about 5:00 a.m., the two went inside. Defendant took with him the handcuffs which he had earlier placed on Miss Brogden. They went to bed and slept until after 7:00 a.m. From then until about 2:00 p.m. they just "sat around and talked." During this time Miss Brogden several times asked defendant to take her home so that she could go to work. He said No but said she could take his car and go get her clothes. She refused this offer.

Finally, Norma Davis, Miss Brogden's friend who had once been defendant's wife, came to his trailer looking for her. Miss Brogden's employer, who had become apprehensive when she did not come to work, called Mrs. Davis and reported her absence. When Mrs. Davis ascertained from defendant's employer that he was absent from work she found out where he lived and went there. Mrs. Davis took Miss Brogden back home, and Miss Brogden went to work at 5:00 p.m. After leaving work shortly before 7:00 p.m. Miss Brogden went to the office of a magistrate and charged defendant with burglary and kidnapping. The next day she gave a statement to Detective Horton of the Orange County Sheriff's Department and accompanied him over the route which defendant had taken her the night of June 4th. She also went with him to the home of Mrs. Davis to get the handcuffs defendant had used.

The State also called Detective James Horton as a witness. For the purpose of corroborating Miss Brogden's testimony he related to the jury what she had told him on 5 June 1975 about defendant's conduct the night before. His account of his interview with her tended to corroborate Miss Brogden. He also testified that, following her directions, he found the well which, she said, defendant had shown her on the night of June 4th. It was "a rock-wall well" at the rear of an abandoned farm-

house. There was no curb around the well; an automobile hood was lying across it. From the well Miss Brogden took Detective Horton to defendant's trailer and then to the home of Mrs. Davis, who gave him a pair of handcuffs which, she said, she had removed from a night stand by the bed in defendant's mobile home the day before. Miss Brogden testified that these handcuffs, which had on them the name "Detective Romo," were those which defendant had used on her the night of June 4th.

At the conclusion of the State's evidence, which consisted of the testimony of Miss Brogden and Detective Horton, defendant's motions for nonsuit were overruled, and he elected to offer no evidence. After hearing the arguments of counsel and the charge of the judge, the jury returned verdicts that defendant was guilty of first-degree burglarly and kidnapping. Upon defendant's conviction of first-degree burglary, the judge imposed a life sentence; upon his conviction of kidnapping, the judgment was that he be imprisoned for not less than 25 nor more than 30 years.

From the life sentence defendant appealed directly to this Court as a matter of right and, under G.S. 7A-31(a), we certified his conviction of kidnapping to this Court for initial appellate review.

Attorney General Rufus L. Edmisten and Assistant Attorney General Ann Reed for the State.

Winston, Coleman and Bernholz by Barry T. Winston and J. William Blue, Jr., for defendant appellant.

SHARP, Chief Justice.

[1] Defendant's first two assignments of error challenge the sufficiency of the kidnapping and burglary indictments, set out in pertinent part in the preliminary statement of facts. At the trial defendant made no motion to quash, but he now argues that both indictments are defective and violative of N. C. Const. art. I, §§ 22 and 23 because neither sets forth the essential elements of the crime of kidnapping. His argument is that the indictments should have charged that Susan Brogden was forcibly carried away against her will. This argument is without merit; past decisions have rejected it.

Since the conduct charged occurred prior to 1 July 1975, the indictment upon which defendant was tried for kidnapping

was drawn under G.S. 14-39 (1969), which made kidnapping a felony, providing in pertinent part: "It shall be unlawful for any person . . . to kidnap . . . any human being. . . ." (We here note that, effective 1 July 1975 G.S. 14-39 was rewritten by N. C. Sess. Laws, ch. 843 (1975), codified in N. C. Gen. Stats. vol. 1B, (Supp. 1975).)

In *State v. Penley,* 277 N.C. 704, 178 S.E. 2d 490 (1971), this Court held essentially the same language used in the present indictment sufficient to charge the crime of kidnapping. Justice Huskins, writing for the Court, after noting that the bill of indictment was drawn in the words of G.S. 14-39, which punished kidnapping without defining the word, said: "This is sufficient. If an indictment charges the offense in a plain, intelligible, and explicit manner and contains averments sufficient to enable the court to proceed to judgment, and to bar a subsequent prosecution for the same offense, it is sufficient. (Cites omitted.) An indictment for a statutory offense is sufficient as a general rule when it charges the offense in the language of the statute. (Cites omitted.)

"In *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406 (1966), a bill of indictment charging that defendant 'unlawfully, wilfully, feloniously and forcibly did kidnap' a named person was held sufficient to withstand a motion to quash, since the word 'kidnap' has a definite legal meaning. It follows, therefore, that defendant's challenge to the sufficiency of the bill of indictment in this case is without merit and is overruled. We think the bill adequately informed defendant of the charge against him and that he understood it." *State v. Penley, supra* at 707-08, 178 S.E. 2d at 492. *See also State v. Roberts,* 286 N.C. 265, 210 S.E. 2d 396 (1974) ; *State v. Lowry,* 263 N.C. 536, 539-40, 139 S.E. 2d 870, 873 (1965).

Thus, we hold that the indictment in the present case was sufficient to support the conviction for kidnapping.

[2, 3] The essential averments of a burglary indictment are set out in *State v. Cooper,* 288 N.C. 496, 219 S.E. 2d 45 (1975) and *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923). The indictment for burglary must specify the particular felony which the defendant is alleged to have intended to commit at the time of the breaking and entering, and it is not sufficient to charge generally an intent to commit an unspecified felony. However the felony intended need not be set out as fully and specifically

as would be required in an indictment for the actual commission of that felony. It is enough to state the offense generally and to designate it by name. *See also* 12 C.J.S. *Burglary* § 32 (1938). Under these rules the burglary indictment here was clearly sufficient.

[4] Defendant's final assignment of error asserts that the trial court committed prejudicial error in admitting into evidence the handcuffs which defendant placed on Miss Brogden's wrists. His contention is that the State failed to prove "a proper chain of custody and failed to show that the handcuffs were in substantially the same condition as they were when defendant used them." At the outset we note that defendant did not object to the admission of the handcuffs when offered, and the settled rule is that the failure to make an objection waives it. 1 Stansbury's North Carolina Evidence § 27 (Brandis Rev. 1973). However, we also note that the assignment of error has no merit; the handcuffs were properly admitted.

Miss Brogden testified that she would recognize the handcuffs that had been used to shackle her. When she was shown a pair of handcuffs marked as State's Exhibit No. One she said: "I recognize the handcuffs and believe them to be the same ones that Ricky [defendant] put on my hands that night. I believe that these are the handcuffs that he used on me that night because they say Detective Romo on them." Detective Horton also testified without objection that State's Exhibit One was the handcuffs he had received from Mrs. Davis, who told him she had taken them from a night stand by the bed in defendant's mobile home "when she went to get Susan."

The rule as to the admissibility of demonstrative evidence such as the handcuffs here is succinctly stated in 1 Stansbury's North Carolina Evidence § 118 (Brandis Rev. 1973): "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 was evidence tending to show that they were used in the commission of a crime or in defense against an assault. In cases of homicide or other crimes against the person, clothing worn by the defendant or by the victim is admissible if its appearance throws any light on the circumstances of the crime. . . ."

State v. Fuller, 270 N.C. 710, 155 S.E. 2d 286 (1967) is cited in support of these propositions. In that case, although

defendant was awarded a new trial on a different ground, the Court overruled defendant's exception to the admission of a baseball bat which was the alleged murder weapon. The Court said: "The defendant challenges the admission into evidence of the baseball bat, saying there was 'no corroborating evidence connecting the defendant with the exhibit.' However, an eyewitness to the event identified it as being the one used by Fuller to strike Jenkins. This alone made it admissible as an exhibit. No corroborating evidence is required." *Id.* at 712, 155 S.E. 2d at 287.

In the present case the victim, an eyewitness, identified State's Exhibit One as the handcuffs defendant used to bind her hands. The handcuffs were clearly relevant and the witness's identification of them was enough to make them admissible notwithstanding the fact that she did not say they were in substantially the same condition as when defendant used them. *See State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975). The handcuffs, made of materials relatively impervious to change, were sufficiently identified by the witness and the trial court did not err in admitting them. Defendant's contention could easily have been met at trial if he had objected on the grounds he presently asserts.

In the trial below we find

No error.

STATE OF NORTH CAROLINA v. LOUIS RALEIGH COFFEY

No. 3

(Filed 2 March 1976)

1. Criminal Law § 163— exceptions to the charge

An alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by law.

2. Criminal Law § 165— objection to argument of counsel

An objection to argument of counsel must be made at the time of argument so as to give the court an opportunity to correct the transgression, if any, and any such impropriety in the argument is waived by waiting until after the verdict to enter the objection.

3. Criminal Law §§ 102, 165— jury argument not supported by evidence — failure to object in apt time

Even if the district attorney in a first degree burglary case went beyond the actual testimony of witnesses in his jury argument that defendant "turned on the oven in the kitchen and piled papers and rags on the table with the intention of burning down the house after he had taken what he wanted," the prejudicial effect of any overstatement could have been corrected by an instruction by the court, and defendant waived objection to the argument by failing to object thereto at the time of the argument.

4. Criminal Law § 66— lineup identification — advice as to right to counsel — failure to object to testimony — invited error

The appellate court cannot conclude that defendant was not advised of his right to counsel at a lineup at which a burglary victim identified defendant where defendant failed to object to the victim's in-court identification of defendant or to testimony concerning the lineup identification, the State introduced no evidence of the lineup identification until after defendant developed this fact on cross-examination of the victim, and no *voir dire* was held before the evidence was introduced.

5. Burglary and Unlawful Breakings § 3— burglary indictment — description of property stolen

It is not necessary that an indictment for burglary describe the property stolen by the burglar or property which he intended to steal.

6. Burglary and Unlawful Breakings § 3; Indictment and Warrant § 9— burglary indictment — description of premises

An indictment for burglary charging defendant with breaking and entering "in the county aforesaid, the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny" describes the location of the dwelling at which the burglary was committed with sufficient clarity to survive a motion to quash.

APPEAL by defendant from *Friday, J.*, at the 10 November 1975 Session of RUTHERFORD.

Having been found guilty of burglary in the first degree, the defendant was sentenced to imprisonment for life. The indictment charges:

> "That Louis Raleigh Coffey late of the County of Rutherford on the 27th day of January, 1975, about the hour of 3 A.M. in the night of the same day, with force and arms, at and in the county aforesaid, the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny feloniously and burglariously did break and enter, with intent, the goods and chattels of the said Doris Matheny in the said

dwelling house then and there being, then and there feloniously and burglariously to steal, take and carry away Goods, U. S. Currency and personal property of Doris Matheny against the peace and dignity of the State."

The evidence for the State, summarized, was as follows:

Mrs. Doris Matheny testified: She lived with her two small children in a house on Old Caroleen Road, Forest City. On 27 January 1975, she and her children were asleep in the house, she having locked the doors before retiring. In the early morning hours she awakened and found two persons in her bedroom. One of them pulled an object from his waistline and advanced upon her. He cut her hand and struck her, knocking her unconscious. When she regained consciousness, the two intruders were "rambling through the drawers and talking."

Mrs. Matheny identified the defendant in court as one of the two persons in the room. (There was no objection to her in-court identification of the defendant.)

Mrs. Matheny further testified: She summoned the police (presumably immediately after the intruders' departure) and they arrived at her house at 3:15 A.M. She was carried to the hospital for medical treatment and returned to her home the next day. She observed "the drawers had been rambled through," some money removed from her purse and the stereo pulled out from the wall. Her son's watch had been taken. When she retired on the evening preceding the intrusion, she turned off the lights in the house, but, when she was awakened, there was a light "on somewhere" and there was light coming through her bedroom windows from a neighbor's outside light. She could see well enough to identify the intruder, who had "not a beard but hair" on his face. The next time she saw this man he was in a police lineup, in which there were eight persons, several of whom had long hair and a beard. While the intruders were in her room, she observed a "vile odor." She was not able to identify the other intruder. The defendant lives "up the road" from Mrs. Matheny and the police did not aid her in making her identification of him.

Detective Laughter of the Rutherford County Sheriff's Department testified that when he arrived at Mrs. Matheny's residence at about 3:15 A.M. on 27 January 1975, she was in bed, her gown was torn, she was crying and there were cuts and bruises about her face and body. The glass in the back door of

her residence was broken next to the doorknob. The drawers in a chest in the dining room of the house and the dresser doors were open. Her pocketbook was on the cabinet in the kitchen with the billfold, checkbook and other papers lying beside it. The oven was turned on.

Detective Laughter further testified: When the defendant "came in" at the police lineup, Mrs. Matheny turned white and went limp so that the officer had to support her. She identified the defendant as the intruder she had observed in her bedroom. The defendant then had long hair, sideburns and a mustache. The lineup was conducted at 1:40 P.M. on 27 January 1975. The defendant lives on the same road as Mrs. Matheny and about one-fourth to one-half a mile from her. All of the men in the lineup had long hair and one of them had a beard. The defendant was found by the officers with his two brothers in their home about 6:30 A.M. on 27 January 1975. One brother, Joe Coffey, had a "bad body odor about him."

James Boyce, a member of the County Sheriff's Department, testified that he is a qualified handler of bloodhounds. He was called to the Matheny residence and there put his bloodhound on the trail. The dog led him to the defendant's home. The dog "went by Lawson's house next door to the Coffey house and he stopped him but the dog wanted to keep going."

The defendant, testifying in his own behalf, said that he, his two brothers and his mother were in bed at their home from shortly after midnight until the arrival of the officers about 6:30 A.M. on 27 January 1975, that he knew nothing about any breaking and entering of Mrs. Matheny's home and did not know where she lived until after he was charged with the burglary.

The defendant's alibi was supported by the testimony of his mother and two brothers. The witnesses for the defendant testified to having seen in the neighborhood a stranger about the size of the defendant who had long hair and a beard.

Detective Laughter, on recall, testified that when he arrived at Mrs. Matheny's home following the burglary, she was "very hysterical" and described "the man in her bedroom as having a beard and the other one as having a strong foul odor about him." One of the other men in the police lineup was about the same height and weight as the defendant and had long hair and a beard, his hair being lighter than the defendant's

and being of two shades. The officers' search of the Coffey house did not reveal any of the items taken from Mrs. Matheny's home.

Attorney General Rufus L. Edmisten and Associate Attorney Daniel C. Oakley for the State.

Robert G. Summey for defendant.

LAKE, Justice.

The defendant's five assignments of error are:

(1) His motion to quash the bill of indictment should have been allowed because the indictment does not state sufficiently the location of the dwelling house alleged to have been burglarized or the property stolen therefrom;

(2) The defendant was not informed of his right to be represented by counsel when put in the lineup at which he was identified by Mrs. Matheny;

(3) In his argument to the jury, the District Attorney "argued facts which were not in evidence";

(4) "The entire judge's charge is * * * biased toward the State * * * thereby expressing an opinion of the court in both tone and content";

(5) The court improperly charged the jury on second degree burglary, though all of the evidence is to the effect that the building was actually occupied at the time of the breaking and entering.

No argument or citation of authority appears in the defendant's brief in support of Assignment No. 5. This assignment is, therefore, abandoned. Rule 28, Rules of Practice in the Supreme Court (old rules). See also, Rule 28a, Rules of Appellate Procedure (new rules), 287 N.C. 671, 741.

[1] Assignment of Error No. 4 is a broadside exception to the charge and is overruled. This Court has said repeatedly that an alleged error in the charge of the court to the jury must be specified, both as to alleged error in the charge actually given and as to an alleged failure to give an instruction required by the law. *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Robinson,* 272 N.C. 271, 158 S.E. 2d 23 (1967); *State v. Stantliff,* 240 N.C. 332, 82 S.E. 2d 84 (1954); *State v.*

Peacock, 236 N.C. 137, 72 S.E. 2d 612 (1952). Notwithstanding this well settled rule, due to the serious nature of the offense charged and of the sentence imposed, we have carefully considered the charge of the trial judge to the jury and we find therein no error prejudicial to the defendant. The charge includes a full and fair summary of the evidence introduced, both by the State and by the defendant, and a clear and impartial explanation of the principles of law applicable thereto.

[2] As to the defendant's Assignment of Error No. 3, the record shows that arguments of counsel were not recorded by the court reporter and no objection by the defendant to the argument of the District Attorney was interposed until after the jury returned its verdict, at which time the defendant made a motion for a new trial on the ground of the alleged improper argument by the District Attorney. The general rule is that an objection to argument of counsel must be made at the time of the argument, so as to give the court an opportunity to correct the transgression, if any, and any such impropriety in the argument is waived by waiting until after the verdict to enter the objection. As Justice Parker, later Chief Justice, said in *State v. Smith,* 240 N.C. 631, 83 S.E. 2d 656 (1954), "We have held in a long line of decisions that exception to improper remarks of counsel during the argument must be taken before verdict." An exception to that general rule is recognized in capital cases where the improper argument was so prejudicial in nature that, in the opinion of the court, no instruction by the trial court could have removed it from the minds of the jury had the objection been seasonably made. See: *State v. White,* 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Smith, supra.* This exception to the general rule has no application here.

[3] It is apparent from the record that we have before us only a brief synopsis of the evidence. If we assume that the District Attorney went beyond the actual testimony of witnesses in his argument that the defendant "turned on the oven in the kitchen and piled papers and rags on the table with the intention of burning down the house after he had taken what he wanted," there is no reason to suppose that the prejudicial effect of any overstatement could not have been corrected by an instruction by the court had objection to the argument been made in due time. Furthermore, this is not a capital case.

[4] There is no merit in Assignment of Error No. 2. The record shows that Mrs. Matheny, the first witness for the State,

made an in-court identification of the defendant as one of the intruders into her home. There was no objection to this in-court identification and no request that the court conduct a voir dire examination to determine its independent origin. The State introduced no evidence of the identification of the defendant at the lineup until after the defendant had developed this fact on his cross-examination of Mrs. Matheny. There was no objection whatever to any testimony concerning the identification at the lineup and the record discloses no irregularity therein. In Stansbury's North Carolina Evidence (Brandis Revision), § 27, it is said: "A judge may always properly exclude inadmissible evidence, but ordinarily he is not required to do so in the absence of objection; and a failure to make an objection waives it. Evidence admitted without objection, though it should have been excluded had proper objection been made, is entitled to be considered for whatever probative value it may have."

Obviously, a defendant who, himself, injects incompetent evidence into the trial, may not urge its admission as ground for a new trial. In the present case, the record does not show whether or not the defendant was advised, prior to the lineup, of his right to have counsel present at the lineup. Only in his assignments of error, long after the trial was concluded, did the defendant assert that he was not so informed. The State in its exceptions to the defendant's statement of the case on appeal says: "No voir dire was ever requested before the evidence was introduced and if same had been requested it would have disclosed that the defendant was advised of his rights to have counsel present at the lineup but that he waived such rights." In this state of the record we cannot conclude that the defendant was not properly advised of his rights to counsel at the lineup.

[5] Finally, there is no merit in the defendant's Assignment of Error No. 1 which is directed to the denial of his motion to quash the bill of indictment for the reason that it does not describe the location of the dwelling at which the burglary was committed with sufficient clarity and does not describe "the property taken" sufficiently to identify it. It is obviously not necessary that an indictment for burglary describe the property stolen by the burglar. The crime of burglary in the first degree is complete when an occupied dwelling is broken and entered in the nighttime with the intent to commit larceny therein whether or not anything was actually stolen from the house. *State v.*

Hooper, 227 N.C. 633, 44 S.E. 2d 42 (1947); *State v. Allen,* 186 N.C. 302, 119 S.E. 504 (1923); *State v. McDaniel,* 60 N.C. 245 (1864). It is not required that the indictment describe the property which the defendant intended to steal, or that which he did steal. *State v. Foster,* 282 N.C. 189, 192 S.E. 2d 320 (1972).

[6] It is true that an indictment for burglary is fatally defective if it fails to identify the premises broken and entered with sufficient certainty to enable the defendant to prepare his defense and to offer him protection from another prosecution for the same incident. *State v. Smith,* 267 N.C. 755, 148 S.E. 2d 844 (1966). The indictment in the present case charges that the defendant "in the county aforesaid [Rutherford], the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny * * * did break and enter" with the requisite intent. This is a sufficient description to withstand a motion to quash.

The present case is distinguishable from *State v. Smith, supra,* where an indictment charging the defendant with breaking and entering "a certain building occupied by one Chatham County Board of Education, a government corporation," was held fatally defective for failure to identify the premises sufficiently. It is a matter of common knowledge that a county board of education occupies more than one building in the county. In the present case, there is nothing to indicate Doris Matheny owned and actually occupied more than one dwelling house in Rutherford County. Prior to the commencement of his trial, the defendant knew that he was charged with burglarizing a dwelling on the same road as his own home and not more than a half a mile therefrom. Thus, he had ample information as to the location of the house to enable him to prepare his defense to the charge, which defense was that, at the time of the burglary, he was asleep in his own home.

No error.

STATE OF NORTH CAROLINA v. McKINLEY WILLIAMS

No. 23

(Filed 2 March 1976)

1. **Homicide § 20— photograph of deceased — clothing — admissibility for illustration**

The trial court in a first degree murder prosecution did not err in allowing into evidence a photograph of deceased and clothing worn by deceased at the time of the homicide, though defendant did not contest the cause of death, since such evidence was admissible for the purpose of illustrating the testimony of a doctor who testified concerning the circumstances of death.

2. **Criminal Law § 76— no intoxication of defendant — voluntariness of confession**

Evidence was sufficient to support the trial court's findings that defendant was not intoxicated at the time he made a confession, he had sufficient mental capacity to understand what he was saying, *Miranda* rights were read to defendant, he understood them, and thereafter signed a waiver of attorney, and defendant voluntarily and understandingly made a statement to officers.

3. **Criminal Law § 113— effect of intoxication on weight given to confession — request for instruction required**

Instructions to the jury to consider the extent of defendant's intoxication upon the weight to be accorded his statements made to the investigating officers concerned a subordinate feature of the case, and the trial court was not required to instruct the jury thereon in the absence of a special request.

4. **Constitutional Law § 36; Homicide § 31— first degree murder — death sentence constitutional**

Imposition of the death penalty upon a conviction of first degree murder was constitutional.

APPEAL by defendant from *Cowper, J.*, at the 4 August 1975 Session of HALIFAX County Superior Court.

Upon an indictment, proper in form, the defendant was convicted of murder in the first degree in the death of George Herbert Johnson, II, on 23 January 1975 and sentenced to death.

The State's evidence tended to show the following:

On Thursday, 23 January 1975, between the hours 5:30 and 6:15 p.m., the son of the deceased went to his father's office at the Scotland Neck Tractor Company and found his father dead, slumped in a chair behind his desk.

Dr. Sutton, who examined the decedent, determined that there was a hole two inches in diameter just below the collarbone and that this hole was caused by a shotgun wound which severed the windpipe as well as the blood vessels leading to the heart.

Andrew Smith, a friend of the defendant, had seen the defendant about 5:15 p.m. at the driveway leading from the Scotland Neck Tractor Company. The defendant asked Smith for money to purchase liquor, but Smith refused. About thirty minutes later, Smith saw the defendant again, and he said that Johnson had mistreated him and he was going to Johnson's office to shoot him. Some 20 minutes later the defendant told Smith that he had killed Johnson.

The defendant returned to his home, and Smith followed him there. The defendant continued to say that he had killed Johnson, but Smith did not believe him, whereupon the defendant told Smith that if he did not believe him to go to his car and he would find the shotgun and an empty shell. This was done, and the shell was retrieved. According to Smith, the defendant was drinking but was not staggering and talked with good sense.

The defendant was apprehended about 8 p.m. at his home. The deputy sheriff asked the defendant to step out of the house so he could talk to him. The defendant replied, "to hell there ain't nothing to talk about. I done it." At that time the officer attempted to read his rights to him. The defendant continued to talk about the killing and said that "he was glad he had shot Mr. Johnson and that if he had to, he would do it again." This officer indicated that he did not appear to have been drinking and he smelled nothing on his breath.

About 9:30 p.m., the defendant was advised of his rights by E. C. Warren, Chief Investigator for the Halifax County Sheriff's Department. This officer did not think the defendant was under the influence of any intoxicants. The officer transcribed a confession by the defendant, and he signed it. The trial judge conducted a voir dire examination with regard to testimony as to this purported confession and received into evidence the officer's statements as to this confession. Defendant's confession indicated that he went to see Mr. Johnson to obtain a fifty dollar loan and that he had some difficulties with his employer (the deceased) during the week, apparently stemming

from drinking on the job. He admitted that he became angry when Mr. Johnson refused the loan and that he shot him.

The defendant's evidence tended to show that he had been drinking to some extent the entire week. Further, he had not worked on Monday or Tuesday, and when he went to work on Wednesday, his employer directed someone to take him home. He was apparently laid off or fired. A separation notice was mailed to defendant on the day of the killing stating that the "cause of separation is that McKinley Williams reported to work on Wednesday, January 22nd drunk after missing Monday and Tuesday." The defendant explained the presence of the shotgun in the car by stating that he had been hunting on that day. The defendant testified that he went to see Mr. Johnson to obtain lay off papers. He did not recall going back to his car for the gun but remembered that Mr. Johnson got angry and a gun went off. He never intended to kill Mr. Johnson. In addition, he denied many of the incriminating statements he had made to the Deputy Sheriff of Halifax County shortly after the killing.

Other facts necessary to the decision will be set out in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General George W. Boylan and Associate Attorney William H. Boone for the State.

W. Lunsford Crew for defendant appellant.

COPELAND, Justice.

The defendant raises several questions for our consideration.

[1] 1. Did the court err in admitting into evidence a photograph of the deceased, as well as some articles of clothing worn at the time of the homicide?

The defendant contends that he did not contest the cause of death and did not deny that he pulled the trigger of the shotgun. He argues that since he did not controvert the killing, then the photographs and clothing were admitted only to inflame and prejudice the jurors.

Despite defendant's contention, the burden was still on the State to prove its case beyond a reasonable doubt so as to con-

vince the jury that there had been an unlawful killing with malice and that the circumstances of the killing justified a finding of premeditation, deliberation and a specific intent to kill. With regard to this photograph, the examining physician had testified that he had seen the body of Mr. Johnson at the desk and that this photograph accurately portrayed the desk, the office, and the body of the deceased as the doctor had seen them. Upon objection the trial judge admitted the photographs for the purpose of illustrating the testimony of the doctor. A photograph is admissible for the purpose indicated. *State v. Young,* 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Crowder,* 285 N.C. 42, 203 S.E. 2d 38 (1974). Because a photograph depicts a gruesome scene does not render it incompetent. *State v. Crowder, supra; State v. Atkinson,* 275 N.C. 288, 167 S.E. 2d 241 (1969); *State v. Porth,* 269 N.C. 329, 153 S.E. 2d 10 (1967). The defendant did not submit the contested photograph for examination by our Court. It is interesting to note that the able trial judge later in the trial sustained defendant's objection to the introduction of a photograph that showed the shotgun wound in more detail. The court held that this photograph was "unduly inflammatory." It can only be concluded that the contested photograph was not unduly inflammatory.

With regard to the clothing offered into evidence, our Courts have held that it is admissible if its appearance throws any light on the circumstances of the crime. 1 Stansbury's N. C. Evidence, § 118 (Brandis Rev. 1973). *See e.g., State v. Cox,* 280 N.C. 689, 187 S.E. 2d 1 (1972), where the bloodstained clothes of a child rape victim were properly admitted. The clothing of the deceased worn at the time of the homicide was another circumstance showing the manner of the killing. The assignment of error is overruled.

[2] 2. Did the trial court commit error in admitting into evidence the defendant's statement made to the investigating officers?

The defendant contends that his statement was improperly admitted because at the time it was made he was so intoxicated he did not understand its contents or significance and neither could he have appreciated the full nature of his *"Miranda"* rights.

Upon objection having been made, the trial judge properly conducted a *voir dire* hearing and concluded that at the time of the interrogation:

"2. That the defendant was not under the influence of intoxicating liquor.

"3. That the defendant had sufficient mental capacity to understand and apprehend what he was saying.

"4. That the Miranda rights were read to the defendant and he understood them, and he thereafter signed a waiver of attorney in the presence of the officers agreeing to make a statement to the officers.

"5. That the statement made by the defendant to Investigator Warren was given freely with full understanding of his rights and that he was capable of giving a correct account of the matters which he had related to the officers, and after the statement was given it was re-read to the defendant and he expressed agreement with it."

In support of these conclusions the court had before it the evidence of the officer present when the defendant made the statement. The officer testified that the defendant was *not* under the influence of any intoxicating beverage when the statement was made.

Counsel for the defendant travels outside the *voir dire* hearing for evidence that the defendant was intoxicated to some extent before the killing. But counsel for the defendant in his brief is frank to admit that there was "evidence both ways."

Our Court speaking through Justice Sharp (now Chief Justice) has held:

"Unless a defendant's intoxication amounts to mania—that is, unless he is so drunk as to be unconscious of the meaning of his words—his intoxication does not render inadmissible his confession of facts tending to incriminate him. The extent of his intoxication when the confession was made, however, is a relevant circumstance bearing upon its credibility, a question exclusively for the jury's determination." *State v. Logner,* 266 N.C. 238, 243, 145 S.E. 2d 867, 871 (1966).

The trial court's findings upon voir dire are certainly supported by ample and competent evidence, and these must be considered final upon appeal. *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. McClure,* 280 N.C. 288, 185 S.E. 2d 693 (1972). The assignment of error is overruled.

[3] 3. Did the trial court err in failing to instruct the jury to consider the extent of defendant's intoxication upon the weight to be accorded his statements made to the investigating officers?

In this case the trial judge had properly instructed the jury that they were the sole judges of the facts, that it was their duty to remember and consider all of the evidence whether it was called to their attention or not, and that they were to determine the credibility of *all the evidence.* (Emphasis supplied.) He instructed the jury, "you may believe all that a witness says, part of what he says, or nothing of what he says and that is entirely a question for you."

The trial judge also properly instructed the jury as to the effects of intoxication on premeditation and deliberation. He charged as follows:

> "If as a result of intoxication, the defendant did not have sufficient intent to kill Mr. Johnson formed after premeditation and deliberation, he is not guilty of first degree murder; therefore, I charge you that if upon considering the evidence with respect to the defendant's intoxication, you have a reasonable doubt as to whether the defendant formulated the specific intent required for a conviction of first-degree murder, you would not return a verdict of guilty of first-degree murder."

Relating the multifarious factors that might affect the weight to be accorded a given piece of evidence, such as defendant's confession, concerns a subordinate feature of the case. *State v. Lester,* 289 N.C. 239, 221 S.E. 2d 268 (1976); *State v. Hunt,* 283 N.C. 617, 197 S.E. 2d 513 (1973). "[I]nstructions as to the significance of evidence which do not relate to the elements of the crime itself or defendant's criminal responsibility therefore have been considered subordinate features of the case." *State v. Hunt, supra* at 624, 197 S.E. 2d at 518. Whether a request is made for an instruction on a subordinate feature of the case involves a tactical decision by the defendant. Giving an instruction on a particular subordinate feature of the case may so concentrate attention upon that subject "as to divert attention from unrelated weaknesses in the State's case." *State v. Hunt, supra* at 624, 197 S.E. 2d at 518. "In the absence of a special request the trial judge is not required to instruct the jury on subordinate features of a case." *State v. Lester,*

supra at 243, 221 S.E. 2d at 271 (1976). *Accord, State v. Hunt, supra* at 623, 197 S.E. 2d at 517-18. No such special request was made in this instance. The assignment of error is overruled.

[4] 4. Did the court err in denying the motion of the defendant to set aside the verdict and judgment for that the death penalty is unconstitutional and unlawful?

Our Court has considered this question on many occasions and found it to be without merit. It would serve no purpose at this time to plow this ground again. *State v. Griffin,* 288 N.C. 437, 219 S.E. 2d 48 (1975) and cases cited therein.

Because of the seriousness of this case, we have carefully examined the entire record. Our examination discloses that the record is free from prejudicial error. In the judgment rendered we find

No error.

STATE OF NORTH CAROLINA v. DAVID LEROY WATTS, No. 75CVS122; LEROY HARRINGTON, No. 75CVS123; GLENN WILLIAMS, JR., No. 75CVS124; ALLEN McLAURIN, No. 75CVS125; ALEX LINDSEY LOCKLEAR, No. 75CVS126; NEAL LLOYD, No. 75CVS127; AND EUGENE SWANSON BURNETTE, No. 75CVS128.

No. 16

(Filed 2 March 1976)

1. **Evidence § 28; Signatures— public documents — authentication — mechanical signature**

Public documents may be authenticated by mechanical reproduction of the signature of the authorized officer when he intends to adopt the mechanical reproduction as his signature.

2. **Automobiles § 2; Evidence § 28; Signatures— records of DMV — certification — mechanical signature**

In proceedings to revoke the driver's licenses of certain persons under the habitual offender law, copies of each defendant's record of conviction of prior motor vehicle offenses were admissible even though the certification thereon bore a mechanical reproduction of the signature of the authorized officer of the Department of Motor Vehicles since it may be presumed that the authorized officer intended to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature when he provided records of the Department pursuant to G.S. 20-222.

ON *certiorari* to review the judgments entered by *Judge A. Pilston Godwin, Jr.*, 27 June 1975, Superior Court of SCOTLAND County.

The district attorney for the Sixteenth Judicial District filed petitions against the seven named defendants pursuant to the provisions of Article 8 of Chapter 20 of the General Statutes of North Carolina which provide for revocation of driver's license of certain individuals with prior motor vehicle violations. When these proceedings were called before Judge Godwin on 27 June 1975, the district attorney sought to introduce an authenticated copy of each defendant's record of conviction of prior motor vehicle offenses. The trial judge rejected this evidence and signed a judgment in each case providing in part:

> . . . [T]hat the name "J. T. Baker, Jr.," which appears under a certification entry, appearing on the aforesaid purported copy of records of said Department of Motor Vehicles, is not a genuine signature of J. T. Baker, Jr., Director of the Driver License Division of said Department of Motor Vehicles, but that it is a mechanical reproduction of what appears to be a signature of J. T. Baker, Jr.
>
> IT IS, THEREFORE, ORDERED AND ADJUDGED that this proceeding be and it is dismissed and that the costs herein shall be by the clerk of this court taxed against the North Carolina Department of Motor Vehicles.

After entry of judgment in each case, the State unsuccessfully petitioned the Court of Appeals for a writ of certiorari in each proceeding. We allowed certiorari on 2 December 1975.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General William W. Melvin, for the State.

No counsel contra.

BRANCH, Justice.

The trial judge's ruling does not question the admissibility into evidence of *properly authenticated* public records of the Division of Motor Vehicles, the certifying officer's authority as the then current keeper of the records of the Department of the Division, or the genuineness of the Departmental seal which was affixed to the respective records. The narrow question here presented is whether the trial judge correctly dismissed each case and taxed the Motor Vehicles Department with the costs

of each case because "the name 'J. T. Baker, Jr.' which appears under a certification entry, appearing on the aforesaid purported copy of records of said Department of Motor Vehicles, is not a genuine signature of J. T. Baker, Jr., Director of the Driver License Division of said Department of Motor Vehicles, but that it is a mechanical reproduction of what appears to be a signature of J. T. Baker, Jr."

Although this Court has not passed on this precise question, we have held that it is permissible for one to sign by the adoption of his name as written by another, *Barrett v. City of Fayetteville,* 248 N.C. 436, 103 S.E. 2d 500, and that a person may sign a deed by a signature written for him, by making his mark or by implementing some sign or symbol by which the signature may be identified. However, it is necessary that the signature, mark or symbol must be made with the signing party's consent. *Lee v. Parker,* 171 N.C. 144, 88 S.E. 217; *Devereux v. McMahon,* 108 N.C. 134, 12 S.E. 902. Decisions from other jurisdictions shed more light on the question before us.

In the case of *Cummings v. Landes,* 140 Ia. 80, 117 N.W. 22, the defendant contended that a notice of foreclosure was not properly served under a statute requiring that the notice "be signed by plaintiff or his attorney" because the attorney's name was printed on the notice. The Supreme Court of Iowa, in rejecting this contention, stated:

> . . . Looking at the original meaning of the word, in connection with the usage since the people generally have become able to write their own names, we have no trouble in reaching the conclusion that, as employed in the statute, no more is exacted than that the name of plaintiff or that of his attorney be attached to the notice by any of the known methods of impressing the name on paper whether this be in writing, printing, or lithographing, provided it is done with the intention of signing or be adopted in issuing the original notice for service. *Loughren v. Bonniwell,* 125 Iowa, 518, 101 N.W. 287, 106 Am. St. Rep. 319; *Herrick v. Morrill,* 37 Minn. 250, 33 N.W. 849, 5 Am. St. Rep. 841; *Mechen v. More,* 54 Wis. 214, 11 N.W. 534; *Hamilton v. State,* 103 Ind. 96, 2 N.E. 299, 53 Am. Rep. 491, and note. . . . As the plaintiff in the foreclosure suit presented the notice signed by his attorney to the court procured a decree to be entered, based on its sufficiency, it will be assumed,

> in the absence of any showing to the contrary, that he had adopted the printed signature, ...

A case involving a similar issue was decided by the Utah Supreme Court in *Salt Lake City v. Hanson,* 19 Utah 2d 32, 425 P. 2d 773. There, several defendants had been charged with violating various ordinances of the City upon complaints made before a City Judge by an officer who was not the arresting officer. The signatures by the complainant and the judge were stamped signatures. The City Court dismissed the complaints without statement of reason. It was suggested that the reasons for dismissal were: (1) the stamped signatures and (2) the complaint was not signed by the arresting officer. The Supreme Court of Utah in holding that the stamped signatures were valid stated:

> In regard to a signature, it is the intent rather than the form of the act that is important. While one's signature is usually made by writing his name, the same purpose can be accomplished by placing any writing, indicia or symbol which the signer chooses to adopt and use as his signature and by which it may be proved: e.g., by finger or thumb prints, by a cross or other mark, or by any type of mechanically reproduced or stamped facsimile of his signature, as effectively as by his own handwriting.

Accord: *Joseph Denunzio Fruit Co. v. Crane,* 79 F. Supp. 117 (S.D. Cal. 1948) *aff'd* 188 F. 2d 569, *cert. denied,* 342 U.S. 820, 96 L.Ed. 620, 72 S.Ct. 37; *McGrady v. Munsey Trust Co.,* 32 A. 2d 106 (Mun. Ct. of App. for D.C.); *Cummings v. Landes, supra; Smith v. Greenville County,* 188 S.C. 349, 199 S.E. 416.

We find the following pertinent statement in 80 C.J.S. Signatures § 1, pages 1284, 1285:

> . . . A signature has also been defined as the act of putting down a person's name at the end of an instrument to attest its validity, any mark or sign made on an instrument or document in token of knowledge, approval, acceptance, or obligation; and also as whatever mark, symbol, or device one may choose to employ as representative of himself. Stated in greater detail, in legal contemplation "to sign" means to attach a name or cause it to be attached by any of the known methods of impressing the name on paper with the intention of signing it.

> A signature consists both of the act of writing the person's name and of the intention of thereby finally authenticating the instrument.

"The general rule that a stamped, printed, or typewritten signature is a good signature appears to be subject to an exception, where the signature is required by statute to be made under the hand of the person making it." Annot., 37 A.L.R. 87 (1925). We note at this point that the statutes pertinent to decision in this case do not impose this restriction. G.S. 8-35; G.S. 20-42(b); G.S. 20-222.

Generally there is a presumption that a public official in the performance of an official duty acts in accordance with the law and the authority conferred upon him. The burden is upon the contesting party to overcome this presumption. *Electric Membership Corporation v. Alexander*, 282 N.C. 402, 192 S.E. 2d 811; *Housing Authority v. Wooten*, 257 N.C. 358, 126 S.E. 2d 101. This rule of law is augmented by statutory provisions declaring that:

> . . . [R]ecords of any public office of the State . . . shall be received into evidence . . . in any of the Courts of this State when certified by the chief officer . . . to be true copies, and authenticated under the seal of the office, department, or corporation concerned. Any such certificate shall be prima facie evidence of the genuineness of such certificate and seal, the truth of the statements made in such certificate, and the official character of the person by which it purports to have been executed. G.S. 8-35.

[1] According to the records of the Division of Motor Vehicles during the year 1975, the Drivers License Section produced 422,637 documents requiring signatures. The purpose of authentication and certification of records is to avoid the inconvenience and sometimes the impossibility of producing original public documents in court. Obviously the admission of certified records tends to expedite the trial of cases. It is just as obvious that to require the manual signing of every record certified from the Division of Motor Vehicles would be extremely time consuming and expensive. We are of the opinion that the weight of authority and the better rule is that public documents may be authenticated by mechanical reproduction of the signature of the authorized officer when he intends to adopt the mechanical reproduction as his signature.

[2] In instant case, when the authorized officer of the Division of Motor Vehicles provided these records of the Department pursuant to the provisions of G.S. 20-222, it may be presumed that he intended to authenticate the documents and to adopt the mechanical reproduction of his name as his own signature.

We, therefore, hold that the trial judge erroneously dismissed the seven proceedings for the reason that the name J. T. Baker, Jr., is a mechanical reproduction of what appears to be a signature of J. T. Baker, Jr.

Even had the petitions been properly dismissed the costs of these proceedings could not have been properly taxed against the Division of Motor Vehicles. The *parties* to these proceedings were the State of North Carolina and the respective defendants. The costs should not have been taxed against the Division of Motor Vehicles which took part in these proceedings, not as a party, but pursuant to the statutory mandates contained in G.S. 20-220, et seq.

The judgments signed on the 27th day of June 1975 by Judge Godwin in the revocation proceedings against David Leroy Watts, No. 75CVS122; Leroy Harrington, No. 75CVS123; Glenn Williams, Jr., No. 75CVS124; Allen McLaurin, No. 75CVS125; Alex Lindsey Locklear, No. 75CVS126; Neal Lloyd, No. 75CVS127; and Eugene Swanson Burnette, No. 75CVS128, are vacated and each of these proceedings is remanded to the Superior Court of Scotland County for further proceedings consistent with this opinion.

Reversed and remanded.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BONDSHU v. BONDSHU

No. 66 PC.

Case below: 28 N.C. App. 411.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

EQUIPMENT CO. v. DeBRUHL

No. 42 PC.

Case below: 28 N.C. App. 330.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

IN RE ADAMEE

No. 43 PC.

Case below: 28 N.C. App. 229.

Petition for discretionary review under G.S. 7A-31 allowed 2 March 1976.

LEA v. DUDLEY

No. 60 PC.

Case below: 28 N.C. App. 281.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

MOORE v. GAS CO.

No. 54 PC.

Case below: 28 N.C. App. 333.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

SCOVILL MFG. CO. v. GUILFORD COUNTY and SCOVILL MFG. CO. v. GREENSBORO

No. 46 PC.

Case below: 28 N.C. App. 209.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. AUSTIN

No. 22 PC.

Case below: 27 N.C. App. 395.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. BARBOUR

No. 39 PC.

Case below: 28 N.C. App. 259.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

STATE v. BOZEMAN

No. 65 PC.

Case below: 28 N.C. App. 404.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. BUCHANAN

No. 58 PC.

Case below: 28 N.C. App. 163.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. CASTOR

No. 56 PC.

Case below: 28 N.C. App. 336.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

STATE v. HANSEN

No. 138 PC.

Case below: 27 N.C. App. 459.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. HUNTER

No. 77 PC.

Case below: 28 N.C. App. 465.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

STATE v. HUNTER and GRAY

No. 69 PC.

Case below: 27 N.C. App. 534.

Petition by defendant Gray for discretionary review under G.S. 7A-31 allowed 2 March 1976.

STATE v. JOHNSON and DANIELS and SANTOS

No. 36 PC.

Case below: 28 N.C. App. 166.

Petition by defendant Daniels for discretionary review under G.S. 7A-31 denied 2 March 1976.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. JOHNSON

No. 40 PC.

Case below: 28 N.C. App. 265.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. LESLIE

No. 68 PC.

Case below: 28 N.C. App. 591.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. McNEILL

No. 20 PC.

Case below: 28 N.C. App. 125.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

STATE v. MOORE

No. 51 PC.

Case below: 28 N.C. App. 353.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 2 March 1976.

STATE v. SPEIGHT and CARTER

No. 57 PC.

Case below: 28 N.C. App. 201.

Petition by defendant Carter for discretionary review under G.S. 7A-31 denied 2 March 1976.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. WALKER

No. 63 PC.

Case below: 28 N.C. App. 389.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. WOODY ET AL

No. 61 PC.

Case below: 28 N.C. App. 411.

Petition for discretionary review under G.S. 7A-31 denied 2 March 1976.

STATE v. YOUNG and WILLIAMSON and TURNER and ARTIS

No. 130 PC.

Case below: 27 N.C. App. 308.

Petition by defendants Williamson and Turner for discretionary review under G.S. 7A-31 denied 2 March 1976.

IN RE: APPEAL OF AND PETITION FOR JUDICIAL REVIEW BY ARCADIA DAIRY FARMS, INC. OF AMENDMENT NO. 27 TO MILK MARKETING ORDER NO. 2

No. 17

(Filed 6 April 1976)

1. **Agriculture § 16— powers of Milk Commission**

The Milk Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Chapter 106, Art. 28B, of the General Statutes.

2. **Statutes § 4— construction — avoidance of unconstitutionality**

If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, the courts should construe the statute so as to avoid the constitutional question.

3. **Agriculture § 16— distribution of "reconstituted" milk — equalization payments for producers — authority of Milk Commission**

The Milk Commission was not authorized by G.S. 106-266.8 to require a distributor of milk "reconstituted" from Wisconsin milk powder to make compensatory payments to North Carolina milk producers with whom it has no dealings based upon the difference in the price of fluid milk and the price of surplus milk; furthermore, if the statute authorized such requirement, it would probably be in conflict with the Commerce Clause of the United States Constitution and Article I, § 19 of the North Carolina Constitution.

4. **Agriculture § 16— construction of milk pricing statute**

The provision in G.S. 106-266.9 that "the Commission may prohibit such practices as it may deem to be contrary to the welfare of the public and the dairy industry, such as the use of special prices or special inducements in any form or any unfair trade practices in order to vary from the prices fixed by the Commission" applies only to the pricing of milk and practices designed to bring about variations from the prices fixed by the Commission.

APPEAL by Arcadia Dairy Farms, Inc., from *McKinnon, J.*, at the 16 June 1975 Session of WAKE, heard prior to determination by the Court of Appeals.

Arcadia Dairy Farms, Inc. (hereinafter called Arcadia), is a producer and a distributor of fluid milk in Marketing Area No. 8 in North Carolina (Asheville and vicinity). The North Carolina Milk Commission (hereinafter called the Commission) is an agency of the State, created by and having the authority conferred upon it by Article 28B of Chapter 106 of the General Statutes.

On or about 10 April 1974, the Commission, following a public hearing, adopted Amendment No. 27 to its Milk Marketing Order No. 2. Arcadia filed its petition for a judicial review thereof by the Superior Court of Wake County. Arcadia sought and obtained from the Superior Court an order restraining the enforcement of the amendment by the Commission until the hearing of the matter in the Superior Court. It alleged Amendment No. 27 is in excess of the statutory authority of the Commission and, if not, the statute authorizing the Commission to promulgate the amendment is unconstitutional and void for that: (1) It is an unlawful delegation of legislative power to the Commission since it fails to establish adequate standards for the guidance of the Commission; (2) it constitutes an unlawful burden upon interstate commerce, in violation of the Constitution of the United States, Article I, Sec. 8, Clause 3; (3) it is confiscatory and levies a tax not enacted by the General Assembly, in violation of the Constitution of North Carolina, Article I, Sec. 8; and (4) it is in violation of the Fourteenth Amendment to the Constitution of the United States and of Article I, Sec. 19, of the Constitution of North Carolina.

The Superior Court, after hearing, concluded the action of the Commission in promulgating the said amendment is not in violation of constitutional provisions, is within the statutory authority and jurisdiction of the Commission, was made upon lawful procedure, is not affected by other error of law, is supported by competent, material and substantial evidence, in view of the entire record as submitted, and is not arbitrary or capricious. The Superior Court, therefore, adjudged that the decision of the Commission adopting the amendment be affirmed, vacated the interlocutory stay order and directed the payment to the Commission of funds deposited by Arcadia and held in escrow pending the adjudication of this matter. By consent of the parties, the judgment of the Superior Court was stayed pending the determination of this appeal.

Nothing in the record indicates that any fluid milk sold or distributed by Arcadia is not wholesome, falls short of the highest standards of purity established by law for the types of milk it purports to be, is in any way misrepresented to the consumer as to content and quality, or is, in any respect, lower in quality than the purportedly comparable product of any of the other five distributors of fluid milk in the Asheville area.

The designations "Class I" and "Class II" hereinafter referred to, do not relate to the quality of the fluid milk but such classification is determined solely by the use made by the distributor (the processor) of fluid milk received from the producer (the dairy farmer) and determines the price paid by the distributor, at the end of each payment period, to the producer for the fluid milk received from the producer by the distributor. This classification of milk (to be distinguished from the grading of milk by the Department of Agriculture pursuant to G.S. 106-267) was not established by statute, but by the regulation of the Commission. With refinements and exceptions not here material, the Commission's Milk Marketing Order #2 defines Class I milk to include all fluid milk and fluid milk products "sold or disposed of for consumption or use as processed fluid milk products" and specifically includes "reconstituted milk." Class IA milk includes all bulk milk sold to other distributors, milk transferred between branches of the same distributors for use as fluid milk and milk sold directly to military installations. Class II milk is all other milk *received* by the distributor. That is, Class II milk includes milk used by the distributor or sold by it for use in the production of butter, cheese, milk powder and other non-fluid milk products. With reference to the demand for milk for use as fluid milk, it is surplus milk.

Records are kept by the distributor showing its use of all milk received by it during a payment period, and at the end of such period the distributor makes payment to the producer for all milk delivered by the producer to the distributor during such payment period, the payment for Class I milk being at a higher rate than the payment for Class II milk. Records are not kept by the distributor to show the use so made of milk purchased from each individual producer, the classification for payment purposes of each producer's milk being in the same proportion as the classification of the total volume received by the distributor during the payment period.

Arcadia is a producer. That is, it has its own dairy herd, all of the milk derived from which is distributed by Arcadia. (The record in Case No. 18, a companion case decided this day, indicates that the herd is actually owned by individuals, or an individual, who own or owns all of the stock of Arcadia, but, for the purpose of this litigation, Arcadia has been regarded and is deemed to be the owner of the dairy herd and, therefore,

a producer-distributor.) Arcadia distributes in the Asheville area fluid milk for consumption for use as such. Its total distribution amounts to approximately six per cent of the total fluid milk sales in that area, there being five other distributors in the Asheville area and Arcadia being, apparently, the smallest. Approximately half of the fluid milk so distributed by Arcadia is "reconstituted milk," processed by Arcadia. This is a low fat milk.

Arcadia's reconstituting process is substantially as follows: It purchases from a supplier in Wisconsin (now a supplier in Tennessee according to the record in Case No. 18) milk powder produced from fluid milk (Grade A milk, apparently). This it mixes with water, obtained from Arcadia's private well, and other milk solids to give the resulting fluid the desired butterfat content, palatability and other nutritious qualities. It then mixes that fluid with an equal amount of whole, natural milk (Class I). The end product is then packaged and sold for consumption or other use as fluid milk. Thus, the end product (one-half of Arcadia's total distribution, approximately three per cent of the total distribution in the Asheville area) constitutes fluid milk which, itself, is composed of 50 per cent Class I milk and 50 per cent Class II milk, the latter portion being composed of the milk powder purchased out of State, the other milk solids and the water from Arcadia's well.

Amendment No. 27 to Milk Marketing Order No. 2, the regulation here in question, provides:

> "To protect the stability of the supply of producer milk, no Class I or Class IA milk shall be purchased, received, handled, or obtained from any source other than from approved producers or other North Carolina licensed distributors without the express permission of the Commission.
>
> "If a distributor reconstitutes milk for Class I sales, such distributor shall pay into an equalization fund an amount equal to the difference between the price of Class I and Class II milk. * * *
>
> "The amount due to the equalization fund shall be determined and paid each month to the Commission. The amount collected shall be distributed in accordance with a procedure approved by the Commission *for payment to*

the producers selling to other distributors within the market area * * * ." (Emphasis added.)

Pursuant to this amendment, the Commission has ordered Arcadia to make payments, substantial in amount, to its "equalization fund." Pending the determination of this proceeding, these payments have, by consent, been paid into a fund held in escrow.

Evidence at the hearing before the Commission was to the effect that at the time Arcadia processed and distributed such "reconstituted milk," there was available in the Asheville area natural, fluid milk which it could have purchased from its competitor distributors, or, perhaps, directly from producers. Had it done so, the producers of such milk would have received from the distributors supplied by them payment for their milk at Class I rates. Since Arcadia did not purchase and use such milk, but used Wisconsin powder plus Arcadia's water to produce "reconstituted milk" for sale to its customers, the milk so left in the hands of Arcadia's competitor distributors became, to them, surplus milk and was used or sold by them for Class II purposes and, consequently, the producers of such milk received therefor, from the distributors suplied by them, payment at the Class II rate.

The effect of the Commission's order is that Arcadia must pay to the Commission the difference between the Class I price and the Class II price on its total volume of "reconstituted" milk less the portion thereof which, itself, consists of natural, fluid milk. That is, Arcadia is ordered to pay to the Commission the difference between the Class I price and the Class II price per volume unit multiplied by the volume of Wisconsin powder plus Arcadia's water. Payments so made by Arcadia to the Commission will be distributed by the Commission to those producers who delivered their milk, not to Arcadia but to Arcadia's competing distributors.

No one in North Carolina manufactures the milk powder used by Arcadia in its processing of reconstituted milk. Arcadia is the only distributor of such milk in the Asheville area.

Evidence at the hearing conducted by the Commission included the following testimony by proponents of the adoption of the amendment in question:

> "We have a real problem in Western North Carolina in that one processor, by recombining milk powder and

water, is taking our Class I sales in the marketplace. * * * We found that if the prices were set after studying the matter through the Milk Commission staff that the reconstituted products would probably take a lower price than the whole milk from the cow, which wouldn't solve our problem."

* * *

"[T]here has been and still is a surplus of raw milk in this Asheville Market since November of 1973. Biltmore [a distributor] has experienced a surplus, and it is my understanding that the other distributors in the area, Pet, Sealtest, and Dairymen, Inc., have likewise had a surplus of milk. There has been no contact whatever with Biltmore or any of its representatives by representatives of Arcadia Dairies during this period seeking raw milk * * * . With regard to the distributors they are plainly and clearly unable to compete with this product under the present status of the regulations. They cannot sell below cost. They cannot market their product, this product, recombined milk, without paying full Class I price for it, and, in addition, the cost of the powder itself. * * * They [Arcadia] are selling it, having a cost of the raw product at Class II prices. * * * [W]e cannot in good conscience recommend that the Commission, instead of this amendment, relax their regulations on marketing of combined milk and allow all other distributors to compete. I believe that would aggravate the problem instead of solving it. As distributors, I submit we must be allowed to either have a corrective measure in the form of this amendment as proposed, or by relaxing the requirements of our having to [pay] Class I prices for recombined milk."

* * *

"Our [North Carolina] dairy farmers cannot economically compete with milk powder and continue to produce fresh and wholesome fluid milk. Our farmers must receive the Class I price for a majority of their production to even have a chance of surviving. They can compete with fluid milk from the mid-west area, the area which produces most of the dry milk powder available for commercial trade. The March, 1974, Federal Order Minimum Class I price in the Minneapolis-St. Paul market is $9.16 per hundredweight. Any distributor in the Asheville area receiving this

fluid milk from the mid-west could expect to pay at least $2.50 per hundredweight for handling and transportation charges, making his total cost approximately $11.66 per hundredweight or at least $1.00 more than the current Class I price in North Carolina.

"However, surplus milk in the mid-west used for manufacturing dry milk powder is purchased by mid-west plants for about $8.00 per hundredweight, which includes the commercial components of butterfat and non-fat milk solids. This simply means that dry milk powder delivered to processors in Asheville does not bear the high transportation costs for the fluid components that have been removed and does reflect the lower prices paid mid-west farmers for their surplus milk.

"A North Carolina distributor who reconstitutes fluid volume from milk powder and water has an ingredient cost of approximately $5.33 per hundredweight for milk solids—non-fat. This is computed on $.65 per pound cost for powder with 8.2 pounds of powder per hundredweight of fluid volume. The $5.33 cost does not include the cost of water and labor.

"A North Carolina processor and distributor with a full supply of local producer milk is required to pay his dairy farmers $10.62 per hundredweight for Class I milk. When a distributor removes the fat to obtain a fluid skim product, the fat value is computed at 3.5 pounds at $.70 per pound to be $2.45. Therefore, $10.62 less $2.45 equals $8.17 as the fluid skim value and this does not include plant costs of separation and processing.

"At the very minimum, this reflects a raw product cost advantage of $2.84 per hundredweight or $.245 per gallon to a distributor who elects to deliberately not buy locally produced milk, but to use milk powder to reconstitute fluid volume for consumer sales. * * *

"To go a step further, if Arcadia Dairy is allowed to continue with its raw product cost advantage, no doubt every processor in the State will quickly go in this direction. During the month of January, 1974, there were 5,157,000 pounds of low-fat product sold in North Carolina. If one-half of this sales volume is lost to the powder reconstitution method, this would cost North Carolina Grade

A dairy farmers $87,669 per month. (2,578,500 pounds x $3.40 per hundredweight.) * * * The only alternative is higher class prices for their product."

Evidence introduced before the Commission by the opponents of the amendment included the following testimony:

"The effect of this amendment would be to increase the cost of reconstituted milk by 15¢ to 25¢ per gallon. * * * What we [the North Carolina Consumer Council] are saying * * * is that the consumer should be allowed the freedom of choice, whether it's a less expensive reconstituted product versus a more expensive whole milk product, or if Mrs. Housewife so desires, to buy her own powder and mix it herself."

* * *

"Arcadia puts out, I believe, somewhere in the neighborhood of 30,000 gallons of milk of one sort or the other per month. Now, 15,000 of this is fresh whole milk. Now, this should have no effect on the market up there. If he has 5% of the market, which we question somewhat—it was close to 4%—but whatever the percentage, it's small—then when you talk about reconstituted milk you are talking about approximately 2% of that market, and as I understand, the reconstituted milk in itself consists of approximately 50% whole milk. So you see we are talking about just a very small amount compared with the total market in the actual area.

* * *

"Now, there is no question but what this reconstituted milk apparently serves a need because otherwise these housewives would be going straight to the shelf and making their own. But they can't put that together with the palatability that their children will drink."

The Commission's Milk Marketing Order No. 2 prescribes regulations pursuant to which a producer establishes his milk base in a marketing area. The order further provides that a producer who has established a base in any marketing area shall be entitled to continue to ship all his milk to the distributor with whom his base is established. The producer may transfer his base to another producer. The producer may also transfer his business from one distributor to another.

Robert B. Long, Jr., for appellant.

Harris, Poe, Cheshire & Leager by W. C. Harris, Jr. for appellee.

LAKE, Justice.

[1] The Milk Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Chapter 106, Art. 28B, of the General Statutes. *Utilities Commission v. Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E. 2d 304, 308 (1975); *Milk Commission v. Galloway*, 249 N.C. 658, 664, 107 S.E. 2d 631 (1959). The powers conferred upon the Commission are set forth in G.S. 106-266.8, the pertinent portions of which read as follows:

> "The Commission is hereby declared to be an instrumentality of the State of North Carolina, vested with power:
>
> * * *
>
> "(3) To supervise and regulate the transportation, processing, storage, distribution, delivery and sale of milk for consumption; provided that nothing in this Article shall be interpreted as giving the Commission any power to limit the quantity of milk that any producer can produce, nor the power to prohibit or restrict the admission of new producers.
>
> * * *
>
> "(7) To make, adopt, and enforce all rules, regulations and orders necessary to carry out the purposes of this Article. * * *
>
> "(10)a. The Commission, after investigation and public hearing, may fix prices to be paid producers and/or associations of producers by distributors in any market or markets, and may also fix different prices for different grades or classes of milk. * * * "

G.S. 106-266.9 further provides:

> " * * * No distributor shall violate the prices as established by or filed with the Commission or offer any discounts or rebates without authority from the Commission; and the Commission may prohibit such practices as it may deem to be contrary to the welfare of the public

and the dairy industry, such as the use of special prices or special inducements in any form or any unfair trade practices in order to vary from the established prices. * * * "

By Amendment 27 to Milk Marketing Order #2 the Commission has undertaken to require one, who purchases, from within or without the State, powdered milk, mixes it with water and, possibly, other substances, thereby "reconstituting" fluid milk, which he distributes to consumers in this State, to pay money to North Carolina producers of natural, fluid milk, from which producers he has purchased nothing and with which producers he has had no business dealing. The purpose of the Commission in so doing is to assure an adequate supply of fluid milk in North Carolina markets by providing for producers of natural fluid milk the same gross revenues they would have received had the distributor of the "reconstituted" milk purchased from such producers natural, fluid milk and distributed it instead of the "reconstituted" milk.

Arcadia contends that the statute, above quoted, does not authorize the Commission to require such payment by it. Arcadia further contends that if the statute, properly construed, does authorize the Commission to impose such requirement, the statute, as applied to Arcadia, violates both the Constitution of North Carolina and the Constitution of the United States.

[2] If a statute is reasonably susceptible of two constructions, one of which will raise a serious question as to its constitutionality and the other will avoid such question, it is well settled that the courts should construe the statute so as to avoid the constitutional question. *Milk Commission v. Food Stores,* 270 N.C. 323, 331, 154 S.E. 2d 548 (1967); *State v. Barber,* 180 N.C. 711, 104 S.E. 760 (1920). In *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, 1361 (1936), the Supreme Court of the United States said: "The cardinal principle of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same." See also: *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed 598 (1931); *Federal Trade Commission v. American Tobacco Co.,* 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786 (1924); *Re Keenan,* 310 Mass. 166, 37 N.E. 2d 516, 137 A.L.R. 766

(1941); 16 AM. JUR. 2d, Constitutional Law, § 146, 16 C.J.S., Constitutional Law, § 98(b).

Arcadia purchases its milk powder from a supplier located in Wisconsin (or Tennessee). Presently, there is no producer of such powder in North Carolina. If Arcadia, having paid the price of the Wisconsin powder, the water and other ingredients of its "reconstituted" milk plus the labor cost of the reconstituting process, must also pay to its competitor distributors, for the benefit of their producers, the difference between the price of Class I milk and the price of Class II milk, the flow of the Wisconsin product into this State will be severely restricted, if not stopped altogether. In this respect, the effect would be the same as that produced by a North Carolina protective tariff.

In *Baldwin v. Seelig,* 294 U.S. 511, 521, 55 S.Ct. 497, 79 L.Ed. 1032 (1935), the Supreme Court of the United States, in an opinion by Mr. Justice Cardozo, held that the State of New York may not forbid the sale therein of milk brought into New York from Vermont unless the price paid to the Vermont producers was one which would have been lawful upon a like transaction within the State of New York. The Court said:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if customs duties, equal to the price differential, had been laid upon the thing transported. * * * Imposts and duties upon interstate commerce are placed beyond the power of a state, without the mention of an exception, by the provision committing commerce of that order to the power of the Congress. Constitution, Art. I, § 8, Clause 3. * * *
>
> "The argument is pressed upon us, however, that the end to be served by the Milk Control Act is something more than the economic welfare of the farmers or of any other class or classes. The end to be served is the maintenance of a regular and adequate supply of pure and wholesome milk; the supply being put in jeopardy when the farmers of the state are unable to earn a living income. * * * This would be to eat up the rule under the guise of an exception. Economic welfare is always related to health, for there can be no health if men are starving. Let such an exception be admitted, and all that a state will have to do in times of stress and strain is to say that its farmers and merchants and workmen must be protected against competition

from without, lest they go upon the poor relief lists or perish altogether. To give entrance to that excuse would be to invite a speedy end to our national solidarity. * * *

"Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. * * * The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended."

In *United States v. Rock Royal Co-op.*, 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446 (1939), the Court sustained Federal regulations, pursuant to an Act of Congress, establishing a system for fixing prices to be paid to producers of milk through equalization pools which distributed the total value of all milk sold in a specified market among the producers supplying that market. However, in *Hood v. Dumond,* 336 U.S. 525, 539, 69 S.Ct. 657, 93 L.Ed. 865 (1949), the Court, noting its decision in the Rock Royal case, nevertheless held that the State of New York could not constitutionally deny a Boston distributor the right to establish a facility within the State of New York for the purchase there of milk for shipment to the Boston market, saying, through Mr. Justice Jackson:

"Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality."

In *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U.S. 76, 82 S.Ct. 1168, 8 L.Ed. 2d 345 (1962), the Court held invalid "compensatory payment" provisions included

in milk marketing orders promulgated by the Secretary of Agriculture. The provision in question required those who purchased milk outside the marketing area and brought it into the area for sale as fluid milk to pay to the farmers who supplied the area a fixed amount, measured (as is true in the present case) by the difference between the minimum price set by the Market Administrator for fluid milk and the minimum price for surplus milk. There the Court said the regulation violated the Act of Congress, which provided, "No * * * order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States." While the Lehigh Valley case did not involve the question of the validity of state action in the light of the Commerce Clause, it recognized that a "compensatory payment" plan, similar to that now prescribed by the order of the North Carolina Milk Commission, would effectively limit the flow of milk from one area into another.

In *Dean Milk Co. v. City of Madison,* 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), the Court held violative of the Commerce Clause an ordinance of the City of Madison, Wisconsin, forbidding the sale therein of milk, as pasteurized, unless such milk was processed and bottled at an approved plant within a radius of five miles from the central square of the city. Speaking through Mr. Justice Clark, the Court said:

> "But this regulation, like the provision invalidated in *Baldwin v. Seelig, supra, in practical effect* excludes from distribution in Madison wholesome milk produced and pasteurized in Illinois. * * * In thus erecting an economic barrier protecting a major local industry against competition from without the State, Madison plainly discriminates against interstate commerce. This it cannot do, even in the exercise of its unquestioned power to protect the health and safety of its people, if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available." (Emphasis added.)

In *Polar Ice Cream and Creamery Co. v. Andrews,* 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed. 2d 389 (1964), the Court had before it a Florida statute requiring a Pensacola distributor to accept its total supply of Class I milk from Florida producers at a fixed price so long as such producers had such milk avail-

able. The Court, speaking through Mr. Justice White, held the statute violated the Commerce Clause, saying:

> "The principles of *Baldwin* are as sound today as they were when announced. They justify, indeed require, invalidation as a burden on interstate commerce of that part of the Florida regulatory scheme which reserves to its local producers a substantial share of the Florida milk market.
>
> "Under the controls challenged here, Polar must buy from its Florida producers, and pay 61 cents per gallon for it, an amount of raw milk equal to its Class I sales if it is available from these producers. * * *
>
> "The exclusion of foreign milk from a major portion of the Florida market cannot be justified as an economic measure to protect the welfare of Florida dairy farmers or as a health measure designed to insure the existence of a wholesome supply of milk. This much *Baldwin* and *Dean* made clear. * * * Florida has no power to prohibit the introduction within her territory of milk of wholesome quality acquired [in another State], whether at high prices or at low ones, 294 U.S. 521; the State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate the Florida milk industry from competition from other States.
>
> "Florida, it is true, does not prevent distributors located in other States from selling wholesome fluid milk in the Florida market. But allowing competition on the distributor level is no justification for barring interstate milk from the most lucrative segment of Florida's raw milk market. Given such distributor competition as there is, there is still milk in other States which Polar can and wants to acquire and which it will not acquire in the face of the Florida regulations. The burden on commerce and the embargo on out-of-state milk remain. * * *
>
> "The power which we deny to Florida is reserved to Congress under the Commerce Clause, and we are offered nothing indicating either congressional consent to, or acquiescence, in, a regulatory scheme such as Florida has employed."

[3] Quite clearly, there is, at least, serious doubt that G.S. 106-266.8, if construed to authorize the Commission to require

the distributor of milk, "reconstituted" from Wisconsin milk powder, to make compensatory payments to North Carolina milk producers, can be reconciled with the Commerce Clause of the Constitution of the United States.

A reasonable, indeed the more reasonable, construction of G.S. 106-266.8 is that no such power was intended to be conferred upon the Commission by the statute. The order of the Commission does not fix the price which Arcadia pays to its supplier of milk powder, or to its supplier of raw milk, nor does it fix the price for which Arcadia sells its "reconstituted" milk. In Webster's International Dictionary, 2d Ed., "price" is defined as follows:

> "In the broadest sense, the quantity of one thing that is exchanged or demanded in barter or sale for another; the exchange value of one thing expressed in terms of units of another thing; in the narrower and more common sense, the amount of money given, or set as the amount that will be given or received, in exchange for anything; * * * the terms or consideration for the sake of which something is done or undertaken. * * * The cost at which something is obtained. * * * "

Arcadia obtains nothing in return for the payment it is required to make by the order of the Commission. It is required to make such payment to its competitor distributors from whom it elected to purchase nothing, for the benefit of producers from whom it purchased nothing. Likewise, the Commission, by this order, has not undertaken to supervise or regulate the processing of "reconstituted" milk or its sale. Its order has nothing whatever to do with the selection of the ingredients which go into Arcadia's "reconstituted" milk and nothing whatever to do with Arcadia's method of processing such milk. The order leaves Arcadia free to sell its "reconstituted" milk. There is no contention that such milk is not wholesome, that Arcadia is representing it to its customers as anything other than that which it is, or that Arcadia, in the sale of its "reconstituted" milk is engaged in unlawful price cutting or other unfair trade practices. The sole purpose and effect of the Commission's order is to require Arcadia to pay to its competitors, for the benefit of producers with whom Arcadia has no dealings, an amount equal to the difference between the price those producers receive for the milk delivered to those distributors and the price

they would have received for such milk had Arcadia purchased from those distributors the milk sold to them by those producers.

We note, in passing, that if Arcadia, instead of distributing "reconstituted" milk, made from Wisconsin powder and North Carolina water, had elected to expand its own dairy herd and to distribute the natural milk derived therefrom, the effect on other producers supplying the Asheville area would have been the same. By the express language of G.S. 106-266.8(3) the Commission could not restrict Arcadia's right to do so. We find in the statute no indication of a legislative intent to empower the Commission to afford to other producers greater protection against competition from wholesome "reconstituted" milk.

To interpret G.S. 106-266.8 as conferring upon the Commission power to require a distributor of "reconstituted" milk to make such payments for the benefit of producers, with whom it has no dealings, would also give rise to serious doubt as to whether such exaction would be a violation of Article I, § 19, of the Constitution of North Carolina, which provides, "No person shall be * * * in any manner deprived of his * * * property, but by the law of the land." In *Insurance Co. v. Johnson, Commissioner of Revenue,* 257 N.C. 367, 126 S.E. 2d 92 (1962), this Court held that a tax levied upon fire and lightning insurance premiums to establish a pension fund for firemen was invalid for the reason that it was a tax imposed exclusively upon a particular group of insurance companies for the special benefit of a particular group of public employees. This Court quoted Mr. Justice Roberts, who said in *United States v. Butler,* 297 U.S. 1, 56 S.Ct. 312, 80 L.Ed 477 (1936), "The word [tax] has never been thought to connote the expropriation of money from one group for the benefit of another." In this respect, there is no distinction between a tax and the payment required by the order of the Commission.

[4] The provision in G.S. 106-266.9 that "the Commission may prohibit such practices as it may deem to be contrary to the welfare of the public and the dairy industry, such as the use of special prices or special inducements in any form or any unfair trade practices in order to vary from the established prices," may not, in our opinion, be fairly construed to authorize the order here in question. We construe that provision to apply only to the pricing of milk and practices designed to bring about variations from the prices fixed by the Commis-

sion. If not so limited in its application, this provision raises serious doubts as to its constitutionality, since it would appear to confer upon the Commission unbridled discretion to determine what practices it may deem to be contrary to the welfare of the public.

We, therefore, hold that Amendment 27 to Milk Order #2, insofar as it requires Arcadia to make the specified payments into the equalization fund set up by the Commission, is in excess of the statutory authority of the Commission and is void. The judgment of the Superior Court is, therefore, reversed, and this matter is remanded to the Superior Court for the entry by it of a judgment directing the custodians of the funds now held in escrow, as above stated, to repay those funds to Arcadia.

Reversed and remanded.

ARCADIA DAIRY FARMS, INC., A NORTH CAROLINA CORPORATION v. NORTH CAROLINA MILK COMMISSION, WILLIAM YOUNTS, JR., HERBERT C. HAWTHORNE, MRS. B. C. LANGSTON, SR., FRANKLIN POISSON, B. F. NESBITT, MRS. LILLIAN WOO, AND MARTIN PANNELL

No. 18

(Filed 6 April 1976)

APPEAL by plaintiff from *McKinnon, J.*, at the 16 June 1975 Session of WAKE, heard prior to determination by the Court of Appeals.

This is a companion to Case No. 17, In Re Appeal of and Petition for Judicial Review by Arcadia Dairy Farms, Inc., of Amendment No. 27 to Milk Marketing Order #2. The two cases were argued together on appeal and present essentially the same questions.

In the present case, Arcadia sued in the Superior Court of Wake County for a declaratory judgment that Milk Marketing Order #2, as amended by Amendment No. 27, be declared illegal, unconstitutional and void insofar as it purports to require payments by the plaintiff to an equalization fund established by the order of the Milk Commission. In Case No. 17, Arcadia sought similar judicial review of the action of the Commission pursuant to G.S. 106-266.15(b). The plaintiff, in the present

suit, also sought a permanent injunction against the defendants to restrain the enforcement of the provisions of the Commission's order with reference to the requirement of such payments into the equalization fund.

After hearing, the trial judge made findings of fact and conclusions of law, including the conclusion that the plaintiff is not entitled to the declaratory judgment for which it prays.

Robert B. Long, Jr., for appellant.

Harris, Poe, Cheshire & Leager by W. C. Harris, Jr., for appellee.

LAKE, Justice.

The trial court concluded: "The Commission does have the statutory power to adopt the regulation known as Amendment No. 27 to Milk Marketing Order No. 2 requiring certain equalization payments under the circumstances prescribed in the order by licensed distributors of the Commission." For the reasons set forth in our opinion in Case No. 17, decided this day, the foregoing conclusion of the trial court is erroneous. The judgment of the Superior Court is, therefore, reversed and this matter is remanded to that court for the entry of a judgment granting to the plaintiff the relief prayed for in its complaint.

Reversed and remanded.

WILLIAM T. SHANKLE (WIDOWER), AND WILLIAM K. SHANKLE, ADMINISTRATOR OF THE ESTATE OF ELI C. SHANKLE, DECEASED, PETITIONERS v. MISSIE G. SHANKLE (WIDOW), BRAXTON SHANKLE (DIVORCED), ALBERT SHANKLE AND WIFE, MRS. ALBERT SHANKLE, E. HERBERT SHANKLE, JR., AND WIFE, MRS. E. HERBERT SHANKLE, JR., NANNIE SHANKLE WILLIAMS AND HUSBAND, JOHN DOCK WILLIAMS, BOBBY SHANKLE (SINGLE), AND NEWNAN HOWARD SHANKLE AND WIFE, MRS. NEWNAN HOWARD SHANKLE, RESPONDENTS

No. 73

(Filed 6 April 1976)

1. Trial § 3— motion for continuance — burden of proof

Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. G.S. 1A-1, Rule 40(b).

2. Trial § 3— motion for continuance — discretion of court

A motion for a continuance is addressed to the sound discretion of the trial judge, who should determine it as the rights of the parties require under the circumstances; however, this discretion is not unlimited and must not be exercised absolutely, arbitrarily or capriciously, but only in accordance with fixed legal principles.

3. Trial § 3— motion for continuance — hearing of evidence

Before ruling on a motion to continue, the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice.

4. Trial § 3— motion for continuance — withdrawal of attorney

The decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of the particular case whether immediate trial or continuance will best serve the ends of justice.

5. Trial § 3— withdrawal of attorney — denial of continuance

Respondents were *prima facie* entitled to a continuance, and the trial judge erred in denying their motion to continue without exploring the matter further, where one respondent presented an affidavit and a statement in open court that respondents had retained and paid an attorney to represent them in the trial, that after conferring with the trial judge who "made strong remarks about the respondents," the attorney withdrew from the case and departed court on the day of the trial, and that respondents "had no way of knowing this would happen."

6. Apppeal and Error § 62— new trial — ends of justice

The ends of justice require that this cause be remanded for a new trial where it is patent that neither side was prepared for the first trial, the evidence was not developed, and the issues which will determine the merits of the controversy were never defined, and where the evidence fomented questions it did not answer and suggested issues not raised by the pleadings.

7. Jury § 1; Rules of Civil Procedure § 38— demand for jury trial — notations in clerk's transfer order

Although the parties made no written demand for a jury trial in the manner prescribed by G.S. 1A-1, Rule 38, the purpose of Rule 38 was accomplished by an oral request of all the parties for a jury trial and a notation of such request by the clerk in her order transferring the cause (begun as a special proceeding) to the civil issue docket of the superior court.

CERTIORARI to review the decision of the Court of Appeals, reported in 23 N.C. App. 692, 209 S.E. 2d 533 (1974), which vacated a judgment entered by *Seay, J.*, at the 25 February 1974 Session of RICHMOND Superior Court and remanded the case

to that court for a new trial, docketed and argued at the Spring Term 1975 as Case No. 96.

This case was begun before the Clerk of the Superior Court on 28 January 1971 as a special proceeding under G.S. 46-22 for the partition by sale of realty located in Richmond County. Petitioners, W. T. Shankle and his son, W. K. Shankle, administrator of the estate of Eli C. Shankle, are respectively the son and grandson of Eli C. Shankle. They allege that the property described in the petition was owned by Eli C. Shankle at the time he died intestate in 1952; that at his death title to the property vested in his two sons, W. T. Shankle and E. H. Shankle, as tenants in common; that E. H. Shankle died intestate in 1969 and his one-half undivided interest devolved upon his wife and six children, the respondents in this action.

Respondents, in their answer filed 23 February 1971, admitted that Eli C. Shankle died intestate in 1952 survived by two sons; that one son, E. H. Shankle, died intestate in 1969 survived by his wife and six children, who are the respondents. They denied, however, that Eli C. Shankle died seized of the property in suit and that petitioner William T. Shankle has any interest in it.

Specifically, respondents alleged: (1) On or about 27 September 1945 Eli C. Shankle conveyed the property to E. H. Shankle in consideration of $2,300.00 paid by E. H. Shankle to W. T. Shankle. (2) This conveyance was subject only to a life estate which Eli C. Shankle retained in a portion of the property. (3) Upon the death of Eli C. Shankle, E. H. Shankle became the sole owner of the property; that he entered into possession of it and continued in exclusive possession until his death intestate in 1969. (4) Respondents, as the heirs of E. H. Shankle, are the sole owners of the property and the court should, therefore, dismiss this proceeding.

In Paragraph Five of respondents' further answer they alleged that Eli C. Shankle executed a memorandum dated 13 March 1945, which evidenced his 1943 conveyance of the property to his son, E. H. Shankle, and that a copy of this memorandum entitled "Exhibit A" is incorporated by reference in Paragraph Five and attached to the answer.

Petitioners moved to strike Paragraph Five of respondents' further answer and defense, and this motion came on for hearing by the clerk on 23 March 1972. Noting that the pleadings

raised issues of fact she ordered the entire proceeding transferred to the civil issue docket of the Superior Court "to be tried at the next ensuing Civil Session." In this order the clerk incorporated the following statement: "[A]ll of the parties hereto have requested a jury trial on the issues arising in this proceeding." No written demand for a jury trial, however, was ever made by any party, either in a pleading or in a separate document as prescribed in G.S. 1A-1, Rule 38(b).

In the Superior Court, on 25 September 1972, the proceeding came before Judge McConnell, who allowed petitioners' motion to strike Paragraph Five of respondents' further answer and granted them thirty days in which to amend the pleading. Petitioners were given permission to reply to respondents' amended answer.

In their amended answer respondents again alleged that Eli C. Shankle had conveyed the property described in the petition to E. H. Shankle. This time they incorporated in Paragraph Five an attached exhibit, which they alleged to be a copy of the deed by which "E. C. Shankle" had conveyed the property in suit to E. H. Shankle on 1 February 1945 reserving to himself "a life estate in [his] house, [his] barn and the few acres of land around [his] house."

This exhibit contains the certificate of Evelyn E. Story, a notary public of Richmond County, that on 1 February 1945 E. C. Shankle acknowledged the execution of the "annexed and foregoing instrument" before her. It also contains two certificates signed on 22 November 1971 by Evelyn E. Story as a deputy clerk of the Superior Court of Guilford County. The first states that the exhibit is "a true and correct copy of the deed signed, sealed, and delivered by E. C. Shankle to E. H. Shankle"; the second, that E. C. Shankle appeared before her on 1 February 1945 and acknowledged the due execution of the instrument.

The exhibit further shows that it was recorded in the office of the Register of Deeds of Guilford County on 24 November 1971 and that a copy was certified to Richmond County, where it was recorded on 2 December 1971.

On 10 November 1972 petitioners moved to strike that portion of respondents' amended answer which referred to a copy of the alleged deed from Eli C. Shankle to E. H. Shankle. Petitioners also filed a motion that respondents be required to pro-

duce the original deed or to account for its absence. In this motion petitioners alleged that the copy of the deed which respondents attached to their amended answer was not a facsimile of a validly recorded deed; that the original deed was never delivered and respondents could not produce it because they never lawfully possessed it and it had been destroyed by the maker. Judge McConnell granted this latter motion on 12 March 1973. A stipulation in the record states that respondents appealed from this order and that the appeal was later dismissed upon petitioners' motion.

In a reply to respondents' amended answer, filed 23 March 1973, petitioners alleged:

Sometime in 1945 Eli C. Shankle agreed with E. H. Shankle that he would transfer the property to E. H. Shankle provided E. H. Shankle would (1) pay his brother, W. T. Shankle, a certain sum of money, and (2) support and care for his father, Eli C. Shankle, for the rest of his life. Pursuant to the agreement Eli C. Shankle prepared a deed conveying the property to E. H. Shankle, and E. H. Shankle paid his brother the money. However, "in order to protect his interest under the agreement," Eli C. Shankle never delivered the deed to E. H. Shankle but kept it in his possession to insure the performance by E. H. Shankle of his obligation to care for him. Thereafter E. H. Shankle failed to support and care for his father. In consequence, Eli C. Shankle burned the deed in the presence of W. T. Shankle and told him he was to share the property with his brother, E. H. Shankle. Several times thereafter W. T. Shankle tried to return to his brother the money he had given him in 1945, but E. H. Shankle would not accept it. The copy of the deed attached to respondents' answer was a xerox copy which one of the respondents found among Eli C. Shankle's effects in 1972, twenty years after his death. However, since the original deed was never delivered, Eli C. Shankle never conveyed the property.

This case was set for trial at the July 1973 Session. However, Judge Armstrong continued the case on the ground that the case "might be" on appeal from Judge McConnell's order of 12 March 1973. He also entered an order directing that the case not be recalendared for trial until the appeal had been determined and "pretrial orders filed in accordance with the rules of court."

Although no pretrial orders were ever filed and no pretrial had been held, the case was recalendared as the first case for trial at the 11 February 1974 Session. When the calendar was called upon the convening of court, Judge Seay announced that he had received a written motion from respondent *Braxton Shankle* requesting a continuance of this case but he would deny the motion.

When the case was called for trial, respondent *Newnan Shankle,* on behalf of all the respondents, filed a verified motion to continue the case until the next term. *Inter alia,* this motion, set out in full in the record, asserted that respondents were without counsel through no fault of their own; that their attorney, Mr. Richard Clark of Monroe, to whom they had paid a retainer of $200.00, had left the court "after the judge made strong remarks about respondents"; that Mr. Clark knew the case was set for trial on 11 February 1974 and they had no knowledge he would quit.

Set out in the record, immediately preceding the motion, are findings by the judge that Mr. Clark never made a formal appearance in this action "nor did he make a continuance request on behalf of the respondents."

Immediately after the filing of the motion for continuance, the record shows the following exchange between the court and Mr. Newnan Shankle:

"Court: Do you want to say anything about your motion?

"Mr. Shankle: I think the motion self explains it. On it I feel very strongly we should have counsel, and we have tried very diligently to have counsel. We had no way of knowing what would happen today or we would have obtained another counsel.

"Court: Motion is denied. Respondents excepted.

"The respondents made a motion for a trial by jury, which motion was denied, and respondents excepted.

"After some discussion of the court, Mr. Newnan Shankle stated, I again repeat. I want to have my attorney.

"Court: What you want and what you get seem to be at a variance. So you go ahead."

Mr. Shankle then called the court's attention to Judge Armstrong's order and stated that he "would like to make a verbal motion" for a pretrial. "The court refused the motion to which respondents except." The court then proceeded with the trial.

Pertinent evidence for petitioners consisted largely of the testimony of petitioner W. T. Shankle, then 77 years of age and hard of hearing. On direct examination he identified a map of the land described in the petition, asserted that he owned one-half of the land, and that the fairest way to divide it between himself and respondents was by sale and division of the proceeds.

At least four of the respondents individually undertook to cross examine W. T. Shankle and thereby to elicit testimony which would substantiate their allegations. The result was confusion worse confounded. Although anxious to give his version of the events which engendered the lawsuit, Mr. Shankle was never able to articulate family history to anyone's satisfaction. Frequent questions interposed by the court for the purpose of clarification served only to divert him from one thought, incompletely expressed, to another which was similarly interrupted. The result was further obfuscation, judicial frustration, and mounting tensions all around. At one point, Judge Seay directed counsel for petitioners to take both his clients out to see what he could do about Mr. W. T. Shankle's testimony. When this occurred, the record shows the following:

"To the manner of questioning by the court and to the court's suggestion as aforesaid, the respondents except.

"A recess was then taken and the witness and his attorney retired for a conference. Thereafterwards, the court resumed hearing."

When considered in its entirety, it would seem that W. T. Shankle's testimony is susceptible of the following interpretation:

On or about 22 September 1943 Eli Shankle and his two sons, W. T. and E. H. Shankle, entered into "a three-way agreement" with reference to the lands of Eli Shankle. In consideration of (1) E. H. Shankle's assumption of responsibility for the care and maintenance of Eli Shankle during the remainder of his life and (2) his payment of a certain sum ($1,600-$1,700) to W. T. Shankle, the parties agreed that title to the Eli Shankle

farm should devolve upon E. H. Shankle. "He was supposed to look after [his] daddy."

Eli Shankle and his sons met at the Bank of Mt. Gilead, where he divided between them some money from the sale of timber from his farm. "Claiming" that W. T. Shankle owed him $1,100.00, Eli Shankle "fixed the $1,100.00 over" to E. H. Shankle, who then gave it to W. T. Shankle along with his personal check for $550.00, dated 23 September 1943. Subject to "the provision" that E. H. Shankle would take care of Eli Shankle, W. T. Shankle accepted this money as his share in the estate of his father.

At the time W. T. Shankle accepted the money he saw Eli Shankle sign a deed to E. H. Shankle, "the original deed to the estate." Eli Shankle, however, kept the deed; he did not deliver it to E. H. Shankle. This deed was drawn by Arnold Bruton, the banker, and W. T. Shankle did not sign the instrument.

Thereafter E. H. Shankle failed to look after his father. W. T. Shankle "went down there many a time and he [Eli] didn't have a mouthful of rations in the house. . . . When he got sick . . . the rest of them had went off and worked," and W. T. Shankle often went down there and cooked meals for him.

With reference to the whereabouts of the deed which Eli Shankle signed on 23 September 1943, W. T. Shankle testified as follows:

"I saw it burn. My daddy burned it in the fireplace. That is where the deed went to, the original deed, he burned it up. He burned it up about '46 or '47. My daddy kept the deed because I have seen that deed many a time, and I saw it burn. . . .

"He said, 'They haven't come up with no agreement at all with me,' says, 'I worked and slaved, I got where I ain't able to work,' and I went down there a many a time—nobody was there but me and him. The original deed was burned, and I know it. You got copies, but the original deed has really been burned up. You will never find it nowhere."

W. T. Shankle's testimony also tended to show the following:

A State road running east and west divides the Eli Shankle farm into two tracts. The one on the north side of the road contains 56 acres and the homeplace of Eli Shankle in which his

two sons were reared. The tract on the south side contains 159 acres and the residence of the late E. H. Shankle. W. T. Shankle left his father's farm in the fall of 1923 when he was 27 years old. Thereafter he came back on weekends to help, but he never came back to farm the land. He bought himself a farm in Anson County, where his occupation was that of a salesman. Since 1 October 1945 he has never paid any taxes on the Eli Shankle farm.

At the conclusion of the testimony of W. T. Shankle the record states that "all respondents present were given an opportunity to testify or present evidence, and much time was taken up by the respondents in offering much evidence that was irrelevant and incompetent. Only the following [stated in brief summary below] is deemed material for a determination of the issues raised herein."

Albert Shankle, the son of E. H. Shankle and a grandson of Eli Shankle, was 19 years old in 1943. He testified that he was in the Bank of Mt. Gilead in September 1943 and saw his father pay his uncle, W. T. Shankle, $2,300.00 in cash and checks. He also saw Eli Shankle give E. H. Shankle a paper of some kind, which E. H. Shankle put in his pocket. Floyd A. Carriker, assistant cashier of the Bank of Mt. Gilead, identified the signature of E. H. Shankle on a check to E. C. Shankle for $80.00 on which "it is stated it is for a deed to the X-way Farm, deed delivered on 2/1/45." The court admitted this check in evidence with the comment, "You see, it's got Paid punched on it."

Thereafter respondents called two witnesses to whom they directed questions apparently designed to establish title in the respondents by adverse possession commencing 1 February 1945. Petitioners' objections to each of these questions were sustained.

On 26 February 1974, Judge Seay entered judgment in which the pertinent findings are summarized as follows (enumerations ours):

1. The parties waived their right to a jury trial by failing to file a written request therefor as required by G.S. 1A-1, Rule 38(b).

2. Eli C. Shankle died intestate on 5 January 1952 seized in fee of the lands described in the petition and survived by

two sons, E. H. and W. T. Shankle, his sole heirs at law, to whom his lands descended.

3. At one time a deed was prepared naming Eli C. Shankle as grantor, but this deed was destroyed and never delivered. Respondents, although directed by the court to do so, have not produced that certain deed dated 1 February 1945, which is referred to in their amended answer.

4. There is no feasible way of equitably dividing the property in kind.

Upon the foregoing findings of fact Judge Seay appointed a commissioner to sell the land in the manner provided by law for judicial sales and to divide the net proceeds among the tenants in common in proportion to their interest as specified in the judgment.

From the foregoing judgment respondents appealed to the Court of Appeals.

The decision of the Court of Appeals, set out in a terse opinion, was that "[i]n view of the particular background of this case, which stated as a special proceeding before the Clerk, where all parties requested a jury trial almost two years prior to the time the case was called for trial, and where these requests were set out in the Clerk's written order transferring the case to the civil issue docket," the ends of justice require that the judgment be vacated and the case remanded for trial by jury. Upon petitioners' application we allowed certiorari.

Ben D. Haines for petitioner appellants.

Jones & Deane for respondent appellees.

SHARP, Chief Justice.

Respondents' first assignment of error is that the trial court forced respondents into trial without the privilege of counsel by denying their motion for a continuance.

[1, 2] Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. G.S. 1A-1, Rule 40(b) provides: "No continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." Considering the myriad circumstances which might be urged as grounds for a continu-

ance the Rule wisely makes no attempt to enumerate them but leaves it to the judge to determine, in each case, whether "good cause" for a continuance has been shown. Thus, a motion to continue is addressed to the sound discretion of the trial judge, who should determine it "as the rights of the parties require under the circumstances." 7 Strong's N. C. Index 2d *Trial* § 3 (1968). However, "this discretion is not unlimited, and must not be exercised absolutely, arbitrarily, or capriciously, but only in accordance with fixed legal principles. . . . " 17 C.J.S. *Continuances* § 5 (1963).

[3] Further, before ruling on a motion to continue the judge should hear the evidence pro and con, consider it judicially and then rule with a view to promoting substantial justice. The rule has been well stated as follows:

"In passing on the motion the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record, although . . . it may take into consideration facts within its judicial knowledge. . . . The motion should be granted where nothing in the record controverts a sufficient showing made by the moving party, but since motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." *Id.* § 97.

In this case nothing in the record contradicts respondent Newnan Shankle's affidavit, and his statement in open court, that respondents had retained and paid Mr. Richard Clark, Attorney, to represent them at the trial on 11 February 1974; that, after conferring with the trial judge who "made strong remarks about the respondents," Mr. Clark withdrew from the case and departed the court on the day of the trial; that respondents "had no way of knowing this would happen to-day or they would have obtained other counsel"; that they were faced with circumstances beyond their control and without an attorney they could not have a fair trial. The court's findings that Mr. Clark made no motion for a continuance or "filed any

legal documents" in behalf of respondents does not contradict Newnan Shankle's affidavit and statement.

In *Abernethy v. Trust Co.*, 202 N.C. 46, 161 S.E. 705 (1932), during term, and prior to the call of the action for trial, the plaintiff's counsel moved that the case be continued because of her illness. The motion was supported by the plaintiff's affidavit and the certificates of her physician. Notwithstanding, the court found that the plaintiff's condition did not entitle her to a continuance and denied the motion. From the judgment entered upon an adverse verdict the plaintiff appealed to this Court. *Inter alia,* she assigned as error that she had been deprived of her right to be presesnt at her trial and to testify in her own behalf by reason of the denial of her motion for a continuance.

In the course of its serious consideration of this assignment, the Court noted (1) that the judge's finding of fact was contradicted by all the evidence in the record; and (2) that granting or refusing a continuance is in the discretion of the judge; and (3) that for this Court to review the trial judge's exercise of his discretion " 'would require circumstances proving beyond a doubt hardship and injustice.' " Specifically, the Court said: "We think that in the absence of any evidence tending to contradict the affidavit of the plaintiff and the certificates of the physician, the court should have found that plaintiff was ill and for that reason unable to attend court during the May Term, 1931. . . . We do not doubt that in a proper case, this Court has the power, and therefore the duty, to grant a new trial, when it appears that as a result of the refusal by the trial court to allow a motion for continuance, the moving party to the action has been deprived of his right to be present at the trial, or to have witnesses whose testimony is essential to his cause present. In the instant case, the plaintiff is entitled to a new trial for error in the charge. . . . It is therefore not necessary for us to grant a new trial upon the ground that there was prejudicial error in the refusal of the trial court to allow the motion for continuance." *Id.* at 48, 161 S.E. at 706.

[4] Although in *Abernethy v. Trust Co., supra,* the motion to continue involved the presence of the party plaintiff at her trial, its rationale may be equally applicable to the absence of the party's attorney. In this regard, the general rule is that an attorney's withdrawal on the eve of the trial of a civil case is not *ipso facto* grounds for a continuance. See Annot; "Withdrawal

or discharge of counsel in civil case as a ground for continuance," 48 A.L.R. 2d 1155 (1956); 17 C.J.S. *Continuances* § 23 (1963). In accordance with the established principles hereinbefore outlined, the decision whether to grant a continuance because the moving party's attorney has withdrawn from the case on the day of trial rests in the trial judge's discretion, to be exercised after he has determined from the facts and circumstances of the particular case, whether immediate trial or continuance will best serve the ends of justice.

The facts in *Smith v. Bryant,* 264 N.C. 208, 141 S.E. 2d 303 (1965) are analogous to those we now consider. In *Smith v. Bryant,* an action for an alleged trespass causing damage to the plaintiff's land, the plaintiff sought to recover both compensatory and punitive damages from the defendant-appellant, Emma Bryant. When the case was called for trial appellant's attorney of record, Mr. Rhoe, announced that he had withdrawn from the cause because he had not been paid. The judge did not enter an order permitting the attorney to withdraw. However, he allowed him to do so notwithstanding the record disclosed "that the defendant disputes the question whether or not she has paid her attorney." Thereafter, appellant's motion to continue until she could secure other counsel was denied and the case set for trial on the following day. Unable to secure counsel overnight, appellant represented herself and judgment was entered against her.

On appeal this Court granted the defendant Bryant a new trial. The decision was that the trial judge should not have allowed appellant's attorney of record to withdraw but, "[h]aving acquiesced in counsel's withdrawal on the afternoon of January 9th, his Honor should have continued the case for a reasonable time" instead of setting the case for trial at 9:30 the next morning. After noting that any litigant would probably have had difficulty in finding a lawyer willing to undertake the defense of such an action without more time for investigation and preparation, the Court said:

"It is quite possible that Mr. Rhoe's withdrawal from this case was entirely justified; that he had given defendant adequate notice; and that she negligently or contumaciously failed to attend to her case. If these are the facts, however, the record fails to show them." *Id.* at 212, 141 S.E. 2d at 306.

Similarly, in this case, it may be that respondents' arrangement with Mr. Clark imposed no obligation upon him to

try their case in all events. However, Mr. Newnan Shankle's affidavit is to the contrary, and Judge Seay failed to question either Mr. Newnan Shankle or Mr. Clark with reference to the timing and the terms of the latter's employment as counsel. Thus, so far as the record reveals, respondents had engaged an attorney who was informed of the date of the trial, had accepted a $200.00 retainer, and had accompanied respondents to the courthouse. Thereafter, after a discussion with the judge, the attorney withdrew without prior notice to respondents that his employment was contingent or conditional upon the outcome of "a discussion with the judge." Upon the convening of court the judge called this case as the first one calendared for trial and stated that he had received a motion to continue from respondent Braxton Shankle, and he would deny it. Then, as shown in the preliminary statement of facts, he summarily denied Mr. Newnan Shankle's motion for a continuance, for a pretrial conference, and for a jury trial.

[5] Upon this record respondents were prima facie entitled to a continuance and the rationale of the decision in *Smith v. Bryant, supra,* dictates the decision here. We hold that the trial judge erred in denying respondents' motion to continue without exploring the matter further.

Indisputably respondents were prejudiced by having to proceed to trial without an attorney. The pleadings and the transcript of the testimony adduced at the trial disclose an intra-family controversy in which proof of crucial and disputed facts will be governed by technical rules of evidence. It is quite apparent that the trial of this case is beyond the capability of laymen and that without counsel respondents will be lost. The petitioner, a 77-year-old gentleman who is partially deaf, presented an unsolved problem to his own attorney on direct examination, and, on cross-examination, one with which the respondents were not equipped to cope. This confrontation between uncle, nieces and nephews demanded the professionalism of an attorney.

[6] After considering the record we are entirely convinced that the Court of Appeals correctly concluded that the ends of justice require a new trial. It is patent that neither side was prepared for the trial which Judge Seay attempted to conduct; that the evidence was not developed, and the issues which will determine the merits of the controversy were never defined. The evidence fomented questions it did not answer and suggested issues the

pleadings do not raise. It is noted that, although one of the respondent's assignments of error is that the court erred "in refusing to allow respondents to offer evidence tending to ripen title in respondents by adverse possession," their answer contains no plea of adverse possession. Judge Armstrong's order that this case not be calendared until pretrial orders had been filed was most certainly intended as a warning that this land suit was a minefield.

This case will be remanded to the end that a pretrial can be held, the pleadings amended, and the parties given an opportunity to use the methods of discovery available to them.

It also appears from the record that the trial court denied respondents' motion for a jury trial as a matter of course and without considering the background of the case or hearing any argument on the motion. At the next trial either petitioner or respondents, if so advised, may move for a jury trial under G.S. 1A-1, Rule 39(b), which authorizes the court, in its discretion, to order a trial by jury notwithstanding the failure of a party to request it.

[7] Although the parties here did not demand a jury trial in the manner provided by Rule 38, *all* parties did request trial by jury, and the clerk noted the request in her order transferring the cause (begun as a special proceeding) to the civil issue docket of the Superior Court. Thus, all parties were not only apprised of the demand, they had participated in it; and the clerk, who recorded the demand in her order of transfer, had ample notice for calendaring purposes that the case for trial by jury. Therefore, as indicated by the Court of Appeals, in this particular factual situation, it would seem that the parties' request and the clerk's notation accomplished the purpose of Rule 38. Nothing else appearing in the interim, we anticipate that at the next trial the court will exercise its discretion in favor of a jury trial in the event one is requested.

The decision of the Court of Appeals vacating the judgment of the Superior Court and remanding the cause for a trial *de novo* is

Affirmed.

STATE OF NORTH CAROLINA v. PHILLIP DIETZ

No. 35

(Filed 6 April 1976)

1. **Constitutional Law § 30— speedy trial — pre-indictment delay — necessity for hearing**

The trial court did not err in denying defendant's motion to dismiss the prosecution because of a four and one-half month pre-indictment delay where the delay resulted from the need to protect from exposure the existence of an ongoing undercover investigation and defendant failed to show that any evidence or testimony which would have been helpful to his defense was lost as the result of the delay; furthermore, the trial court was under no obligation to hold an evidentiary hearing to determine issues of intentional delay and actual prejudice where defendant's motion to dismiss contained only conjectural and conclusory allegations of malicious intent on the part of law enforcement officials and of impaired memory and lost witnesses.

2. **Narcotics § 3— sale of marijuana — attempted purchases by others — harmless error**

In a prosecution for the felonious sale and delivery of marijuana, any error in allowing the district attorney to ask defendant if anyone else besides the State's witness had ever approached him about buying marijuana was not so prejudicial as to require a new trial.

3. **Narcotics § 1— sale of marijuana — necessity for findings by Drug Authority**

In a prosecution for the felonious sale and delivery of marijuana, it was not necessary for the State to show that the North Carolina Drug Authority had made a finding that marijuana is in fact a controlled substance since marijuana has been listed as a controlled substance by the General Assembly in G.S. 90-94, and the findings referred to in that statute apply only to drugs the Authority may wish to add, delete or reschedule.

4. **Indictment and Warrant § 9— two acts constituting separate offenses — charge of one offense**

Defendant was not prejudiced by the fact one count of an indictment charged him with one offense of sale *and* delivery of marijuana when both acts could have been charged as separate offenses.

5. **Narcotics § 4.5— delivery of marijuana — instructions**

In a prosecution for the felonious sale and delivery of marijuana, the trial judge sufficiently charged on delivery by placing the burden on the State to prove beyond a reasonable doubt that defendant sold and "transferred" more than five grams of marijuana since transfer, under the narcotics statute, is delivery.

6. **Criminal Law § 118— instructions on contentions**

A judge is not required to state the contentions of the parties.

7. Criminal Law § 113— statement of evidence — minor discrepancies

The court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case, and minor discrepancies must be called to the attention of the court in time to afford opportunity for correction or they are deemed to be waived and will not be considered on appeal.

ON petition by the State for discretionary review of the decision of the Court of Appeals, reported in 27 N.C. App. 296, 219 S.E. 2d 256 (1975), which ordered a new trial for errors found in the trial before *Thornburg, J.*, at the 2 December 1974 Special Criminal Session of JACKSON Superior Court.

Defendant was charged in a two-count bill of indictment with (1) the felonious sale and delivery to Dan Crumley on 17 May 1974 of more than five grams of the controlled substance marijuana and (2) the felonious possession on 17 May 1974 of more than five grams of marijuana with intent to sell and deliver. Defendant entered pleas of not guilty to both charges.

The State's evidence tended to show that on 17 May 1974, Danny Eugene Crumley, a student at Western Carolina University, went to defendant's room in Madison Dormitory where defendant sold him "$20 worth of marijuana." On 23 May 1974, Crumley turned this green vegetable material over to State Bureau of Investigation Agent James T. Maxey. Analysis by a State Bureau of Investigation chemist showed the material to be 22.19 grams of marijuana.

Defendant testified that he was a student at Western Carolina University during the spring of 1974 and knew Dan Crumley. Defendant admitted that Dan Crumley had offered to purchase marijuana from him but denied that he ever sold any marijuana to Crumley.

The jury found defendant guilty of the charge contained in the first count of the indictment but not guilty of the charge contained in the second count. Defendant was sentenced to five years' imprisonment; however, that portion of the sentence accruing after 3 December 1976 was suspended for five years and defendant was placed on probation on conditions specified in the judgment. From this judgment defendant appealed. The Court of Appeals reversed the conviction and granted defendant a new trial.

We allowed the State's petition for discretionary review pursuant to G.S. 7A-31 on 6 January 1976.

Other facts necessary to decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Daniel C. Oakley for the State, appellant.

Morris, Golding, Blue and Phillips by William C. Morris, Jr. for defendant appellee.

MOORE, Justice.

We allowed the State's petition for discretionary review to consider the decision of the Court of Appeals in which that court (1) reversed the trial court and ordered a new trial because of the pre-indictment delay and (2) held that the trial court erroneously overruled defendant's objection to a question asked by the district attorney.

[1] The State first contends that the trial court did not err in denying defendant's motion to dismiss the prosecution because of a four and one-half month pre-indictment delay, and that the Court of Appeals erroneously decided that the trial court should have held a sufficient hearing to determine the reason for the delay and the resulting prejudice, if any, to defendant. The State urges that there was sufficient evidence before the trial judge in the form of defendant's motion and affidavit to enable him to consider and rule on the motion without conducting an evidentiary hearing.

In *United States v. Marion,* 404 U.S. 307, 30 L.Ed. 2d 468, 92 S.Ct. 455 (1971), the Supreme Court refused to extend the Sixth Amendment's guarantee of a speedy trial to those persons who had not yet been "accused" of a crime, either by arrest or indictment. However, persons who allege pre-indictment delay are protected under the Fifth Amendment " . . . if it were shown at trial that the pre-indictment delay . . . caused *substantial* prejudice to appellees' rights to a fair trial and that the delay was an *intentional device* to gain tactical advantage over the accused. . . . " (Emphasis added.) 404 U.S. at 324, 30 L.Ed. 2d at 481, 92 S.Ct. at 465. The delay in that case was thirty-eight months from the date of the alleged offenses until indictment. The Court refused to dismiss the prosecution because of that delay.

This Court also considered pre-indictment delay in *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). There, we held the prosecution must be dismissed due to an intentional four-year delay by the State in securing an indictment against defendant. Justice Sharp (now Chief Justice), speaking for the Court, said:

> "We here hold that when there has been an atypical delay in issuing a warrant or in securing an indictment and the defendant shows (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State; and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed."

Numerous federal decisions have expanded on the Fifth Amendment standards applicable to the pre-indictment situation. These decisions have recognized the uncertainty after *Marion* of whether a successful claim under the Fifth Amendment must establish both actual prejudice to the defendant *and* intentional delay on the part of the government. Most are in accord, however, that at least in the absence of intentional governmental delay for the purpose of harassing or gaining advantage over defendant, the burden is on defendant to affirmatively demonstrate actual and substantial prejudice. *United States v. Jackson,* 504 F. 2d 337 (8th Cir. 1974); *United States v. Joyce,* 499 F. 2d 9 (7th Cir. 1974), *cert. den.,* 419 U.S. 1031, 42 L.Ed. 2d 306, 95 S.Ct. 512 (1974); *United States v. Giacalone,* 477 F. 2d 1273 (6th Cir. 1973); *United States v. White,* 470 F. 2d 170 (7th Cir. 1972). Most courts appear to engage in a balancing process, such as that mandated in *Barker v. Wingo,* 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), a Sixth Amendment speedy trial case, of weighing the reasonableness of the delay against the prejudice to the accused. *United States v. Jackson, supra; United States v. Norton,* 504 F. 2d 342 (8th Cir. 1974); *Robinson v. United States,* 459 F. 2d 847 (D.C. Cir. 1972).

In the case at bar, the record reveals that Dan Crumley was working as an undercover agent, buying drugs for the SBI. At different times, Crumley received his money to purchase the drugs, totaling approximately $200, from SBI Agent James T. Maxey and reported all his buys to Agent Maxey. This particular undercover investigation took place over a five or six-month

period, from January or February 1974 until around August 1974. During this time, Crumley made fourteen or sixteen purchases of drugs, only one of which was from defendant. Had the drugs obtained by Crumley been used as the basis for an arrest of defendant on the date of purchase, his identity as an undercover agent would have been exposed and his further effectiveness destroyed. Moreover, since Crumley remained at Western Carolina until the end of that term, he could have been in danger had his undercover activities been known. In fact, Agent Maxey, probably because of the possibility of that danger, arranged with the officials of Western Carolina and Elon College to have Crumley transfer to Elon at the end of the 1974 spring term.

On the issue of whether the four and one-half month delay was intentionally engineered by the State to disadvantage him, defendant, in the affidavit filed with his motion to dismiss, stated:

> "Defendant is advised, informed and believes, and therefore alleges, that the State delayed the indictment, declined to issue a warrant against him, and delayed giving him any information about the nature and details and the names of witnesses against him, so that he would be substantially prejudiced in the defense of this prosecution because of his inability to remember places, dates, times, his own whereabouts, and for the further reason that the memory of any witnesses that he might have been able to obtain when he finally learned of the details of the charges against him would also be dimmed and lost to the defendant."

The legitimate need to protect the existence of an ongoing undercover investigation from exposure has been frequently recognized by the federal courts as a reasonable justification for delay in bringing an indictment. *United States v. Cowsen,* 18 Crim. Law Rptr. (7th Cir. 1976); *United States v. Jackson, supra; United States v. Emory,* 468 F. 2d 1017 (8th Cir. 1972). Defendant's allegations of malicious intent on the part of the law enforcement officials are unsupported by defendant's affidavit, and, defense counsel, on oral argument before us, stated that this affidavit was all the evidence he had.

Concerning his claim of prejudice due to the delay, defendant stated:

> "That this defendant first became aware of the date on which the alleged offense is supposed to have occurred in November, 1974, and at that time learned for the first time that he is alleged to have sold marijuana to Dan Crumley on 17 May 1974 and that by the time such information was made available to him, the defendant was unable to remember precisely where he was on 17 May 1974, the names of persons that he saw on that date, the places he visited, the classes he attended, or any other information which might be helpful to him in advising his attorney and structuring a defense to this prosecution."

Again, defendant produced no evidence to support these allegations. Mere claims of "faded memory" have often been held not to constitute "actual and substantial" prejudice required by *Marion. United States v. McGough,* 510 F. 2d 598 (5th Cir. 1975); *United States v. Giacalone, supra; United States v. Atkins,* 487 F. 2d 257 (8th Cir. 1973). Rather, the courts hold that defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as the result of the pre-indictment delay. *United States v. Parish,* 468 F. 2d 1129 (D.C. Cir. 1972), *cert. den.,* 410 U.S. 957, 35 L.Ed. 2d 690, 93 S.Ct. 1430 (1973). Hardly a criminal case exists where the defendant could not make these general averments of impaired memory and lost witnesses. *United States v. Marion, supra.*

As stated by the Court in *United States v. Cowsen, supra:*

> " . . . A claim of faded memory, the veracity of which can rarely be satisfactorily tested, can be plausibly asserted in almost any criminal case in which the defendant is not charged within a few weeks, at most, after the crime. The possibility of likelihood of faded memory has not, however, in itself, been viewed as prejudice that requires dismissal of an indictment, despite delays of much longer than the four and one-half months shown here. . . . "

Defendant relies on *Ross v. United States,* 349 F. 2d 210 (D.C. Cir. 1965), one of the few cases where prosecutions have been dismissed due to pre-indictment delay. There, the Court reversed a narcotics conviction involving a seven-month pre-

indictment delay where the court found "(1) a purposeful delay of seven months between offense and arrest, (2) a plausible claim of inability to recall or reconstruct the events of the day of the offense, and (3) a trial in which the case against appellant consists of the recollection of one witness refreshed by a notebook." Here, however, we do not have the seven-month unnecessary delay between offense and arrest that the court found in *Ross*. Defendant has not shown here, as in *Ross*, that he has been precluded from offering the testimony of a specific alibi witness because of the witness's uncertainty as to the events. Finally, here we do not have a suspect identification by the undercover agent. On the contrary, defendant and Crumley knew each other prior to the purchase of the marijuana on 17 May 1974. *Ross* has been called a "paradigm case" in its own circuit, *Robinson v. United States, supra,* and is of no aid to this defendant.

Defendant strenuously urges upon this Court his contention, upheld by the Court of Appeals, that the trial court erred in failing to hold an evidentiary hearing into these issues of intentional delay on the part of the State and actual prejudice to defendant. We disagree with the Court of Appeals and hold that the trial court did not abuse its discretion in failing to hold such hearing. First, it does not appear in the record that defendant ever requested a hearing either before or after his motion to dismiss had been denied. Second, we agree with the reasoning of the Court in *United States v. Pritchard,* 458 F. 2d 1036 (7th Cir. 1972), *cert. den.,* 407 U.S. 911, 32 L.Ed. 2d 685, 92 S.Ct. 2434 (1972):

> " . . . In the instant case the defendant's assertion of prejudice is a wholly conclusory allegation. No specific actual prejudice is factually alleged. The rationale of *Marion* is equally applicable here. Mere 'delay' does not equate with 'actual prejudice'. And, defendant alleged nothing in his motion which entitled him to an evidentiary hearing on an issue of actual prejudice alleged to have resulted from the delay. His motion speaks only of a potential prejudice predicated on the pre-indictment delay itself. Moreover, no actual prejudice was shown at the ensuing trial. [Citation omitted.]" *Accord, United States v. White, supra.*

In *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973), in holding that an eight to ten-month Sixth Amendment delay was

not unreasonable, we reiterated that the right to a speedy trial is an integral part of the fundamental law of this State, but the burden is on an accused who asserts denial of his right to a speedy trial to show the delay was due to the neglect or willfulness of the prosecution. *See State v. Harrell,* 281 N.C. 111, 187 S.E. 2d 789 (1972); *State v. Johnson, supra; State v. Hollars,* 266 N.C. 45, 145 S.E. 2d 309 (1965). No such showing has been made in this case. Neither has there been a showing that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State. *State v. Johnson, supra.*

[1] We therefore hold that under the facts of this case, defendant has not demonstrated *either* intentional delay on the part of the State in order to impair defendant's ability to defend himself *or* "actual and substantial" prejudice from the pre-indictment delay. We further hold that given the conjectural and conclusory nature of the allegations in defendant's affidavit and motion to dismiss, the trial court was under no obligation to hold an evidentiary hearing in this matter, and that the Court of Appeals erred in ordering a new trial for this reason.

[2] The Court of Appeals also held that the trial court erred in overruling defendant's objection to the following question by the district attorney:

> "Q. Has anyone else ever approached you about buying marijuana?
>
> OBJECTION FOR DEFENDANT.
>
> OVERRULED.
>
> A. Yes, sir, they have."

Considering, *arguendo,* that the question technically was incompetent, we do not see how it was so prejudicial as to require a new trial. Immediately prior to the asking of this question, defendant had testified:

> " . . . On the occasions when Dan Crumley asked me to sell him marijuana, I simply refused him. I did not have any.
>
> " . . . I did say that two times this man asked me to buy marijuana. I did say that I refused him. I simply told

him that I refused to sell him any. I did not have any so I just told him no. I deny seeing him on May 17."

Crumley had also previously testified without objection:

" . . . I told him [defendant] I wanted him to sell me some marijuana. I had asked him this before—as to how many times I had asked him—twice—he said he didn't have any."

The testimony of Crumley, corroborated by Maxey, was sufficient to support the charge of the State that defendant did sell and deliver marijuana to Crumley. As Justice Bobbitt (later Chief Justice) said in *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969), quoting with approval from 3 Strong, N. C. Index 2d, Criminal Law § 169, p. 135:

" 'Where there is abundant evidence to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result.' "

Other decisions affirming and applying this rule include the following: *State v. Temple*, 269 N.C. 57, 66, 152 S.E. 2d 206, 212 (1967); *Gasque v. State*, 271 N.C. 323, 340, 156 S.E. 2d 740, 752 (1967), *cert. den.*, 390 U.S. 1030, 20 L.Ed. 2d 288, 88 S.Ct. 1423 (1968). " ' . . . Unless there is a reasonable possibility that the evidence complained of might have contributed to the conviction, its admission is harmless. [Citation omitted.]' . . . " *State v. Hudson*, 281 N.C. 100, 106-07, 187 S.E. 2d 756, 761 (1972). *Accord, State v. McCotter*, 288 N.C. 227, 217 S.E. 2d 525 (1975).

The Court of Appeals erred in awarding a new trial on the ground that the trial court erroneously overruled defendant's objection to this question.

The Court of Appeals ordered a new trial upon the two grounds brought forward by the State in its petition for discretionary review, and, consequently, considered only those two assignments of error. On appeals taken before 1 July 1975, ordinarily our review was restricted to the rulings of the Court of Appeals which were challenged in the petition for *certiorari* or on direct appeal and brought forward in appellant's brief filed in this Court. In criminal cases in which the State ap-

pealed or petitioned for *certiorari,* we could elect to consider defendant's remaining assignments of error. *State v. McCotter, supra; State v. Muse,* 280 N.C. 31, 185 S.E. 2d 214 (1971), *cert. den.,* 406 U.S. 974, 32 L.Ed. 2d 674, 92 S.Ct. 2409 (1972). Under Rule 16(a) of the Rules of Appellate Procedure, effective for appeals taken on or after 1 July 1975, "[a] party who was an appellant in the Court of Appeals, and is either an appellant or an appellee in the Supreme Court, may present in his brief any question which he properly presented for review to the Court of Appeals, and is not limited to those actually determined by the Court of Appeals nor to those questions upon whose existence the appeal of right or the discretionary review is based. . . . " Section (b) of that Rule defines the terms *appellant* and *appellee,* when applied to discretionary review, as follows: "(1) With respect to Supreme Court review of a determination of the Court of Appeals upon petition of a party, *appellant* means the petitioner, *appellee* means the respondent."

Both the State and defendant, in their new briefs filed in this Court, restated questions presented in the Court of Appeals, but not decided by that court, and incorporated by reference arguments contained in the briefs filed in the Court of Appeals, in accordance with Rule 28(d). Hence, we consider the other questions presented by defendant in the Court of Appeals but not passed upon by that court.

[3] Defendant assigns as error the failure of the trial court to grant defendant's motion as of nonsuit at the close of the State's evidence and at the close of all the evidence. Defendant argues, in support of his motion, that the State failed to show that marijuana is a controlled substance in that no evidence was offered that the North Carolina Drug Authority had ever made a finding that marijuana was in fact a controlled substance.

A "controlled substance" is defined in G.S. 90-87(5) as "a drug, substance, or immediate precursor included in Schedules I through VI of this Article." G.S. 90-94 lists as Schedule VI substances: marijuana and tetrahydrocannabinols. Prior to this listing, is the following sentence upon which defendant relies:

> " . . . In determining that such substance comes within this schedule, the North Carolina Drug Authority shall find: no currently accepted medical use in the United States, or a relatively low potential for abuse in terms of risk to public health and potential to produce psychic or

physiological dependence liability based upon present medical knowledge, or a need for further and continuing study to develop scientific evidence of its pharmacological effects."

Defendant contends the State must show that the North Carolina Drug Authority has made these findings as to marijuana, and that the State has failed so to do. Defendant's contention is patently without merit. G.S. 90-88 defines the powers of the Drug Authority, and sets out the procedures that must be followed before the Authority may "add, delete, or reschedule substances within Schedules I through VI of this Article." This section makes it clear that the sentence relied on by defendant, which is found before each schedule of controlled substances, I-VI, applies only to drugs the Authority may wish to add, delete, or reschedule. Marijuana is clearly a controlled substance in North Carolina and was listed as such by the General Assembly in G.S. 90-94. This assignment of error is overruled.

[4] The first count in the bill of indictment charges that defendant did "sell and deliver to Dan Crumley more than five grams of the controlled substance marijuana." G.S. 90-95(a)(1) makes it unlawful to manufacture, sell or deliver, or possess with intent to sell or deliver a controlled substance. Defendant contends that the first count in the bill of indictment charges two separate offenses, sale *and* delivery of marijuana, and that the State thereby assumed the burden of showing both a sale and delivery in order to convict. Defendant further contends that under these circumstances, it was incumbent upon the trial judge to explain both sale and delivery to the jury and to declare and explain the law thereon. Defendant specifically contended that the trial judge failed to mention delivery in his charge. The first count in the bill of indictment charged two acts, sale and delivery, which were a part of a single transaction. Admittedly, the two acts could have been charged as separate offenses. The fact that the State elected to subject defendant to one criminal penalty on the first count does not prejudice defendant. *State v. O'Keefe*, 263 N.C. 53, 56, 138 S.E. 2d 767, 769 (1964), *cert. den.*, 380 U.S. 985, 14 L.Ed. 2d 277, 85 S.Ct. 1355 (1965). As stated in 4 Strong, N. C. Index 2d, Indictment and Warrant § 9, p. 350: "Two acts constituting essentially parts of a single transaction may be charged together as a single offense, and defendant is not entitled to complain that only one offense was charged even though each act would

have been ground for a separate charge." Defendant concedes that the State's evidence tends to show both sale and delivery but insists that the trial judge did not define delivery. G.S. 90-87(7) defines delivery as the "actual constructive, or attempted transfer from one person to another of a controlled substance."

[5] In summarizing the State's evidence, the trial judge stated that Crumley went to defendant's room, asked for and received from defendant 22.19 grams of marijuana for which he gave defendant $20. He then charged the jury that to find defendant guilty the State must prove beyond a reasonable doubt that defendant intentionally sold Crumley more than five grams of marijuana. He further stated: "An agreement by which the defendant, Phillip Dietz, intentionally transferred to Danny Eugene Crumley the controlled substance marijuana in exchange for $20.00 in money actually paid to him by Danny Crumley would be a sale of marijuana." Thus, the trial court put the burden on the State to prove beyond a reasonable doubt that defendant sold and transferred more than five grams of marijuana. Transfer, under the statute, is delivery. A charge to a jury must be read and considered in its entirety. *Gregory v. Lynch,* 271 N.C. 198, 155 S.E. 2d 488 (1967); *McPherson v. Haire,* 262 N.C. 71, 136 S.E. 2d 224 (1964). When the charge here is so read, there is no reasonable cause to believe the jury was misled or misinformed. No prejudicial error to defendant is shown.

[6, 7] Defendant next contends that the trial judge erred in failing to equally stress the contentions of both parties and in expressing an opinion on the evidence. The evidence in this case was comparatively short, and a careful reading of the charge discloses that the trial judge ably presented the principal features of the evidence for both the State and the defendant. The time devoted to summarizing the evidence for both was almost equal. Actually, the judge appears to have exercised more care in stating the evidence for the defendant than in stating the evidence for the State. He did not state any contentions for either the State or defendant. A judge is not required to state the contentions of the parties. *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Cook,* 273 N.C. 377, 160 S.E. 2d 49 (1968); *State v. King,* 256 N.C. 236, 123 S.E. 2d 486 (1962). The recapitulation of the evidence is in substantial accord with the testimony in the case. In reviewing

the evidence, the court is not required to give a verbatim recital of the evidence but only a summation sufficiently comprehensive to present every substantial and essential feature of the case. If there are minor discrepancies, they must be called to the attention of the court in time to afford opportunity for correction. Otherwise, they are deemed to be waived and will not be considered on appeal. *State v. Thomas, supra; State v. Tart,* 280 N.C. 172, 184 S.E. 2d 842 (1971); 7 Strong, N. C. Index 2d, Trial § 33. If defendant desired a more comprehensive statement of the evidence or a statement of defendant's contentions, he should have requested it. Nowhere in the charge did the court express any opinion or intimation of opinion contrary to G.S. 1-180. This assignment is without merit.

We have considered defendant's other assignments of error and find them to be without merit. A careful review of the entire record discloses that defendant has received a fair trial, free from prejudicial error.

For the reasons stated above, the decision of the Court of Appeals is reversed.

Reversed.

STATE OF NORTH CAROLINA v. EDWARD COLLINS DAVIS

No. 8

(Filed 6 April 1976)

1. **Criminal Law § 77— introduction of in-custody statement — cross-examination as to subsequent self-serving statements**

Where the State introduced evidence of in-custody statements made by defendant on 6 October, but introduced no evidence of in-custody statements made by defendant on 7 October which constituted self-serving declarations, and defendant did not testify or offer evidence, the trial court properly refused to allow defense counsel to elicit the self-serving 7 October statements on cross-examination, the State not having opened the door by presenting testimony on *voir dire* concerning the 7 October statements and testimony before the jury concerning the 6 October statements.

2. **Criminal Law § 92— consolidation of charges for trial**

The trial judge may consolidate for trial two or more indictments in which defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of another.

3. Criminal Law § 92— consolidation of charges — fair trial

In ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial, and if such consolidation hinders or deprives the accused of his ability to present his defense, the charges should not be consolidated.

4. Criminal Law § 92— consolidation of murder charges

The trial court did not err in consolidating two murder charges against defendant for trial where the crimes were continuing criminal acts which permit the admission in evidence of each in the trial of the other, and defendant's unsupported statement that he was prejudiced because he was denied the election of testifying in one case but not in the other was insufficient to show abuse of discretion by the trial judge in consolidating the charges.

5. Homicide § 28— powder burns on hands — instruction on self-defense

In a prosecution for the murder of two police officers, evidence of powder burns on defendant's hands was insufficient to require an instruction on self-defense since such evidence at most permits an inference that defendant was engaged in a struggle for possession of the death weapon when it was fired but fails to show that (1) defendant was free from fault in bringing on the difficulty and (2) it was actually or apparently necessary for defendant to kill or use the force used in order to save himself from death or great bodily harm.

6. Homicide § 4— first degree murder defined

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation.

7. Homicide § 4— premeditation and deliberation

Premeditation is thought beforehand for some length of time; deliberation means an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design or to accomplish some unlawful purpose.

8. Homicide § 18— premeditation and deliberation — circumstances to consider

Among the circumstances to be considered in determining whether a killing was done with premeditation and deliberation are: (1) want of provocation on the part of the deceased; (2) the conduct of defendant before and after the killing; (3) the dealing of lethal blows after deceased has been felled and rendered helpless; (4) the vicious and brutal manner of the killing; and (5) the number of shots fired.

9. Homicide § 21— premeditation and deliberation — sufficiency of evidence

The State's evidence was sufficient for the jury to find that defendant, after premeditation and deliberation, formed a fixed purpose to kill two police officers in a breathalyzer room and thereafter accomplished that purpose where the evidence was sufficient to support reasonable inferences that: (1) defendant was highly resentful and belligerent when he was taken into custody; (2) both

officers were at all times engaged in the execution of their sworn duty and did nothing to provoke an assault on them by defendant; (3) defendant forcefully obtained one officer's pistol and brutally shot him three times with at least one of the shots being fired after the officer had been felled and rendered helpless; (4) defendant shot the second officer who was sitting at his desk with his pistol holstered; and (5) without offering any aid to the victims or notifying anyone of their plight, defendant took the first officer's pistol and watch and documents which identified defendant as being in the breathalyzer room and fled.

10. Constitutional Law § 36— death penalty — constitutionality

Imposition of the death penalty for first degree murder does not constitute cruel and unusual punishment.

APPEAL by defendant from *Snepp, J.*, 3 March 1975 Session of BUNCOMBE Superior Court.

Defendant was charged in separate indictments with the first-degree murder of Lawrence Canipe, Jr., and William Dean Arledge. The charges were consolidated for trial over defendant's objection and defendant entered a plea of not guilty to each charge.

The State offered evidence which tended to show the following:

On 5 October 1974, Lt. Tom Alexander, an employee of the Haywood County Sheriff's Department, was driving from Hendersonville to Waynesville when he observed defendant driving a black Buick automobile at an extremely high rate of speed. Patrolman Lawrence Canipe responded to Lt. Alexander's radio request for assistance and stopped defendant after a pursuit which covered approximately one mile. After the patrolman had obtained defendant's driver's license, he requested that defendant get out of his automobile and at that time the officer saw several weapons in defendant's car. Lt. Alexander stated that defendant was very talkative but that he was coherent. Defendant wanted to know why he was being handcuffed and, among other things, stated that he had a son who was a policeman but that he was not an S.O.B. like Lt. Alexander. The weapons were removed from the automobile and defendant was taken by Trooper Canipe to a room in the Buncombe County Courthouse where breathalyzer tests were usually administered.

Gary Moffitt, who worked in the basement of the courthouse, testified that at about 8:00 p.m. he heard three to five

noises which sounded like a door slamming in the vicinity of the breathalyzer room.

Trooper Thad May came to the breathalyzer room at about 8:23 p.m. on 5 October and found the door locked. He obtained a key and upon entering the room, he found the bodies of Sgt. Arledge and Trooper Canipe. Trooper Canipe's body was on the floor near the door and Trooper May observed that his pistol holster was empty and that there was a hole on the left side of Canipe's shirt. The fallen patrolman's shirt, trousers and shoes were bloody. Sgt. Arledge's body was in a kneeling position near a chair and Trooper May observed blood around a hole in the left side of his back below his shoulder and on his right arm and hand. Sgt. Arledge's fully loaded pistol was found in his holster. Trooper May also found a partially completed form used by the State Patrol in cases involving driving an automobile under the influence of intoxicants. Defendant's name had been entered on this form along with the notation "test refused." The form listed L. C. Canipe as arresting officer and Sgt. Arledge as breathalyzer officer.

Dr. John McLeod, a pathologist, testified that he performed autopsies on the bodies of both Canipe and Arledge and that in his opinion they both died as a result of gunshot wounds. According to his testimony Trooper Canipe had been shot three times and two of the bullets caused "through and through wounds" and one bullet lodged just beneath Trooper Canipe's skin. It was Dr. McLeod's opinion that this bullet did not completely exit because the trooper's back was pressed against some firm object when the bullet struck.

Arledge had sustained a gunshot wound to his chest and right arm. The bullet entered his left shoulder, penetrated his chest, exited through the anterior portion of the right shoulder, and then through the medial portion of his right arm.

SBI Agent Michael Lewis who investigated the shooting found a bullet and a copper casing beneath Canipe's body and a part of a Speidel watchband under his chest. A bullet was found in the door about seven inches from the floor and another bullet was found in the window sill.

Defendant was arrested on a charge of public drunkenness on the following morning and at that time a watch, later identified as the property of Trooper Canipe, was found in his possession. The State also offered evidence tending to show

that Trooper Canipe's pistol was found in an area near the courthouse along with several official forms bearing the names of the deceased officers and the name of defendant. It was established that soil found on defendant's clothes was similar to that found in this area.

SBI Agent James Maxey testified that in his opinion there were flame burns on the back of defendant's left hand and burned powder deposits on both of defendant's hands. SBI Agent Maxey also testified concerning a statement made to him by defendant on 6 October 1974. We will more fully consider this statement in the opinion.

Defendant offered no evidence.

The jury returned a verdict of guilty of first-degree murder on each charge and defendant appealed from judgments imposing mandatory death sentences.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Lester V. Chalmers, Jr., for the State.

Robert L. Harrell, Assistant Public Defender, for defendant appellant.

BRANCH, Justice.

[1] Defendant contends that the trial judge committed prejudicial error by refusing to permit the State's witness, Sgt. Cook, to testify concerning a statement made by defendant.

By agreement of the parties, the court conducted a *voir dire* hearing concerning two statements made by defendant. One statement was made on 6 October 1974 and the other on 7 October 1974. The only witness offered on *voir dire* was Sgt. Cook.

Defendant does not challenge the *admissibility* of either of the confessions and properly so since there was ample evidence offered on the *voir dire* hearing to support Judge Snepp's finding "that the statements were made freely, intelligently, and voluntarily after the defendant had been fully advised of his rights under the law and had knowingly and intelligently waived those rights." The trial judge's findings and conclusions of law in turn supported his ruling that both confessions were admissible into evidence. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 *cert. denied,* 396 U.S. 934; *State v. Barber,* 278 N.C. 268, 179 S.E. 2d 404.

After the trial court's ruling the jury returned to the courtroom and the district attorney did not examine Sgt. Cook before the jury but tendered the witness for cross-examination. Thereupon, defendant's counsel sought to elicit from the witness Cook the context of the confession allegedly made by defendant on 7 October 1974. The trial judge sustained the State's objection.

In order to keep our consideration of this assignment of error in proper perspective, we here note that the State subsequently offered the testimony of SBI Agent Maxey who related the statements made by defendant to Sgt. Rhew and the witness on *6 October 1974*. The statement as related by the witness Maxey was to the effect that defendant told the officers that he was in the breathalyzer room with two highway patrolmen when the door opened and an older man stepped inside the room and shot Trooper Canipe and then shot the second patrolman. Thereafter defendant grabbed his property and the pistol belonging to Trooper Canipe and fled. On cross-examination the witness stated: "I was not present when Mr. Davis made a statement the next day . . . I don't know whether there was a second interview or not."

The statement allegedly made by defendant on 7 October in substance was that after he was brought into the breathalyzer room the arresting officer filled out a form and told him to sign it and he told the officer to sign it himself. Thereupon the arresting officer pulled his gun and told defendant to sign or he would blow his heart out. A struggle ensued between the defendant and the officer during which the gun fired twice hitting the arresting officer. Defendant stated that he did not know how the other officer was hit. He thereafter took his belongings and the officer's gun and fled.

It is well settled that if the State offers a part of a confession, the accused may require the whole confession to be admitted into evidence. *State v. Marsh*, 234 N.C. 101, 66 S.E. 2d 684; *State v. Edwards*, 211 N.C. 555, 191 S.E. 1; 2 Stansbury's N. C. Evidence § 187 (Brandis Rev. 1973). However, we are here faced with two separate conflicting statements made on different occasions.

In the case of *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677, this Court considered a question similar to the one here

under consideration. There, the Court, speaking through Justice Huskins, stated:

> Defendant's counsel proposed to ask a State's witness on cross-examination if defendant, when told by the witness that he was under arrest for rape, did not immediately deny his guilt. In the absence of the jury the witness stated that the defendant did deny it. The court sustained objection to the question and excluded the answer. This is the basis for defendant's sixth assignment of error.
>
> Defendant did not take the witness stand and offered no evidence whatever. The proposed cross-examination was therefore not competent to corroborate the defendant or, for that matter, any other witness. It was properly excluded as a self-serving declaration. . . .

Headnote No. 1 in the case of *State v. Davis*, 246 N.C. 73, 97 S.E. 2d 444, correctly and concisely states the pertient holding of that case. We quote:

> Where the State introduces testimony of statements made by defendant on a particular date, but introduces no evidence in regard to statements made by him on a subsequent date, defendant is not entitled to elicit from the State's witness testimony as to self-serving declarations made by defendant on the latter date, the State not having "opened the door" to such testimony.

Defendant argues that the State "opened the door" when Sgt. Cook testified on *voir dire* and when SBI Agent Maxey testified concerning the 6 October 1974 statement. We do not agree. Defense counsel had full opportunity to examine SBI Agent Maxey concerning the 6 October statement. It is noted, however, that this witness testified that he knew nothing about the 7 October statement. The State elected not to examine Sgt. Cook before the jury and the trial judge correctly refused to allow defense counsel to elicit this self-serving evidence on cross-examination at a time when the State had offered no evidence relating to it and defendant had not testified or offered evidence. This assignment of error is overruled.

Defendant assigns as error the ruling of the trial judge granting the State's motion to consolidate the two charges for trial.

[2] The general rule in this jurisdiction is that the trial judge may consolidate for trial two or more indictments in which the defendant is charged with crimes of the same class and the crimes are so connected in time or place that evidence at the trial of one indictment will be competent at the trial of the other. *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721; *State v. Anderson,* 281 N.C. 261, 188 S.E. 2d 336; *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652.

The usual objection to consolidation grows out of circumstances where one or more of several defendants takes the position that he or they will be prejudiced if forced to trial with the other defendants; however, we have also considered circumstances in which a single defendant objected to being tried upon several charges at the same time. We rejected such a contention in *State v. Jarrette, supra,* and in so ruling the Court, speaking through Justice Lake, stated:

> Over the objection of the defendant, the State's motion to consolidate for trial the four charges (murder, rape, kidnapping and armed robbery) was granted and the defendant's motion for severance was denied. In these rulings there was no error.

G.S. 15-152 provides:

> "When there are several charges against any person for the same act or transaction or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court will order them to be consolidated * * * ."

The uncontradicted evidence is that the entire series of events comprising the four crimes with which the defendant is charged began at about 3:30 p.m., Eastern Standard Time, on 11 February 1973 and was concluded when it was just dark enough to require lights on automobiles. On that date, this would be approximately two and one-half hours. Obviously, the four offenses constituted a continuing criminal episode. See: *State v. Frazier,* 280 N.C. 181, 185 S.E. 2d 652; *State v. Turner,* 268 N.C. 225, 150 S.E. 2d 406; *State v. White,* 256 N.C. 244, 123 S.E. 2d

483; *State v. Chapman,* 221 N.C. 157, 19 S.E. 2d 250. They were so related in time and circumstance as to permit the admission in evidence of each in the trial of the others. *State v. Morrow,* 262 N.C. 592, 138 S.E. 2d 245; *State v. McClain,* 240 N.C. 171, 81 S.E. 2d 364; *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232; Stansbury, North Carolina Evidence (Brandis Revision), § 91. Under these circumstances, the consolidation of the cases for trial was within the sound discretion of the trial judge. *State v. Yoes* and *State v. Hale,* 271 N.C. 616, 157 S.E. 2d 386.

We note parenthetically that G.S. 15-152 was repealed by Session Laws 1973, c. 1268, s. 26, however, this legislative change became effective July 1, 1975, subsequent to the trial of this case.

[3] It is true that in ruling upon a motion for consolidation of charges, the trial judge should consider whether the accused can fairly be tried upon more than one charge at the same trial. If such consolidation hinders or deprives the accused of his ability to present his defense, the cases should not be consolidated. *Pointer v. United States,* 151 U.S. 396, 14 S.Ct. 410, 38 L.Ed. 208; *Dunaway v. United States,* 205 F. 2d 23. Nevertheless it is well established that the motion to consolidate is addressed to the sound discretion of the trial judge and his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Jarrette, supra; State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386; *State v. Overman,* 269 N.C. 453, 153 S.E. 2d 44; *Dunaway v. United States, supra.*

[4] Defendant argues that he was prejudiced by the consolidation because without the consolidation of charges he would have had the election of testifying in one case without being forced to testify in the other.

In instant case, the charged crimes were obviously continuing criminal acts which permit the admission in evidence of each in the trial of the other. We are unable to discern any material reason why it would be to defendant's advantage to testify in one case and not the other. Certainly his unsupported statement of possible prejudice is not sufficient to show abuse of discretion on the part of the trial judge in allowing the motion to consolidate the charges for trial.

[5] Defendant next assigns as error the denial of his request for special instructions on self-defense. He contends that the

State's evidence of powder burns on his hands was sufficient to show that defendant was engaged in a struggle for possession of the weapon when it was fired thereby requiring instruction on self-defense.

The general rule is that when the State or defendant produces evidence that defendant acted in self-defense, the question of self-defense becomes a substantial feature of the case requiring the trial judge to state and apply the law of self-defense to the facts of the case. *State v. Deck,* 285 N.C. 209, 203 S.E. 2d 830; *State v. Watkins,* 283 N.C. 504, 196 S.E. 2d 750. Conversely, if the evidence is insufficient to evoke the doctrine of self-defense, the trial judge is not required to give instructions on that defense even when specifically requested. *State v. Freeman,* 275 N.C. 662, 170 S.E. 2d 461; *State v. McLawhorn,* 270 N.C. 622, 155 S.E. 2d 198.

A person may kill in self-defense if he be free from fault in bringing on the difficulty and if it is necessary, or appears to him to be necessary to kill so as to save himself from death or great bodily harm. The reasonableness of his belief and the amount of force required, must be judged by the jury upon the facts and circumstances as they appeared to the defendant at the time of the killing. *State v. Deck, supra; State v. Kirby,* 273 N.C. 306, 160 S.E. 2d 24 *cert. denied,* 386 U.S. 1032; *State v. Smith,* 268 N.C. 659, 151 S.E. 2d 596; *State v. Fowler,* 250 N.C. 595, 108 S.E. 2d 892.

The facts of this case when taken in the light most favorable to defendant, as we are required to do, are insufficient to raise the issue of self-defense. *State v. Watkins, supra; State v. Finch,* 177 N.C. 599, 99 S.E. 409. At most the evidence permits an inference that defendant struggled for possession of the weapon before the fatal shots were fired. The record is void of evidence tending to show that: (1) Defendant was free from fault in bringing on the difficulty, (2) it was necessary or appeared to defendant to be necessary for him to kill or use the force used in order to save himself from death or great bodily harm.

We hold that under this evidence, the trial judge properly refused to instruct the jury on self-defense.

This record does not disclose that defendant's counsel moved for judgment as of nonsuit at the appropriate time or by his brief questioned the sufficiency of the evidence to show pre-

meditation or deliberation so as to sustain the verdicts of murder in the first degree. Nevertheless since these cases involve the imposition of the death penalty we, *ex mero motu,* elect to consider this question.

[6, 7] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. DuBoise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 *cert. denied,* 404 U.S. 840. Premeditation may be defined as thought beforehand for some length of time. "Deliberation means . . . an intention to kill, executed by defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose . . . . " *State v. Perry,* 276 N.C. 339, 172 S.E. 2d 541.

Murder in the second degree is the unlawful killing of a human being with malice, but without premeditation and deliberation. *State v. DuBoise, supra; State v. Winford,* 279 N.C. 58, 181 S.E. 2d 423.

[8] In our opinion, there is ample evidence in the case *sub judice* to permit the jury to find that defendant unlawfully killed Sgt. William Dean Arledge and Trooper Lawrence Canipe with malice. Thus, the only remaining question is whether the evidence taken in the light most favorable to the State is sufficient to support legitimate inferences and findings by the jury that defendant, after premeditation and deliberation, formed a fixed purpose to kill Trooper Canipe and Sgt. Arledge and thereafter accomplished this purpose. *State v. Perry, supra; State v. Walters,* 275 N.C. 615, 170 S.E. 2d 484. Obviously premeditation and deliberation are not ordinarily susceptible of proof by direct evidence and therefore must usually be proved by circumstantial evidence. *State v. Walters, supra.* Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) Want of provocation on the part of the deceased, *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 174 S.E. 2d 385 *modified on other grounds,* 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862; (2) the conduct of defendant before and after the killing, *State v. Britt,* 285 N.C. 256, 204 S.E. 2d 817; (3) the dealing of lethal blows after deceased has been felled and rendered helpless, *State v. DuBoise, supra;* (4) the vicious and brutal manner of the killing, *State v. Fountain,* 282 N.C. 58, 191 S.E. 2d 674; (5) the number of shots fired, *State v. Sparks,*

285 N.C. 631, 207 S.E. 2d 712 *pet. for cert. filed,* 43 U.S.L.W. 3392 (U.S. Nov. 29, 1974) (No. 669).

[9] The evidence in instant cases is sufficient to support reasonable inferences that: (1) When defendant was taken into custody, he was highly resentful and belligerent, (2) both Trooper Canipe and Sgt. Arledge were at all times engaged in the execution of their sworn duty and did nothing to provoke an assault upon them by defendant, (3) after forcefully obtaining Trooper Canipe's pistol, defendant brutally shot him three times and at least one of the shots was fired after the Trooper had been felled and rendered helpless, (4) defendant while engaged in one continuing criminal act shot Sgt. Arledge who was apparently sitting at his desk with his glasses on top of his head and with his pistol holstered, and (5) defendant without offering any aid to the fatally wounded men or even anonymously notifying anyone of their plight took Trooper Canipe's pistol, documents which identified defendant as being in the room where the killings occurred, a watch belonging to Trooper Canipe and fled.

In our opinion, when taken in the light most favorable to the State, the evidence was sufficient to permit, but not require, the jury to reasonably infer that defendant after premeditation and deliberation formed a fixed purpose to kill Trooper Lawrence Canipe and Sgt. William Arledge and thereafter accomplished that purpose.

[10] Finally defendant contends that the death penalty is cruel and unusual punishment and therefore its imposition is constitutionally impermissible. These contentions have been considered and rejected by this Court in a host of recent decisions. We adhere to the holdings in those cases. *State v. Alford,* 289 N.C. 372, 222 S.E. 2d 222 (1976); *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975); *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Sparks, supra; State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v.*

Noell, 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Jarrette*, *supra*.

Our careful examination of this entire record discloses that defendant has had a fair trial free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. LAWRENCE McCALL

No. 10

(Filed 6 April 1976)

1. Homicide § 21— first degree murder — sufficiency of evidence

The State's evidence was sufficient to be submitted to the jury on the issue of defendant's guilt of first degree murder where it tended to show: the victim died as a result of gunshot wounds inflicted by a shot fired from a house trailer some 80 feet away; a short time before the shooting, defendant had test fired a 12 gauge shotgun; 12 gauge shotgun wadding was found in a straight line between the trailer and bodies after the shooting; a freshly fired 12 gauge shotgun was later found in defendant's house hidden between the quilts and mattress of a bed; defendant was the only person in the trailer when the fatal shots were fired; defendant attempted to run down the victim with a car shortly before the shooting; defendant had driven back and forth by the victim before the killing; defendant fired a second shot after two others also wounded by the first shot were able to rise; and defendant left the scene hurriedly after the shooting without offering any assistance.

2. Criminal Law §§ 102, 170— jury argument invited by opposing counsel — harmless error

Jury argument by the district attorney in which he repeatedly referred to the fact that defense counsel was from another area of the State was invited by defense counsel's jury argument severely attacking the credibility of two State's witnesses and the honesty of local law enforcement officers and did not constitute prejudicial error.

3. Homicide § 24— presumptions of malice and unlawfulness — Mullaney decision

The trial court's instruction in a first degree murder case on the presumptions of malice and unlawfulness arising upon proof of a killing by the intentional use of a deadly weapon does not contravene the decision of *Mullaney v. Wilbur*, 421 U.S. 684; furthermore, the *Mullaney* decision is not retroactive and does not apply to the trial of defendant held before that decision was rendered.

4. Constitutional Law § 36; Homicide § 31— constitutionality of death penalty

The death penalty for first degree murder is not unconstitutional.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Fountain, J.*, at the 2 June 1975 Special Criminal Session of TRANSYLVANIA Superior Court.

On separate indictments, proper in form, defendant was charged with the first degree murder of Ruth Looker Hice and Billy Derwood Hice. The jury found defendant guilty as charged in the death of Ruth Looker Hice, and a sentence of death was imposed. The jury was unable to agree on a verdict in the case charging the murder of Billy Hice. A juror was withdrawn and a mistrial declared in that case.

Defendant had been previously convicted of both murders before Martin, J., at the 1 February 1974 Regular Criminal Session of Transylvania Superior Court. However, defendant was granted a new trial in both cases by this Court in a decision reported in 286 N.C. 472, 212 S.E. 2d 132 (1975).

The evidence for the State at the new trial tended to show the following: On 12 September 1973 the decedents, Billy Derwood Hice (Billy) and Ruth Looker Hice (Ruth), lived in a trailer home on the north bank of the French Broad River in the Transylvania County community of Balsam Grove. Lloyd McCall and his son Gary McCall also lived in house trailers along the north bank and near the Hices. State Highway 215 ran parallel to the south bank of the river and the only method of ingress to and egress from the Hices' and McCalls' property was by way of a concrete bridge, built by Hice, that crossed the river and intersected with Highway 215. On the date in question, Mr. and Mrs. Melvin Owens lived on the south side of the river, directly across from Gary McCall's trailer. Mr. Owens was the father-in-law of Lloyd McCall and the grandfather of Lloyd's son Gary. Defendant and Lloyd McCall are brothers.

Mr. Owens testified as follows: He first saw defendant on the day of the shooting at approximately 8:00 a.m. when defendant left the trailer of his brother Lloyd and drove down Highway 215. Defendant was next seen at approximately 12:00 p.m. when he returned to his brother's trailer. About 2:30 p.m., defendant drove his Mustang down to Gary's trailer nearer the river. From their front porch the Owenses observed defendant come out from behind Gary's trailer with a shotgun in his

hand and fire it into the air. The force of the discharge "backed him up between two and three steps" and Mr. Owens began laughing "about that gun a kicking Lawrence."

At this time Billy was attempting to install a swinging gate at the end of the concrete bridge on the north side of the river. Shortly after defendant fired the shotgun, Billy returned to his trailer for some additional materials for the gate. Defendant then left Gary's trailer and drove down Highway 215. Later, both Billy and Ruth again began to work on the gate. While they were doing so, defendant drove up and down the highway past the bridge six or eight times, the last time driving out onto the bridge and watching the Hices work. Defendant then backed off the bridge and went down the highway.

Mr. Owens started to walk down to the bridge to talk with the Hices when he saw defendant reappear down the highway, driving at a high rate of speed. He swerved at Mr. Owens and drove onto the bridge. The Hices threw up their hands in an effort to stop him but defendant's car "butted them backwards," knocking Ruth down. Defendant then parked at Gary's trailer and went in the front door. Mr. Owens joined the Hices at the gate at which time he saw Lloyd and Gary McCall approximately 550 to 600 feet from Gary's trailer. Almost immediately a shot rang out, wounding Billy and Mr. Owens and killing Ruth. Mr. Owens suffered a head wound but managed to make it across the bridge to his home. On his way across the bridge, he heard another shot and saw that it came from Gary's trailer. This shot hit Billy as he bent over Ruth.

Mr. Owens received first aid from his wife and subsequently was able to get in his pickup truck and go for help. After he left, Mrs. Owens went back into the house where she began watching the bridge and adjacent area. She observed defendant leave Gary's trailer almost immediately and drive without stopping past the two bodies, across the bridge and onto the road.

On cross-examination of Mr. and Mrs. Owens, the defense elicited that Lloyd and Gary McCall were on bad terms with the Hices over a boundary dispute, that Mr. Owens felt animosity toward defendant, who was his former son-in-law, and that Mr. and Mrs. Owens had made conflicting remarks about who had done the shooting shortly after the incident.

Dr. George Lacey, an expert in the field of pathology, testified that Ruth died as a result of gunshot wounds in the chest, perforating the right lung, and that Billy died as a result of a gunshot wound, perforating the heart.

State Trooper Zeb Hawes, the first law enforcement officer to arrive on the scene, testified that he found the Hices' bodies lying approximately twenty feet from the end of the bridge, and that he saw two vehicles parked nearby with dents in their sides, apparently from the impact of shotgun pellets.

During a search of the area, the officers found some "shotgun wadding" approximately twenty-four feet from Gary's trailer and in a straight line between the trailer and the bodies. Another small piece of wadding was found on the inside windowsill of the trailer. The window screen of the window nearest the Hices on the north end of the trailer had been partially torn down and had a hole through it. After obtaining a search warrant, the officers searched the trailer and found powder markings around the hole in the screen. Three 12 gauge shotgun shells were found in a dresser drawer. A rifle and a 20 gauge shotgun were also found in the trailer. Near the trailer where Mr. Owens saw defendant fire a shotgun, the officers found an empty 12 gauge shotgun shell.

Defendant was arrested at approximately 2:30 a.m. on 13 September 1973. A search of the house in which defendant was staying revealed a 12 gauge shotgun hidden between the quilts and the mattress of a bed. The shotgun smelled of fresh powder burns. After being taken into custody, defendant was found to have a large bruise on the biceps of his left arm.

SBI Agent F. G. Satterfield, Jr., an expert in the field of firearms identification, identified the pieces of wadding found around Gary's trailer as 12 gauge shotgun wadding. He further testified that the 12 gauge shotgun found at defendant's home had fired the empty shotgun shell found near the trailer and that when he test fired that shotgun at the test range in Raleigh, the "kick" of the gun produced a slight bruise on his shoulder.

The State rested and the defendant offered evidence tending to show the following: Mr. Owens made a statement to SBI Agent Charles Chambers on the day of the shooting in which he stated that either Lloyd or Lawrence McCall had done the shooting. Mrs. Owens' statement on the same day described prior animosity between Lloyd and the Hices over the bridge.

Debbie Williams, Gail Enloe, Mike McCall and Phillip Owens, all of whom arrived at the scene shortly after the shooting, each heard Mrs. Owens state that Lloyd had killed the Hices and that Gary had tried to stop him.

The defense then rested and the State offered rebuttal testimony tending to show that neither Gary nor Lloyd McCall was in or near Gary's trailer at the time of the shooting.

Other facts pertinent to decision will be set out in the opinion.

Attorney General Rufus L. Edmisten, Special Deputy Attorney General Edwin M. Speas, Jr., and Associate Attorney Joan H. Byers for the State.

Ransdell & Ransdell by W. G. Ransdell, Jr., for defendant appellant.

MOORE, Justice.

[1] Defendant first assigns as error the denial of his motions for judgment as of nonsuit at the close of the State's evidence and at the close of all the evidence. Defendant contends that the evidence tending to show that defendant murdered Mrs. Hice was insufficient to be submitted to the jury. Upon considering a motion for nonsuit, the court must find that there is "substantial evidence . . . both that an offense charged . . . has been committed and that the defendant committed it" before such motion can be overruled. *State v. Cutler,* 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967). *See* 2 Strong, N. C. Index 2d, Criminal Law, §§ 104 and 106. The evidence for the State, considered in the light most favorable to it, is deemed to be true and the State is entitled to the benefit of all inferences which may reasonably be drawn therefrom. *State v. Price,* 280 N.C. 154, 184 S.E. 2d 866 (1971); *State v. Roseman,* 279 N.C. 573, 184 S.E. 2d 289 (1971); *State v. Cutler, supra.*

The State's evidence in this case tends to show that Mrs. Hice died as a result of gunshot wounds inflicted by a shot fired from Gary McCall's trailer some eighty feet away. The State's evidence further tends to show that defendant, a short time before the shooting, had test fired a 12 gauge shotgun, that 12 gauge shotgun wadding was found in a straight line between the trailer and the bodies after the shooting, and that a freshly-fired 12 gauge shotgun was later found in defendant's house

hidden between the quilts and mattress of a bed. The State also produced evidence tending to show that defendant was the only person in Gary McCall's trailer when the fatal shots were fired.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969); G.S. 14-17.

The killing of Mrs. Hice with a deadly weapon, when established beyond a reasonable doubt, raises two presumptions: first, that the killing was unlawful, and second, that it was done with malice. *State v. Williams,* 288 N.C. 680, 220 S.E. 2d 558 (1975); *State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975); *State v. Rummage,* 280 N.C. 51, 185 S.E. 2d 221 (1971). Indeed, actual ill will can be inferred from defendant's attempt to run down deceased shortly before the shooting.

Premeditation and deliberation can be inferred from defendant's (1) obtaining and test firing the weapon before the fatal shooting, (2) driving back and forth by the victims before the killing, (3) shooting the unsuspecting victims from ambush some eighty feet away, (4) firing the second shot after two of those wounded by the first shot were able to rise, and (5) leaving the scene hurriedly and passing the wounded victims immediately after the shooting without offering assistance. Thus, there was ample evidence tending to show that the crime of murder in the first degree was committed and that defendant committed it. Contradictions and discrepancies, even in the State's evidence, are for the jury to resolve and do not warrant nonsuit. *State v. Mabry,* 269 N.C. 293, 152 S.E. 2d 112 (1967); 2 Strong, N. C. Index 2d, Criminal Law § 104, and cases therein cited. The motions for judgment as of nonsuit were properly overruled.

[2] By his next assignment of error, defendant insists that the trial court erred in permitting the district attorney to make an argument to the jury "which tended to belittle, demean and ridicule appellant's counsel for the apparent purpose of diminishing counsel's effectiveness." Defendant claims this argument denied him due process and the effective assistance of counsel guaranteed by the Constitution of North Carolina and the Constitution of the United States.

The remarks complained of followed the following arguments of defense counsel:

"(1) 'The prosecution is in a box. Mr. Lowe [the District Attorney] is boxed in.' Law enforcement officers are in a bind. Whole law enforcement and District Attorney office have their hands tied.

(2) 'I am talking bad about Melvin and Flora Owens because I think they are bad people. I wish that Melvin Owens had remained seated in the courtroom during my argument because I wanted to call him a liar to his face.'

(3) 'I have tried a lots of murder cases and I haven't seen a single murder case where there was not a motive involved. There is no motive for Lawrence McCall to kill the Hice's.'

(4) 'Members of the jury I ask you to come back into the Courtroom after your deliberation and look Melvin and Flora Owens in the eye and say; Not Guilty.'

(5) 'Melvin Owens a Minister of the Gospel. I can't believe it. There is a bad apple in every barrel. I don't want him telling me how to live.'

(6) 'Lawrence McCall is going to walk out of this courtroom a free man.'

(7) 'Thank you for your attention this week and we demand of you a verdict of Not Guilty.' "

A review of the comments of the district attorney reveals that they were made in response to the above attacks by defense counsel on the credibility of the Owenses and the law enforcement officers in Transylvania County. Excerpts from the district attorney's comments are as follows:

"You know what Mr. Ransdell did? He made light of Mr. Melvin Owen's religion. He made light of his religion. Now, I'm sorry he did that. You know, we all have our own beliefs and we all look at religion with—most of us are different denominations. I'm a Baptist and I'm proud to be a Baptist. But you know every man has his right to his belief in God. And every man doesn't have an engraved certificate showing that he's been ordained as a minister. Maybe they have golden engraved certificates down in Raleigh where Mr. Ransdell comes from, showing that some

man is the pastor of the First Baptist Church of the big city of Raleigh. . . . [H]e stood right here in the courtroom and looked out there and said, 'Mr. Melvin Owens is a liar,' and I resent anybody coming into Transylvania County when he doesn't even know the county and doesn't know the citizens of this county.

Listen, I been in this county seventeen years, and if I was going to prove a man's character I wouldn't come all the way from Raleigh to call him a liar. . . .

. . . You show me one citizen in Transylvania County that took the oath on the Holy Bible and said Mrs. Flora Owens wasn't worthy of belief. The only person that's said that is the man from Raleigh, North Carolina, big city of Raleigh.

. . . You ought to be proud of your law enforcement officers here. I don't know how they do it down in Raleigh where Mr. Ransdell's from, you know, that big city. But I want to say this, I'm proud of the officers in Transylvania County.

. . . Now, let me talk about guns. Let me tell you something. You talk about how they do it down in Raleigh. Here's what your officer did.

. . . He broke the one he got out of Lawrence's house. He broke the guns down that he got out of the trailer, and don't you know that Hubert Brown would have told you that they smelled of gun powder if they did?

OBJECTION. OVERRULED.

I'm sure he objects to it.

THE COURT: Well, now don't argue about that.

I apologize to the Court.

THE COURT: Well, I want to make it clear that he's entitled to object when he thinks it's appropriate and I'll make such rulings as I think appropriate."

It is well established that the control of the arguments of counsel must be left largely in the sound discretion of the trial judge with wide latitude given counsel to argue all the law and the facts presented by the evidence and all reasonable inferences therefrom. *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125

(1975); *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974); *State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971); *State v. Graves,* 252 N.C. 779, 114 S.E. 2d 770 (1960). It should also be noted that none of the remarks of the district attorney quoted above, with the exception of the last exchange, were objected to in apt time by defense counsel. An objection after verdict ordinarily comes too late. *State v. Noell, supra; State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970). We hold, however, that even if properly objected to, the arguments of the district attorney were not so prejudicial as to require a new trial. Defense counsel is in fact from Raleigh and in our opinion his remarks invited the response of the district attorney. This Court has disapproved the type of argument made by defense counsel. In *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967), we stated that "[i]t is improper for a lawyer in his argument to assert his opinion that a witness is lying. He can argue to the jury that they should not believe a witness, but he should not call him a liar."

Defense counsel severely attacked the credibility of the two State's witnesses, Mr. and Mrs. Owens, and the honesty of the local law enforcement officers. The district attorney answered by attempting to restore the credibility of these witnesses and to defend the performance of the investigating officers. Mr. Ransdell opened the door with abusive comments. The response he received was justified. *State v. Stegmann,* 286 N.C. 638, 654, 213 S.E. 2d 262, 274 (1975); *State v. Seipel,* 252 N.C. 335, 113 S.E. 2d 432 (1960). This assignment of error is overruled.

[3] The trial court in its charge to the jury placed the burden upon the State to prove defendant's guilt beyond a reasonable doubt. The court further charged:

> " . . . [W]here it is shown that a person intentionally, with the use of a deadly weapon, kills another, nothing else appearing, two presumptions arise. First, that . . . the killing was unlawful, and second, that it was done with malice. And an unlawful killing with malice is murder in the second degree. And if the State can show that from the evidence and beyond a reasonable doubt, and further show from the evidence and beyond a reasonable doubt that the killing resulted from . . . premeditation and deliberation, then it becomes murder in the first degree."

Defendant challenges this portion of the charge, contending that it contravenes the holding in the recent case of *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), that the burden of proving every element of a crime beyond a reasonable doubt rests on the State.

Defendant was sentenced to death for the murder of Mrs. Hice on 7 June 1975. The date of the *Mullaney* decision was 9 June 1975. Therefore, *Mullaney* does not control unless it is to be applied retroactively. This Court has recently held that *Mullaney* will not be given retroactive effect insofar as North Carolina cases are concerned. *State v. Hankerson, supra.* Therefore, defendant's challenge based on *Mullaney* is without merit.

Even if *Mullaney* should later be found to be retroactive, *Mullaney* does not invalidate the use of the presumptions of unlawful killing and malice in the present case. In *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975), Justice Branch addressed the issue of whether the presumptions of malice and unlawfulness must fall after *Mullaney*. In holding that they do not, Justice Branch, speaking for the Court, stated:

> "We are of the opinion that when the State proves beyond a reasonable doubt that an accused intentionally inflicted a wound with a deadly weapon proximately causing death, such basic facts are sufficient to meet the most stringent of the standards of due process recognized by the [United States Supreme] Court. Establishment of the presumption requires the triers of fact to conclude that the prosecution has met its burden of proof with respect to the presumed fact by having established the required basic facts beyond a reasonable doubt. This does not shift the ultimate burden of proof from the State but actually only shifts the burden of going forward so that the defendant must present some evidence contesting the facts presumed. We, therefore, hold that the presumptions here challenged comport with due process. [Citations omitted.]
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> " . . . We find nothing in *Mullaney* which declares that due process is violated by a rule which allows rational and natural presumptions or inferences to arise when certain facts are proved beyond a reasonable doubt by the State."

The evidence in present case was sufficient to permit the jury to find beyond a reasonable doubt that defendant intentionally fired the shots that killed Mrs. Hice, thereby raising the presumed facts of malice and unlawfulness. Defendant then was faced with the burden of going forward with some evidence to contest the facts presumed, which he failed to do. This assignment of error is overruled.

[4] Finally, defendant challenges the constitutionality of North Carolina's death penalty. Questions raised by this assignment of error have been considered and found to be without merit in *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Lowery,* 286 N.C. 698, 213 S.E. 2d 255 (1975); *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Stegmann, supra; State v. Woods,* 286 N.C. 612, 213 S.E. 2d 214 (1975); *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Lampkins,* 286 N.C. 497, 212 S.E. 2d 106 (1975); *State v. Avery,* 286 N.C. 459, 212 S.E. 2d 142 (1975); *State v. Williams,* 286 N.C. 422, 212 S.E. 2d 113 (1975); *State v. Sparks,* 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Dillard,* 285 N.C. 72, 203 S.E. 2d 6 (1974); *State v. Noell, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to those decisions.

In view of the seriousness of the charge, we have carefully examined each of defendant's assignments of error. Our examination of the entire record discloses that defendant has had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. JAMES JUNIOR BIGGS

No. 43

(Filed 6 April 1976)

1. Homicide § 21— first degree murder — sufficiency of evidence

Testimony by an eyewitness, an SBI agent who related defendant's own account of the manner of killing the victim and his reasons for killing her, and a pathologist who described the stab wounds in the victim's heart and abdomen was sufficent to establish an unlawful

killing done with premeditation, deliberation, and actual malice, and thus to sustain a verdict of murder in the first degree.

2. **Criminal Law § 75— in-custody statements — waiver of counsel — necessity for express finding**

The trial court in a homicide case erred in the admission of defendant's in-custody inculpatory statements without an express finding that defendant had knowingly and intelligently waived his right to counsel before making the statements where the *voir dire* evidence concerning defendant's waiver of counsel was conflicting.

APPEAL by defendant under G.S. 7A-27(a) from *Webb, J.*, 25 August 1975 Session of CHOWAN Superior Court.

Defendant was tried upon a bill of indictment charging him with the first degree murder of Doris Jean Ferebee on 12 July 1975. The State's evidence, consisting primarily of the testimony of deceased's 11-year-old daughter, Antionette, an eyewitness to the killing, and of the investigating officers to whom defendant made inculpatory statements, tended to show the facts summarized below.

Prior to 12 July 1975 defendant and the deceased, Doris Jean Ferebee, had known one another intimately for sometime. On 11 July 1975, Mrs. Ferebee swore out a warrant against defendant, charging that he had assaulted her. Defendant was arrested upon this warrant at approximately 7:30 p.m. that day and detained until he was released on bond between 8:00 and 8:30 p.m.

About 1:00 a.m. on 12 July 1975 defendant went to Mrs. Ferebee's home, where she lived with her five children whose ages ranged from 5 to 14 years. Antionette testified that when he arrived defendant tapped on one of the front windows and called to the deceased. Receiving no reply he broke the front door and entered the children's bedroom carrying an open pocketknife in his hand. He asked each child in turn where his mother was and all answered that they did not know. Defendant told them he was going to give them five minutes to find their mother. He instructed them to tell her he would not hurt her if she came downstairs, that he only wanted to talk with her. The children went upstairs, found their mother hiding under a bed, told her what defendant had said, and went back downstairs.

Mrs. Ferebee, holding a butcher knife and fire poker in her hand, came to the top of the stairs. Seeing defendant stand-

ing at the bottom of the stairs she walked slowly down the steps toward him. When she was about halfway down, defendant pushed her the rest of the way. He then showed her a copy of the warrant she had sworn out against him. "They talked loud about it" and ultimately defendant, the deceased, and her children all went into the kitchen.

Once in the kitchen Mrs. Ferebee placed the butcher knife and the fire poker on a table. Defendant then went over to her, grabbed her arm, and "pushed her into the pocketknife" he had continuously held in his hand. Defendant asked the children if they wanted to see their mother when he was finished with her. They all responded "No," and he pushed Mrs. Ferebee into the living room. In a few moments defendant called the children to come in "and look at her one more time." When the children entered they saw their mother lying on the floor beside the couch moaning. Defendant then left and the children ran next door for help. As the last two were leaving, Mrs. Ferebee struggled to her feet.

At approximately 1:30 a.m. Deputy Sheriff Glenn Perry was notified that Mrs. Ferebee had been stabbed in her home on Paradise Road. He immediately drove to the Ferebee home, where he was later joined by Sheriff Troy Toppin and SBI Agent William Godley. The officers searched the residence but could not find Mrs. Ferebee. In consequence of information given him by her children, Sheriff Toppin directed Deputy Perry to find defendant and question him with reference to Mrs. Ferebee's whereabouts.

When Deputy Perry arrived at the home of defendant's father, where defendant lived, he was invited in by the father. Perry informed defendant that Mrs. Ferebee had been hurt and asked him whether he had been to her house that night. At this point the court conducted a *voir dire* to determine the admissibility of defendant's statements to Deputy Perry en route to the home of deceased. After hearing the testimony of Deputy Sheriff Perry and the defendant the court found that the statements were volunteered and were not in response to custodial interrogation and were admissible in evidence. (Defendant does not assign the admission of these statements as error.)

Deputy Perry testified that, in response to his question, defendant told him he had been to Mrs. Ferebee's house that night at 1:30 a.m.; that he then told defendant he had a report

that she had been hurt, that the officers could not find her and he asked him "if he would mind" going with him to help find her. When defendant said that he would go, the deputy asked him if he had a knife. He said Yes and, upon the officer's request, defendant gave him the pocketknife he had on his person.

En route to Mrs. Ferebee's house Deputy Perry asked defendant no questions. Defendant, however, asked the deputy, "Mr. Perry, do you mean to tell me that she is not in the house?" When the deputy said No, defendant replied, "I don't see how the bitch could go anywhere the way she was hurt." Defendant made no further statement at that time and the deputy did not interrogate him. In his opinion, defendant was perfectly sober.

When the two men arrived at the Ferebee home, Deputy Perry informed the Sheriff what defendant had told him. At that point the Sheriff placed defendant under arrest, "[r]ead him his rights," and questioned him.

A *voir dire* was conducted to determine the admissibility of defendant's further statements. The evidence for the State tended to show that Sheriff Toppin correctly informed defendant of his constitutional rights in accordance with the *Miranda* decision and that defendant freely and voluntarily waived those rights, including his right to have counsel present. Defendant, testifying on *voir dire*, stated that the Sheriff did not inform him of his right to have an attorney appointed for him, never asked him whether he wanted an attorney present during questioning, and that he (defendant) never indicated he did not desire counsel. On this conflicting evidence the trial judge concluded that defendant's statements to Sheriff Toppin were admissible. (His findings will be set out in the opinion.) In response to the Sheriff's questions, defendant stated he had stabbed Mrs. Ferebee twice in the chest, two times in the stomach and back, and that she was hurt bad. At this time, 2:45 a.m., defendant was taken to the county jail.

At approximately 3:00 a.m. the officers found Mrs. Ferebee's body about 200 yards from her home in a ditch by the side of the road. Medical evidence established that Mrs. Ferebee had been stabbed four times in the chest and abdomen and that the cause of death "was blood loss from the wound to the heart."

At approximately 5:25 a.m. SBI Agent Godley interviewed defendant at the jail. Again the court conducted a *voir dire* to determine the admissibility of defendant's statements. Agent Godley testified that he again advised defendant of his constitutional rights by reading the *Miranda* warning to him and explaining each right fully.

Agent Godley testified that defendant specifically stated that he was willing to make a statement and answer questions; that he did not want a lawyer at that time; and that he signed a waiver after inquiring the meaning of the word *coercion,* which was explained to him. The record does not reveal that this waiver was introduced in evidence. On the other hand, defendant testified on *voir dire* that he did not remember Agent Godley telling him he had the right to talk to an attorney before he was questioned or to have one with him during the questioning, and he did not understand he had these rights. Defendant also stated that he did not understand that an attorney would be appointed for him if he could not afford to hire one. He admitted he signed "a paper" but denied the authenticity of his purported signature on the "paper" which was shown to him. On this conflicting evidence, the court concluded that defendant's statements to Godley were admissible. (The court's findings will be set out in the opinion.)

Agent Godley asked defendant to relate the circumstances of Mrs. Ferebee's death, and he let him tell it in his own words. In essential part, defendant's statement is summarized as follows: He killed Mrs. Ferebee because "she had lied on him." She said he had assaulted her when he had not. "The bitch stayed at his home more than she did hers," and "she got the warrant because he was seeing another woman and she didn't like it." He stabbed her six or seven times in the chest, the stomach, and in the side, and "Hell, no!" he was not sorry he did it. He gained entry to deceased's house by kicking in the door. He kicked the door open "because she knew he was going to kill her." He had been planning to kill her ever since the day before when the assault warrant was served upon him. He put the kids in the kitchen and asked them if they could see their mother. When they said Yes, he told them to look because the next time they saw her she would be in her coffin. He stabbed her in the room next to the kitchen because he did not want the kids to see him stab her. When she fell on the couch he called the kids and told them to come and look at their

mother; that he wanted them to see her after she was hurt. After the kids came into the room and he started to leave, "he heard Doris Jean murmer, or gurgle" and he said to her, "ain't you dead yet, bitch?" She did not answer and he went home, where he remained until the officer came for him. The pocketknife he gave to Deputy Perry was the knife with which he killed Doris Jean Ferebee.

Defendant also told Mr. Godley he had had some beer and smoked some marijuana, but he would have killed her even though he had not been drinking because he had it on his mind. Mr. Godley never detected the odor of alcohol about defendant and, in his opinion, he was not intoxicated at anytime he saw him.

At the conclusion of the State's evidence defendant moved for a directed verdict and, upon the court's denial of that motion, he elected to offer no evidence. The judge charged the jury, and thereafter it returned a verdict of guilty of murder in the first degree. From the sentence of death imposed upon the jury's verdict, defendant appealed directly to this Court as a matter of right.

Attorney General Rufus L. Edmisten and Assistant Attorney General Charles J. Murray for the State.

W. T. Culpepper III for defendant appellant.

SHARP, Chief Justice.

At the outset we consider and dispose of defendant's contention that the evidence of premeditation and deliberation was not "substantial enough" to warrant submitting the case to the jury on the charge of first degree murder. The assignment is feckless. The familiar rule is that a motion to nonsuit "requires the trial court to consider the evidence in its 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. Goines,* 273 N.C. 509, 513, 160 S.E. 2d 469, 472 (1968). Furthermore, all admitted evidence which is favorable to the State, whether competent or incompetent, must be taken into account and so considered by the court when ruling upon the motion. *State v. Crump,* 277 N.C. 573, 178 S.E. 2d 366 (1971); *State v. Clyburn,* 273 N.C. 284, 159 S.E. 2d 868 (1968); *State v. Cutler,* 271 N.C. 379, 156 S.E. 2d 679 (1967).

[1] When tested by the foregoing rule, the testimony of Antionette Ferebee, an eyewitness; that of SBI Agent Godley, who related defendant's own account of the manner in which he killed Mrs. Ferebee and his reasons for killing her; and the testimony of the pathologist who described the stab wounds in the heart and abdomen which caused her death was superabundant to establish an unlawful killing done with premeditation, deliberation, and actual malice, and thus to sustain the verdict of murder in the first degree. *See State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973); *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970); *State v. Moore,* 275 N.C. 198, 166 S.E. 2d 652 (1969).

[2] Notwithstanding, there must be a new trial because Judge Webb, without first finding that defendant had waived his right to the presence of counsel, admitted into evidence, over the objection of defendant, the testimony of Sheriff Toppin and SBI Agent Godley as to in-custody, inculpatory statements which defendant made in response to their interrogation.

As indicated in the preliminary statement of facts the trial court conducted *voir dire* hearings to determine whether defendant had been informed of his constitutional rights in accordance with *Miranda* and whether he had knowingly and voluntarily waived his right to counsel before making the challenged admissions. The testimony of both Sheriff Toppin and Agent Godley tended to show that each had explained to defendant in detail all his rights as defined in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). With reference to his right to counsel he was told "you have the right to talk to a lawyer before we ask you any questions, and to have him or someone else present during questioning. If you cannot afford to hire a lawyer, one will be appointed for you before any questioning if you wish one." He also was told that if he decided to answer any questions without a lawyer he had the right to stop answering them at any time. In response to each officer's inquiry defendant said he understood his rights and, "having these rights in mind," he wanted to answer their questions then without having a lawyer present.

As heretofore noted, however, on *voir dire,* defendant testified that neither Sheriff Toppin nor Agent Godley informed him of his right to the appointment of an attorney; that he did not understand he had the right to consult with an attorney either before or during police interrogation; and that he had

never agreed to answer any questions without the presence and advice of an attorney.

Upon this conflicting evidence the trial judge in each instance made only brief findings of fact. At the conclusion of the *voir dire* relative to defendant's statements to Sheriff Toppin, Judge Webb made the following entry: "Let the record show then that the court finds as a fact that after the voir dire hearing that Sheriff Troy Toppin, at the time when (sic) the arrest of the defendant, fully advised him of his right to remain silent, and of his right to have an attorney represent him, and of his right to stop answering questions at any time during the interrogation, and that the defendant freely, voluntarily, and understandingly waived his right to remain silent, and that any statements he made to Sheriff Toppin may be introduced in evidence in this case."

The judge's findings relative to defendant's confession made to Agent Godley are as follows: "Let the record show that at the end of the voir dire the court finds as a fact the SBI Agent William Godley fully informed defendant of his right to remain silent, of his right to have an attorney, and that any statements he made could and would be used against him; and that the defendant knowingly, understandingly and voluntarily waived his right to remain silent, and that any statements he made to Mr. Godley may be introduced in evidence in this case."

As defendant points out, it is obvious that in both post *voir dire* findings, the trial judge failed to find that defendant had affirmatively waived his right to counsel or to make any findings of fact with reference to waiver of counsel. Since the *voir dire* evidence concerning defendant's waiver of counsel was conflicting, defendant argues that the admission of the inculpatory in-custody statements without an express finding that defendant had knowingly and intelligently waived his right to counsel violated the holding of *Miranda v. Arizona, supra,* as that case has been interpreted and applied in *State v. White,* 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); and *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971). We are constrained to agree.

In this jurisdiction, when a defendant challenges the admissibility of an in-custody confession, the trial judge must conduct a *voir dire* hearing to determine whether the confession

was voluntarily made and whether the requirements of the *Miranda* decision have been met. *See State v. Moore,* 275 N.C. 141, 166 S.E. 2d 53 (1969). When the trial judge concludes a *voir dire* hearing, the general rule is that he should make findings of fact to show the bases of his ruling. *See State v. Silver,* 286 N.C. 709, 213 S.E. 2d 247 (1975). However, when there is no conflict in the evidence on *voir dire,* we have held it is not error to admit a confession without making specific findings. Yet, at the same time, we have emphasized that it is always the better practice for the court to find the facts upon which the admissibility of the evidence depends. *State v. Whitley,* 288 N.C. 106, 215 S.E. 2d 568 (1975); *State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Lynch,* 279 N.C. 1, 181 S.E. 2d 561 (1971).

When there is no conflict in the testimony the necessary findings are implied from the court's admission of the confession into evidence. However, when the *voir dire* evidence is conflicting and contradictory, it is incumbent upon the trial judge to weigh the credibility of the witnesses, resolve the crucial conflicts, and make appropriate findings of fact. *State v. Smith,* 278 N.C. 36, 178 S.E. 2d 597 (1970). Because of his superior opportunity to observe the demeanor of the witness and to ferret out the truth, the trial judge is given the responsibility for resolving the factual disputes which govern the admissibility of challenged evidence. For the same reason, the trial judge's findings are conclusive on appeal if they are supported by competent evidence. *State v. Smith, supra.*

In *State v. Blackmon, supra,* the defendant was convicted of murder, partially upon the basis of his in-custody confession. Upon the *voir dire* to determine the competency of the confession the evidence as to whether the defendant had intelligently waived his right to the presence of counsel was conflicting. The trial judge made no findings of fact in this regard; but he did find that the defendant had been given the full *Miranda* warnings, that he understood his rights, and that the defendant had not requested the presence of an attorney. In granting the defendant a new trial, this Court said: "Although the evidence at the voir dire is ample to support a finding that the defendant made the statements in question freely and voluntarily, having been fully advised of and having full understanding of his right to have an attorney present, the plain language of the *Miranda* decision . . . in addition requires a waiver of right to counsel

knowingly and intelligently made by defendant. ' . . . [F]ailure to ask for a lawyer does not constitute a waiver.' " *State v. Blackmon, supra* at 49-50, 185 S.E. 2d at 128.

Subsequent opinions of this Court make it clear when the State seeks to offer in evidence a defendant's in-custody statements, made in response to police interrogation and in the absence of counsel, the State must affirmatively show not only that the defendant was fully informed of his rights but also that he knowingly and intelligently waived his right to counsel. *State v. White,* 288 N.C. 44, 215 S.E. 2d 557 (1975); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972). When the *voir dire* evidence regarding waiver of counsel is in conflict, the trial judge *must* resolve the dispute and make an express finding as to whether the defendant waived his constitutional right to have an attorney present during questioning.

In the present case the police officers testified that defendant waived his right to presence of counsel. Defendant testified that he did not. Under these circumstances it was incumbent upon the judge to make an express finding in this regard, and his failure to do so rendered the admission of defendant's inculpatory statements to Sheriff Toppin and Agent Godley erroneous. *See State v. Hudson,* 281 N.C. 100, 187 S.E. 2d 756 (1972). Upon this record we cannot say that the error complained of was harmless beyond a reasonable doubt. *Chapman v. California,* 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). Therefore, there must be a

New trial.

STATE OF NORTH CAROLINA v. WILLIAM CHRISTOPHER WILSON

No. 13

(Filed 6 April 1976)

1. Criminal Law § 166— abandonment of assignments of error

Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned. Rule 28, Rules of Appellate Procedure.

2. **Criminal Law § 66— in-court identification — pretrial motion to suppress — necessity for objection**

A pretrial motion to suppress identification testimony which the trial court has not heard and ordinarily will not hear until the testimony is offered at trial will not suffice to challenge the admissibility of in-court identification testimony, but defendant must make at least a general objection when such evidence is offered or request a *voir dire* to probe the competency of the proffered evidence for the trial judge to be required to conduct a *voir dire*, make findings of fact and determine whether the proffered testimony is admissible.

3. **Criminal Law § 66— lineup identification — in-court identification**

There is nothing in the record of this rape and burglary case suggesting that a pretrial lineup was conducted in an impermissibly suggestive manner or that the victim's in-court identification of defendant was otherwise tainted by out-of-court identification procedures.

4. **Criminal Law § 161— exception to judgment**

An exception to the judgment must fail if the judgment is within statutory limits and no fatal defect appears on the face of the record proper.

5. **Criminal Law § 157— record proper**

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

6. **Burglary and Unlawful Breakings § 1— burglary defined**

To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein; if the burglarized dwelling is occupied it is burglary in the first degree; if unoccupied, it is burglary in the second degree. G.S. 14-51.

7. **Burglary and Unlawful Breakings § 5— sufficiency of evidence of breaking**

There was sufficient evidence of a breaking, both actually and constructively, to support a conviction of first degree burglary where the State's evidence tended to show that defendant knocked on the victim's door and asked the victim to open the door, the victim "cracked" her door to see who was there, saw defendant's face and attempted to shut it, and defendant forcefully opened the door, knocking the victim down in doing so, entered the dwelling, and raped the victim.

DEFENDANT appeals from judgments of *Alvis, J.*, 28 July 1975 Session, FORSYTH Superior Court.

Defendant was tried upon separate bills of indictment, proper in form, charging him with first degree burglary and

second degree rape of Reba J. Smith on 5 November 1974 in Forsyth County.

On 18 July 1975 defendant filed a written motion to suppress all evidence of Reba J. Smith's identification of defendant, whether said identification was photographic, lineup or of defendant in person. On the same date defendant filed a second motion to suppress certain "black and white pictures depicting the defendant in a state of emotional distress." These and other motions came to the attention of the trial judge in chambers. He disposed of the other motions and stated he would, during the course of the trial, deal with the motions to suppress identification of defendant and to suppress certain photographs defendant believed the prosecution would offer in evidence.

The State offered evidence tending to show that Reba J. Smith, a school teacher with five years' experience, lived in her own home at 6215 Brewer Avenue in the Town of Clemmons. On 2 November 1974 she was trimming her shrubbery in the front yard. Defendant drove by and waved at her. Without recognizing the person but thinking it was one of her neighbors, she waved back. The driver of the small white car turned it around and passed in front of Miss Smith's house a second time. This time, although she saw it, she didn't acknowledge the presence of the car. It continued to the intersection of Brewer Avenue with James Street where the driver again turned around, drove to Miss Smith's house and pulled into her yard. Although Miss Smith had only one arm, she continued to clip her shrubbery. Defendant asked why her husband wasn't trimming the shrubbery. She became suspicious and asked if he were a policeman. At first defendant said he was a policeman but later contradicted that statement. Defendant asked if he could help her. She had not requested help and answered in the negative. She did not know defendant and had never seen him before that date. Defendant remained in her presence for about fifteen minutes and repeatedly offered to help her. Miss Smith observed defendant's facial features, noticed the gaps in his teeth, and noted that he was wearing a white formless hat and a blue blazer jacket. Finally, not wanting to be rude but desiring to dismiss him from her presence, Miss Smith told him she had a date that night and had to start getting dressed for the evening. Defendant said, "Well, I'll see you later, baby," and drove away in his small white car.

Two days later, on the evening of 4 November 1974, Miss Smith had retired for the night. In the early morning hours of 5 November 1974, around 2 a.m., Miss Smith was awakened by a knock at her front door. She turned on the bedroom lamp, made her way to the front door, and asked who was there. The response was, "It's me." She again asked, "Who is there?" and the response was "Open the door, it's me." Miss Smith then turned on the porch light and intended to crack the door to see who was there. Without knowing whether the storm door was latched from the inside, she cracked the door, saw defendant's face, and attempted to shut it. However, defendant instantly "slammed it open on me, pushing me down into the floor."

Miss Smith screamed and fought desperately despite the fact she had only one arm. When she kept screaming defendant punched her in the mouth and nose with his fist and she tasted blood. She grabbed him by the mouth and scratched his face. One of her fingers slipped inside his mouth and he bit it through the knuckle. Although she continued to fight and scream, defendant pinned her down and by superior force completed the rape. After defendant left she ran to the window and saw a small white car drive away. She ran to a nearby neighbor's house, told them what had happened, and officers were summoned. Miss Smith testified: "I have no doubt that the defendant is the one that raped me on the 5th day of November 1974. I will never forget his face as long as I live."

The State offered further evidence tending to show that defendant did not report for work at his place of employment on 5 November 1974 and when he did report for work he had a patch on his face.

Defendant testified as a witness in his own behalf. He said he saw Reba J. Smith clipping shrubbery at her home on Saturday, 2 November 1974. He thought she waved at him so he turned around and stopped at her house. He said he told her that her husband ought to be doing that type of work and she replied, "I don't have no husband." When she declined his offer to help, he drove away. He testified he never saw her on Tuesday, 5 November 1974 and denied that he ever had sexual intercourse with her. He stated unequivocally that he did not break into her house on the night in question and neither raped nor assaulted her. He said that on the night of 5 November 1974 he was with his girl friend Shirley Gregory at her home; that she kept nagging him about getting married, they called each

other names, and in the fuss which ensued she scratched his face and neck rather badly. Then, a little after midnight they had sexual relations on the couch and he went to sleep. Shirley awakened him about 1:30 a.m. and he went home. He testified that he and Shirley had since married on 1 April 1975.

Shirley Gregory's testimony corroborates the defendant. His parents testified that he arrived home that night at about 1:45 a.m. Defendant offered numerous witnesses who testified to his good character and reputation in the community where he lived.

The jury convicted defendant of first degree burglary and second degree rape. Sentences of life imprisonment for the burglary and sixty years for the rape were pronounced. Defendant appealed directly to the Supreme Court in the burglary case, and we certified his rape conviction to this Court to the end that both cases receive initial appellate review by the same court.

Laurel O. Boyles, attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; James E. Magner, Assistant Attorney General; Cynthia Jean Zeliff, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] Questions raised by assignments of error but not presented and discussed in a party's brief are deemed abandoned. Rule 28, Rules of Appellate Procedure. In this case the record on appeal contains seven assignments of error but only Nos. 2 and 7 are discussed in defendant's brief. Under the cited rule all other assignments are deemed abandoned.

[2] Defendant's pretrial motion to suppress the testimony of Reba J. Smith identifying defendant as the burglar and rapist was based on the ground that she had seen pictures taken of defendant by the police and her identification was based on her memory of him from the pictures rather than on her memory of him from the events which occurred in the early morning hours of 5 November 1974 in her home. This motion was brought to the attention of the trial judge when the case was called. The judge stated he would deal with that motion during the course of the trial. Thereafter, defendant was arraigned and pled not guilty in each case. Reba J. Smith was called as the first witness for the State. In her testimony on direct examination, covering fourteen pages of the record, she positively identi-

fied defendant as the man who stopped in her yard on 2 November 1974 and thereafter forced his way into her home and raped her on 5 November 1974. After describing the assault upon her, she said: "I have no doubt that the defendant is the one that raped me on the 5th day of November 1974. I will never forget his face as long as I live." She was then cross-examined and much of the cross-examination tended to challenge her identification testimony. No objection to her in-court identification of defendant was ever interposed and no request was ever made for a voir dire examination of the witness. As a result the trial judge conducted no voir dire, found no facts, and never ruled on the pretrial motion to suppress Miss Smith's in-court identification of defendant. Defendant assigns these omissions by the trial judge as prejudicial error requiring a new trial.

Under the circumstances narrated above, no ruling on the pretrial motion to suppress was required. "When the State offers a witness whose testimony tends to identify the defendant as the person who committed the crime charged in the indictment, and the defendant interposes timely objection and requests a *voir dire* or asks for an opportunity to 'qualify' the witness, such *voir dire* should be conducted in the absence of the jury and the competency of the evidence evaluated. Upon such hearing, if the in-court identificaton by a witness is challenged on the ground it is tainted by an unlawful out-of-court photographic or corporeal identification, all relevant facts should be elicited and all factual questions determined, including those involving the defendant's constitutional rights, pertinent to the admissibility of the proffered evidence." *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970).

We said in *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972); "In the present case, as above noted, there was no objection to the initial in-court identification of the defendant by this witness and there was no request for a voir dire. This assignment is without merit." So it is here.

The rule requiring timely objection to in-court identification testimony is further sustained by the following language from *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975):

> "Similarly, there is no merit to the argument that the trial court erred in admitting *without a voir dire examination* the testimony of this witness concerning Mrs. Ferguson's identification of a photograph of defendant prior to

trial. Mrs. Ferguson on direct examination had already made an in-court identification of defendant and on cross-examination she gave explicit testimony of the pretrial identification, all without objection or a request for a voir dire examination. Moreover, there is nothing whatever in the record suggesting this pretrial procedure was conducted in an impermissibly suggestive manner. Under these circumstances a voir dire examination was not necessary, especially since one was not requested at the time objection was made to the testimony of Detective Moore."

It does not suffice merely to file a pretrial motion to suppress evidence which the trial judge has not heard and ordinarily will not hear until it is offered at trial. To challenge the admissibility of in-court testimony defendant is required to interpose at least a general objection when such evidence is offered. *State v. Haskins,* 278 N.C. 52, 178 S.E. 2d 610 (1971). Absent such objection or a request for a voir dire to probe the competency of the proffered evidence, the trial judge is not required to conduct a voir dire, make findings of fact and determine whether the proffered testimony meets the test of admissibility. An objection to the admission of evidence is necessary to present defendant's contention that the evidence was incompetent. *State v. Camp,* 266 N.C. 626, 146 S.E. 2d 643 (1966). "Failure to object in apt time to incompetent testimony results in a waiver of objection so that admission of the evidence will not be reviewed on appeal unless the evidence is forbidden by statute or results from questions asked by the trial judge or a juror." *State v. Blackwell,* 276 N.C. 714, 174 S.E. 2d 534, *cert. denied* 400 U.S. 946, 27 L.Ed. 2d 252, 91 S.Ct. 253 (1970). *See* 1 Stansbury's North Carolina Evidence, § 27 (Brandis rev. 1973).

[3] Even so, we have carefully examined the record to ascertain whether any pretrial identification procedure was conducted in an impermissibly suggestive manner. We find nothing prejudicial. Miss Smith described defendant to the police immediately after she was raped. She told the officers that the black man who drove into her yard on 2 November 1974 was the same man who invaded her home at 2 a.m. on 5 November 1974 and raped her. She said he was about 5 feet 8 to 9 inches tall, weighed 140 to 150 pounds, was in his early twenties, had a gap between his two front teeth, wore a white formless hat and was driving a small white car. She stated that she could definitely identify him when she saw him.

Defendant requested a lineup after he was taken into custody, and Miss Smith viewed the lineup composed of six black men, each holding a number from one to six. Defendant was permitted to choose his position in the line and to choose the number he would hold. Miss Smith immediately identified defendant as her assailant. There is nothing in the record whatsoever suggesting that the lineup was conducted in an impermissibly suggestive manner or that Miss Smith's in-court identification of defendant was otherwise tainted by out-of-court identification procedures.

There is no merit in this assignment of error and it is overruled.

Defendant contends the trial court erred in signing and entering the judgments appearing of record. This constitutes the seventh and final assignment discussed in his brief.

[4, 5] An exception to the judgment must fail if the judgment is within statutory limits and no fatal defect appears on the face of the record proper. *State v. Cox,* 281 N.C. 131, 187 S.E. 2d 785 (1972); *State v. Elliott,* 269 N.C. 683, 153 S.E. 2d 330 (1967). Ordinarily, the record proper in criminal cases consists of the organization of the court, the charge contained in the information, warrant or indictment, the arraignment and plea, the verdict and the judgment. *State v. McClain,* 282 N.C. 357, 193 S.E. 2d 108 (1972); *State v. Tinsley,* 279 N.C. 482, 183 S.E. 2d 669 (1971).

The record discloses that the indictments are proper in form, the verdicts were properly returned and the judgments are within statutory limits. G.S. 14-21; G.S. 14-52. Moreover, we note parenthetically that the verdicts and judgments are supported by the evidence.

[6] To warrant a conviction for burglary the State's evidence must show that there was a breaking and entering during the nighttime of a dwelling or sleeping apartment with intent to commit a felony therein. *State v. Mumford,* 227 N.C. 132, 41 S.E. 2d 201 (1947). If the burglarized dwelling is occupied it is burglary in the first degree; if unoccupied, it is burglary in the second degree. G.S. 14-51; *State v. Frank,* 284 N.C. 137, 200 S.E. 2d 169 (1973); *State v. Allen,* 279 N.C. 115, 181 S.E. 2d 453 (1971).

[7] A "breaking" is an essential element of the crime of first degree burglary. Defendant's entry was accomplished by a

"breaking" notwithstanding the fact that the prosecuting witness "cracked" her door to see who was there. "If any force at all is employed to effect an entrance through any usual or unusual place of ingress, whether open, partly open, or closed, there is a breaking sufficient in law to constitute burglary, if the other elements of the offense are present." 13 Am. Jur. 2d, Burglary § 8 (1964). *See People v. White,* 153 Mich. 617, 117 N.W. 161 (1908). "We think, . . . that to hold that the opening of a door or window which is closed but not fastened is sufficient evidence of breaking, but that the further opening of a door or window partly open, in order to gain an entrance is not sufficient evidence, is a useless refinement." *Goins v. State,* 90 Ohio St. 176, 107 N.E. 335 (1914). We concur, especially in the factual context of this case where entrance was obtained by the use of force and violence.

A breaking may be actual or constructive. In *State v. Rodgers,* 216 N.C. 572, 5 S.E. 2d 831 (1939), defendants challenged the sufficiency of the evidence to sustain a verdict of burglary in the second degree, contending there was no "breaking" as is required in burglary. The evidence disclosed that defendants encountered the owner of a dwelling house immediately outside the house in the nighttime, marched him into the house at the point of a gun and stole money which was hidden therein. Held: The evidence was properly submitted to the jury on the theory of a constructive breaking. *Accord, State v. Foster,* 129 N.C. 704, 40 S.E. 209 (1901).

"Constructive breaking, as distinguished from actual forcible breaking, may be classed under the following heads:

"1. When entrance is obtained by threats, as if the felon threatens to set fire to the house unless the door is opened.

"2. When, in consequence of violence commenced, or threatened in order to obtain entrance, the owner, with a view more effectually to repel it, opens the door and sallies out, and the felon enters.

"3. When entrance is obtained by procuring the servants or some inmate to remove the fastening.

"4. When some process of law is fraudulently resorted to for the purpose of obtaining an entrance.

"5. When some trick is resorted to to induce the owner to remove the fastening and open the door, and the felon enters;

as, if one knocks at the door, under pretense of business, or counterfeits the voice of a friend, and, the door being opened, enters.

"In all these cases, although there is no *actual breaking*, there is a breaking in law or by construction; 'for the law will not endure to have its justice defrauded by such evasions.' In all other cases, when no fraud or conspiracy is made use of or violence commenced or threatened *in order to obtain an entrance*, there must be an actual breach of some part of the house." *State v. Henry*, 31 N.C. 463 (1849).

In light of the foregoing principles, we conclude that the evidence is sufficient to support a finding that defendant did, both actually *and* constructively, break and enter the occupied dwelling of Reba J. Smith during the nighttime with intent to commit a felony therein.

The sufficiency of the evidence to support the judgment in the rape case is beyond question and requires no discussion.

Since no error appears on the face of the record proper, the judgments will be sustained. *State v. Bumgarner*, 283 N.C. 388, 196 S.E. 2d 210 (1973); *State v. Williams*, 268 N.C. 295, 150 S.E. 2d 447 (1966). Evidence of defendant's guilt is overwhelming.

In the trial, verdicts and judgments we find

No error.

STATE OF NORTH CAROLINA v. MICHAEL COUSINS

No. 31

(Filed 6 April 1976)

1. Criminal Law § 99— admonition to defense counsel — no expression of opinion

The trial judge's admonition to defense counsel in the presence of the jury to refer to his client as defendant or as Michael Cousins rather than Michael was made to preserve the trial judge's conception of dignity and decorum in the courtroom and did not constitute an expression of opinion or a display of partiality toward either defendant or the State.

2. **Criminal Law § 87; Witnesses § 1— concessions to State's witness — failure to notify defense counsel — suppression of testimony**

Although the district attorney failed to notify defense counsel of an agreement to grant a State's witness concessions in return for truthful testimony as required by G.S. 15A-1054, his failure to do so did not warrant suppression of the witness's testimony since the statute provides that the remedy for such omission shall be the granting of a recess when the interest of justice requires and the trial judge did grant a recess, and since the record shows that defense counsel had knowledge of the agreement for over three weeks.

3. **Criminal Law § 87; Witnesses § 1— concessions to State's witness — informing jury**

Trial court's refusal to inform the jury prior to a witness's testimony that the district attorney had agreed to grant concessions to the witness in return for his testimony was not prejudicial error where the jury was fully informed of the agreement prior to the time it began deliberations.

4. **Homicide § 20— pistol — adequacy of identification — relevancy**

A pistol was sufficiently identified for its admission in a homicide prosecution where an officer testified it looked like the one he found lying some 20 feet from the body of deceased and the evidence showed the pistol had been in the custody of the police since the night of the shooting; furthermore, the pistol was relevant to contradict defendant's contention that deceased shot at him with a pistol before he fired where an officer testified the gun had not been recently fired when it was found at the crime scene.

5. **Homicide § 20; Criminal Law § 50— tag on pistol — notation that gun found at "murder scene"**

In a homicide prosecution, admission of a tag attached to a pistol previously admitted in evidence which stated that the gun was found at the "murder scene" near the body of deceased, if technically improper, did not constitute prejudicial error.

6. **Criminal Law § 102— jury argument — discrepancy from evidence — action by court**

In a homicide prosecution in which defendant admitted on cross-examination that he had been convicted of assault growing out of an incident in which he fired a sawed-off shotgun at a person three times, the district attorney's jury argument that defendant admitted "that he pumped three shotgun shells into another man" was not so inflammatory or so far outside the record so as to require further action by the trial judge after he directed the district attorney to move on to other matters.

7. **Homicide § 27— incorrect instructions on voluntary manslaughter**

The trial court in this homicide prosecution committed prejudicial error in twice incorrectly instructing the jury that in order to convict defendant of voluntary manslaughter it must find that defendant did not act in the heat of passion, did not act upon adequate provocation, and that the killing occurred sufficiently long after the provocation that the passion of a person of average mind and disposition would

have cooled, notwithstanding the court properly defined voluntary manslaughter in another portion of the charge.

APPEAL by defendant from *Canaday, J.*, 29 September 1975 Session of ORANGE Superior Court.

Defendant was charged in an indictment, regular in form, with the first-degree murder of Issac Ray. He entered a plea of not guilty.

The State's evidence tended to show the following:

On the night of 2 March and the early morning hours of 3 March 1975, defendant and Issac Ray were at a night spot known as the Duces Wild. This place was located at 226 Colby Street in Hillsborough, North Carolina, and was operated by Harvin McAdoo. We will hereafter refer to this establishment as McAdoo's place. After some altercations between defendant and Ray, defendant asked Melvin Robinson if he had a gun. At defendant's request, Robinson went to his home where he obtained a .22 caliber automatic rifle fully loaded with high powered, hollow-point bullets. Defendant told Robinson that he (defendant) was going to "get Issac Ray." Upon returning to McAdoo's place defendant jumped out of Robinson's car, picked up the rifle, and started toward the men's room. Robinson testified that he saw defendant and Ray engage in a conversation which included profanity and a statement by defendant to Ray to the effect that "I am going to get you." According to Robinson, defendant pointed the rifle toward Ray who fell to the ground after defendant fired seven shots. Robinson saw Ray try to get a pistol out of his pocket at the time defendant fired the rifle. Defendant then ran back to the car and Robinson took him home.

Dr. Paige Hudson, a pathologist, testified that he performed an autopsy on the body of Issac Ray and observed nine entrance wounds caused by small caliber bullets. In his opinion, Issac Ray died of multiple gunshot wounds.

Officer Albert and Deputy Sheriff Mickey Sykes gave testimony which tended to show that, pursuant to a call, Officer Albert went to McAdoo's place where he observed the body of Issac Ray lying on the ground. He found a pistol about twenty feet from Ray's body and he gave the pistol to Officer Sykes.

The State offered other corroborative and cumulative evidence.

Defendant testified and in substance stated that while he was in the bathroom at McAdoo's place around midnight on the 2nd day of March 1975, Issac Ray came in, cursed him, tore his shirt and tried to cut him with a knife. Defendant later asked Ray to pay for his shirt and at that time Ray pulled a pistol and threatened defendant. Defendant stated that he then went with Melvin Robinson to Robinson's home where they obtained a .22 caliber rifle. Upon returning to McAdoo's place, he saw Ray standing near the men's room. He testified that Ray pulled a pistol and shot toward him and when he returned the fire Ray fell. Defendant left with Robinson.

Defendant offered other witnesses whose testimony tended to corroborate his testimony.

The jury returned a verdict of murder in the second degree and defendant appealed from judgment imposing a sentence of life imprisonment.

Attorney General Rufus L. Edmisten, by Special Deputy Attorney General William F. O'Connell, for the State.

Barry T. Winston for defendant appellant.

BRANCH, Justice.

[1] We find no merit in defendant's contention that the trial judge committed prejudicial error by directing defense counsel in the presence of the jury to refer to his client as defendant or as Michael Cousins rather than Michael. Obviously the trial judge's admonition to defense counsel was made in order to preserve the trial judge's conception of dignity and decorum in the courtroom. The remarks made by the trial judge did not express an opinion or display any partiality toward either defendant or the State. Under these circumstances, defendant has failed to show that the trial judge's admonition had any probable effect upon the jury's verdict. *State v. Gibson,* 233 N.C. 691, 65 S.E. 2d 508; *State v. Carter,* 233 N.C. 581, 65 S.E. 2d 9.

[2] Defendant next assigns as error the failure of the trial judge to grant his motion to suppress the testimony of Melvin Robinson because the district attorney failed to give notice to defense counsel of an agreement with Melvin Robinson to give him concessions in return for truthful testimony. Defendant also argues that the trial judge committed prejudicial error in deny-

ing his motion to inform the jury of this agreement prior to the time when the witness Robinson testified.

G.S. 15A-1054 contains the following provisions:

> (a) Whether or not a grant of immunity is conferred under this Article, a solicitor, when the interest of justice requires, may exercise his discretion not to try any suspect for offenses believed to have been committed within the judicial district, to agree to charge reductions, or to agree to recommend sentence concessions, upon the understanding or agreement that the suspect will provide truthful testimony in one or more criminal proceedings.
>
> * * *
>
> (c) When a solicitor enters into any arrangement authorized by this section, written notice fully disclosing the terms of the arrangement must be provided to defense counsel, or to the defendant if not represented by counsel, against whom such testimony is to be offered, a reasonable time prior to any proceeding in which the person with whom the arrangement is made is expected to testify. Upon motion of the defendant or his counsel on grounds of surprise or for other good cause or when the interests of justice require, the court must grant a recess.

This record discloses that the district attorney did fail to notify defense counsel of the agreement as directed by the above-quoted statute. Although the district attorney should have disclosed the existence and terms of this agreement to defense counsel, his failure to do so did not warrant suppression of Melvin Robinson's testimony. The statute provides that the remedy for such omission shall be the granting of a recess when the interest of justice so requires. Here the trial judge did grant a recess and defense counsel did not take exception to the length of time granted. There was no possible prejudice to defendant on the ground of surprise since the record shows that defense counsel had known of this agreement for over three weeks.

We hold that the trial judge correctly denied defendant's motion to suppress the testimony of Melvin Robinson.

[3] Neither do we find prejudicial error in the trial judge's refusal to inform the jury of the agreement prior to the time that Robinson testified. After Robinson testified, the prosecution

introduced the agreement into evidence. Judge Canaday instructed the jury that Robinson was testifying pursuant to an agreement with the State and if the jury should find that the witness testified in whole or in part because of such agreement, the jury should examine his testimony with great care and caution. Defense counsel also cross-examined the witness Robinson concerning promises made to him. Thus it appears that the jury was fully informed of the agreement between the district attorney and the witness Robinson prior to the time it began deliberations.

[4] Defendant contends that the court erred by admitting into evidence a pistol identified as State's Exhibit 15.

It is well established that any object which has a relevant connection with a case is ordinarily admissible into evidence. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *rev'd in part on other grounds*, 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292; *State v. Harris*, 222 N.C. 157, 22 S.E. 2d 229.

In *State v. Macklin*, 210 N.C. 496, 187 S.E. 785, this Court held that a shotgun found in the defendant's room several days after the alleged shooting which was described as "like the one with which he had been seen on the night the deceased was shot" was admissible into evidence. In *State v. Winford*, 279 N.C. 58, 181 S.E. 2d 423, we approved the admission into evidence of a small knife found on the deceased on the theory that it contradicted defendant's statement that deceased was attacking him with a long-bladed knife at the time of the killing. In instant case, Officer Albert testified, without objection, that he found a pistol lying about twenty feet from the body of Issac Ray and that he turned this weapon over to Deputy Sheriff Mickey Sykes. Albert testified that the pistol looked like the one he found on the night of the shooting. Deputy Sheriff Sykes testified, without objection, that he had seen the pistol identified as State's Exhibit 15 before and that Officer Albert handed it to him on the scene. He further stated that the gun had not been recently fired when he received it from Officer Albert. The unfired pistol, Exhibit 15, was found near the body of deceased and is relevant evidence in light of defendant's contention that deceased shot at him with a pistol before he ever fired. The evidence further shows that this pistol had been in the custody of police officers since the night of the killing. It must be borne in mind that the pistol was not used in an experiment and whether it was in the same condition at the

time that it was found is of little moment. In our opinion, State's Exhibit 15 was relevant evidence and was amply identified. We, therefore, hold that the trial judge correctly admitted the pistol into evidence.

[5] Defendant also assigns as error the court's ruling admitting into evidence Exhibit 16 which was a tag attached to the pistol, State's Exhibit 15. The tag contained the following language: "Gun found at murder scene, near body of Isaac Ray. s/ Nickey Syke, 3-2-75."

Before this exhibit was admitted into evidence, Deputy Sheriff Mickey Sykes had testified that Exhibit 16 was the tag he used to label the pistol Exhibit 15. He further testified that the words contained on Exhibit 15 were in his handwriting. Prior to Sheriff Sykes' testimony, Officer Albert had testified that he found the pistol near the body of Isaac Ray. Assuming, *arguendo,* that the admission of Exhibit 16 was technically improper we hold that under the above-recited circumstances, defendant has failed to show any prejudice or to show that the jury would likely have reached a different result had this evidence been excluded. *State v. Temple,* 269 N.C. 57, 152 S.E. 2d 206; *State v. Rowland,* 263 N.C. 353, 139 S.E. 2d 661. This assignment of error is overruled.

[6] Defendant contends that the trial judge erred in failing to declare a mistrial and in failing to properly instruct the jury concerning the district attorney's references to a prior conviction during final argument to the jury.

On cross-examination, defendant testified:

> . . . Yes, sir, I was convicted of assaulting Mr. Samuel Lee Powell with a sawed-off shotgun in 1973. No, I shot a shotgun at him. Yes, sir, I shot a shotgun at Mr. Powell three times. I was convicted of it then. . . .

During his closing argument, the district attorney referred to this conviction in the following manner:

> . . . Are you going to believe a man who in 1973 admits now that he pumped three shotgun shells into another man and pled guilty to assault with a deadly weapon? . . .

At this point, defense counsel called to the court's attention that there was no evidence that "anybody pumped any shots into anybody else."

The court then said: "All right, sir, proceed to some other points of argument."

We have long recognized that argument of counsel must be left largely in the discretion of the trial judge and that counsel are entitled to a wide latitude in argument during a hotly contested case. *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572, *rev'd in part on other grounds,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873; *State v. Bowen,* 230 N.C. 710, 55 S.E. 2d 466; *State v. Little,* 228 N.C. 417, 45 S.E. 2d 542. Nevertheless counsel may not by his argument place before the jury incompetent and prejudicial matter not admissible into evidence, and he may not "travel outside the record." *State v. Westbrook, supra; State v. Little, supra.*

In instant case, defendant admitted that he had been convicted of an assault growing out of an incident in which he fired a sawed-off shotgun at a person three times. The evidence concerning this conviction was competent. True the district attorney's language was more colorful than the actual evidence and the actual evidence did not reveal whether the person fired upon was hit. However, defendant's animus must have been the same in either event. The discrepancy between the evidence and the district attorney's argument was promptly brought to the attention of the court who directed the district attorney to move on to other matters.

We do not believe that the district attorney used such inflammatory language or "traveled outside the record" in such a manner as to demand further action by the trial judge.

This assignment of error is overruled.

[7] Defendant by his final assignment of error contends that the trial judge erred in his charge on voluntary manslaughter.

In the first portion of the charge relating to voluntary manslaughter, the trial judge correctly instructed as follows:

> . . . Now, with respect to the offense of voluntary manslaughter, I instruct you that voluntary manslaughter is an intentional killing which occurs in the heat of passion, produced by acts of adequate provocation on the part of the decedant (sic), which killing occurs so soon after the provocation that the passions of a person of average mind and disposition would not have cooled. . . .

State v. Rummage, 280 N.C. 51, 185 S.E. 2d 221; *State v. Watson,* 222 N.C. 672, 24 S.E. 2d 540.

However, just prior to his final mandate to the jury as to voluntary manslaughter, the trial judge instructed:

> Now, in order to convict the defendant of voluntary manslaughter, the State must satisfy you from the evidence, beyond a reasonable doubt, that the defendant intentionally killed the decedant (sic), and further, *that the defendant did not act in the heat of passion, and further, that the defendant did not act upon adequate provocation, and further, that the killing occurred sufficiently long after the occurence* (sic) *of such provocations may have existed, that the passion of a person of average mind and disposition would have cooled.* (Emphasis ours.)

Immediately thereafter the court, in applying the law to the facts and in its final mandate on the charge of voluntary manslaughter, charged:

> So with respect to the offense of voluntary manslaughter, Ladies and Gentlemen, I instruct you that if the State has satisfied you from the evidence, beyond a reasonable doubt, the burden here again being upon the State to do so, that on March 2, 1975 or March 2, 1975 (sic), the defendant, Michael Cousins, intentionally and without justification or excuse shot Isaac (sic) Ray, and that the defendant, *Michael Cousins, did not act in the heat of passion, and that the defendant, Michael Cousins, did not act upon adequate provocation from the decedant* (sic), *Isaac* (sic) *Ray, and that the shooting and killing of Isaac* (sic) *Ray by the defendant, Michael Cousins, occurred sufficiently long after the occurrence of such provocation as may have existed, that the passion of a person of average mind and disposition would have cooled,* it would be your duty, if the State has so satisfied you in each of these respects, to return a verdict of guilty of voluntary manslaughter. (Emphasis added.)

Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393; *State v. Benge,* 272 N.C. 261, 158 S.E. 2d 70.

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation.

State v. Duboise, supra; State v. Winford, 279 N.C. 58, 181 S.E. 2d 423; *State v. Foust,* 258 N.C. 453, 128 S.E. 2d 889.

This Court has defined malice as not only hatred, ill will, or spite but also "that condition of mind which prompts a person to take the life of another *intentionally without cause or excuse, or justification.*" *State v. Benson,* 183 N.C. 795, 111 S.E. 869.

It is well established by our decisions that when the court charges correctly at one point and incorrectly at another, a new trial is necessary because the jury may have acted upon the incorrect part, and this is particularly so when the incorrect portion of the charge is contained in the application of the law to the facts. *State v. Parrish,* 275 N.C. 69, 165 S.E. 2d 230; *State v. Ingland,* 278 N.C. 42, 178 S.E. 2d 577; *State v. Kea,* 256 N.C. 492, 124 S.E. 2d 174; *State v. Gurley,* 253 N.C. 55, 116 S.E. 2d 143; *State v. Johnson,* 227 N.C. 587, 42 S.E. 2d 685.

The State, citing *State v. Cole,* 280 N.C. 398, 185 S.E. 2d 833, and *State v. Sanders,* 280 N.C. 81, 185 S.E. 2d 158, contends that this was a *lapsus linguae* on the part of the trial judge which does not necessitate a reversal.

In *Sanders* the trial judge instructed that the defendant entered the building "with the consent of the owner" rather than "without the consent of the owner." The Court, noting that there was no evidence of consent by the owner and that it was apparent that the jury could not have misunderstood the court's language, held the language to be a harmless inadvertence. Thus, *Sanders* differs from the case before us in that in *Sanders* it must have been apparent to the jury that there was an inadvertent slip of tongue on the part of the trial judge. Here the trial judge twice and at crucial times in the charge gave an incorrect instruction as to the law and related it to the evidence in a manner which would not disclose patent error to the average juror.

In *Cole* the court instructed that second-degree murder was the intentional killing of a human being without malice and without premeditation and deliberation. However, the trial judge immediately after making the incorrect instruction stated that malice was a necessary element of second-degree murder and again at the conclusion of his charge reminded the jury of the corrected definition of second-degree murder. There, our

Court held that the trial judge's proper and repeated instructions amply corrected any harmful effect of this *lapsus linguae.* The case *sub judice* differs from *Cole* in that the trial judge did not at any time correct the erroneous portion of the charge.

State v. Kea, supra, is extraordinarily similar to instant case. There the defendant was charged with first-degree murder and the solicitor elected to "seek no greater verdict than that of murder in the second degree." The jury returned a verdict of murder in the second degree. Defendant appealed assigning as error, *inter alia,* this portion of the charge:

> . . . "Manslaughter is the unlawful killing of a human being *with malice* but without premeditation and deliberation, as I have said to you, and is of two kinds, voluntary and involuntary. Voluntary manslaughter, as I have said, is the unlawful killing of a human being *with malice* but without premeditation and deliberation." . . .

In ordering a new trial, this Court stated:

> The challenged instruction contains obvious error. Manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. The unlawful killing of a human being with malice, but without premeditation and deliberation, is murder in the second degree.
>
> The court, in an earlier instruction, had given the correct definition of manslaughter. Defendant contended, if guilty at all, he was guilty of no greater crime than manslaughter. The failure, by reason of the conflicting instructions, to draw clearly and accurately the distinction between murder in the second degree and manslaughter must be held sufficiently prejudicial to entitle defendant to a new trial.

It is just as obvious this was a *lapsus linguae* on the part of the able trial judge or an error in transcription of the record since the judge had previously correctly charged on voluntary manslaughter. Nevertheless, we are bound by the record and the record discloses prejudicial error in this portion of the charge.

Finally, the fact that defendant was convicted of murder in the second degree does not render the error harmless. *State v. Kea, supra; State v. DeGraffenreid,* 223 N.C. 461, 27 S.E.

2d 130; *State v. Freeman*, 275 N.C. 662, 170 S.E. 2d 461 (dictum).

Prejudicial error in the charge requires that there be a New trial.

STATE OF NORTH CAROLINA v. WILLARD WARREN, JR.

No. 14

(Filed 6 April 1976)

1. **Criminal Law §§ 89, 146— improper corroborative evidence — failure to object at trial — new trial awarded on appeal**

Defendant in a first degree murder prosecution is entitled to a new trial since the trial court erred in allowing corroborative testimony by a witness which was actually additional and contradictory to the testimony it was intended to corroborate, and the Supreme Court could take cognizance of the error *ex mero motu* in the absence of objection by defendant's counsel at trial, since this is a capital case.

2. **Homicide § 21— murder in perpetration of robbery — sufficiency of evidence**

Evidence was sufficient to go to the jury on the charge of murder in the first degree, a murder committed in the perpetration of a robbery, where such evidence tended to show that the victim died of multiple injuries inflicted by both blunt and sharp objects, defendant admitted that he and his brother had a 2 x 4 piece of lumber and a knife when they decided to rob their victim, that the victim "bucked up on them," and that they took $18.36 from the victim, cleaned their hands when they were through and went to meet their companion before he returned to the scene of the crime.

3. **Constitutional Law § 36; Homicide § 31— first degree murder — death penalty — no cruel and unusual punishment**

Imposition of the death penalty upon a conviction of first degree murder does not result in cruel and unusual punishment.

APPEAL by defendant pursuant to G.S. 7A-27(a) from *Thornburg, J.*, at the 7 July 1975 Session of HAYWOOD Superior Court.

On an indictment, proper in form, defendant was charged with the first degree murder of Leo Jack Clark. The jury found defendant guilty as charged and a sentence of death was imposed.

The State offered evidence tending to show the following: Leo Jack Clark was a resident of a rest home in Waynesville, North Carolina. On 4 February 1975, Clark ate lunch at the rest home and then left for town around 1:00 p.m. with about $18.00 in his possession. When Clark failed to return for the evening meal, normally served between 4:00 and 5:00 p.m., Mary L. Caldwell, the operator of the rest home, notified the police. Clark's body was found on the morning of 5 February 1975 inside the abandoned Pure Oil bulk plant near the railroad tracks in Waynesville. The floor of the building was littered with debris, papers, and dirt, and there was blood on the littered paper and the wall. The victim's wallet was empty.

Dr. Robert S. Boatwright, an expert in pathology, examined the body and found numerous injuries, including abrasions about the head, a broken jaw, broken teeth, fractures of the right wrist and left lower leg, a broken finger on the left hand, surface wounds on the chest, and internal injuries. Clark died as the result of these multiple injuries.

Further evidence for the State tended to show that the deceased had been seen by Cathy Trummell, an employee of the rest home, between 3:00 and 4:00 p.m. on 4 February on the street between the bulk plant and the rest home, walking toward the rest home. Barbara Mercer saw defendant talking to Reeves Webb on the street around 2:45 p.m. on 4 February. Defendant, his brother Harold, and Reeves Webb later came to Barbara Mercer's house and drank some wine. Her son took defendant home around 4:00 p.m. Verlin Stewart saw defendant on the gravel road leading to the bulk plant at approximately 4:10 p.m. Reeves Webb met defendant, defendant's brother and Clark near the railroad tracks on the afternoon of 4 February. Clark gave Webb money to get more wine from the A & P Store. When Webb returned with the wine, he met defendant and his brother walking up the street from the general direction of the bulk plant but Clark was not with them. Webb then walked home, arriving there around 4:00 p.m.

Curtis Boyd Wyatt was arrested on 17 February 1975 on breaking and entering charges and incarcerated in the Haywood County Jail. While in jail on 25 February 1975, he met defendant who had been arrested for public drunkenness. Defendant told Wyatt that he met Reeves Webb and Clark coming down the railroad tracks and drank wine with them in an old building until the wine ran out. Defendant then stated that the de-

ceased gave Reeves Webb a dollar to go to the A & P for some more wine. While Webb was gone, defendant and his brother Harold decided to rob the deceased but he "bucked up," and at the time Harold had a 2 x 4 and defendant had a knife. Defendant further stated that they took $18.36 from the deceased and that after they got through, they cleaned their hands and decided to meet Webb up the street before he returned with the wine. Wyatt repeated the story to SBI Agent Dan Crawford, and defendant was arrested on 27 February 1975.

Defendant offered evidence tending to show: SBI Agent Dennis J. Mooney performed fingerprint comparisons on the evidence gathered from the scene of the crime. Five identifiable fingerprints were found, four being identified as those of the deceased and one remaining unidentified. No prints of the defendant or his brother were located.

Ernest Fisher was at the courthouse on 4 February 1975 applying for a job with the sheriff's department. He gave defendant a ride home around 2:00 or 2:30 p.m. and let him out in front of his house. Mrs. Ida Warren, defendant's mother, got off work at 3:30 p.m. on 4 February and went directly home, arriving at 3:45 p.m. At that time defendant was in bed asleep and she did not notice anything unusual about his clothes. James Earl Sutton drank wine with defendant and others on the morning of 4 February and saw defendant ask Ernest Fisher to take him home. Sutton did not see defendant any more that day.

Other facts necessary to decision will be discussed in the opinion.

Attorney General Rufus L. Edmisten and Associate Attorney Jack Cozort for the State.

Creighton W. Sossomon for defendant appellant.

MOORE, Justice.

In every case where a death sentence has been pronounced, it is the practice of this Court to carefully review the entire record to determine if prejudicial error appears. If such error does appear, even though not assigned by defendant, in capital

cases we take cognizance of the error *ex mero motu*. In present case, prejudicial error is disclosed by the following testimony:

Curtis Boyd Wyatt, a witness for the State, testified:

" . . . I was arrested February 17, 1975 on the charge of breaking and entering and placed in the Haywood County Jail. I recall seeing Willard Warren on February 25th. He was up in jail with us charged with public drunk. He made a statement there. We were talking about Reeves Webb.

* * *

We were talking about Reeves Webb being nervous.

Q. Now, what did Willard Warren say about Reeves Webb and what did he tell you?

A. We were just talking about him being so nervous and he said he met Reeves Webb and they met this old man coming down the railroad track and they went to this old building and had something to drink and said they run out of wine.

Q. Who ran out of wine?

A. Willard and Reeves and Harold and they called him Jack.

Q. All right, then what happened, what did he say?

A. Said Jack gave him a dollar there.

Q. Said what?

A. Said Jack gave him a dollar there.

Q. Gave who a dollar?

A. Reeves Webb.

Q. All right.

A. To go up to the A & P store to get another bottle of wine.

Q. Then go ahead and tell what he said.

A. He said after Reeves got gone they decided to rob the old man and he bucked up on them and Harold had a 2 x 4 and he had a knife.

Q. Then what did they do, just go ahead and say what he told you.

A. He said after they got through there they cleaned their hands off and decided to meet Reeves up the street before he got back and they met him about halfway in front of Tommy Mercer's and went there and drunk that wine.

Q. Did he say anything about having any money?

A. He said it was $18.36 they took off him.

Q. Said it was how much?

A. Said $18.36 they took off him.

Q. Now, did he say where they saw Reeves Webb, I mean after they went up the street?

A. Said they met him halfway up the street and went over to Tommy Mercer's and drunk that bottle."

Wyatt also testified that defendant was sober when he made this statement and that defendant was more or less bragging when he told the story. Wyatt further testified: "I told Dan Crawford of the SBI exactly what I have said here. . . . All he [defendant] said was that he had a knife and Harold had a 2 x 4. He did not say he stabbed him in the chest, and I never told anyone he did. He did not say he cut him in the face."

Dan Crawford, an agent of the State Bureau of Investigation who had previously testified for the State, was recalled and was asked for the purpose of corroboration what statement Curtis Boyd Wyatt had made to him. At the request of defendant's counsel, the court instructed the jury: "Members of the jury, this evidence is offered and admitted for the sole purpose of corroborating or strengthening the testimony of the witness, Curtis Boyd Wyatt, if you find that it does or tends to do so and it may not be considered by you for any other purpose." Mr. Crawford was then instructed to go ahead and tell what Wyatt had told him. Crawford then testified:

"A. Mr. Wyatt was interviewed on Thursday, February 27, 1975 at 5 o'clock p.m., reference investigation of the homicide of Leo Jack Clark. Mr. Wyatt stated that on Tuesday evening on or about the 25th day of February, 1975, while in the Haywood County Jail, that he, Wyatt,

was talking to Willard Warren; they talked about different things and it was mentioned about Reeves Webb getting out of jail that morning; that Willard Warren laughed about Reeves and said that he knew Reeves and that they drank together; he said that he, Willard Warren, and his brother, Harold Warren, had seen Reeves Webb and this old man go into a little building with a bottle of wine and that he and his brother had gone to see if they could get a drink; that they drank all the wine and that the old man said that he had some money and would buy some more wine and gave Reeves a dollar; that they sent Reeves to the A & P store to get the wine and while he was gone he, Willard Warren, and Harold Warren decided to kill and rob the old man; that Harold Warren hit the old man with a 2 x 4 piece of wood and Willard cut the man in the face and cut the old man's chest and cut his throat; that they got $18.00 and 34 or 36 cents from the man and hurried to get out of there before Reeves returned with the wine; that Willard and Harold met Reeves coming back down from the A & P store with the wine and that they went over to Tommy Mercer's house and drank the wine.

"Further, that while attacking the old man he had skinned his elbow, the right one, against the wall.

"He also mentioned that a little man that walked fast and had a dog that followed behind him, that they were going to kill him next."

[1] The testimony of Crawford contains additional evidence going far beyond the testimony of Wyatt. For instance, Wyatt only testified that defendant and his brother Harold decided to rob the old man and that Harold had a 2 x 4 and defendant had a knife. At no time did Wyatt say that defendant told him that they planned to rob *and kill* the old man or that Harold hit the old man with a 2 x 4, or that defendant cut the old man's face, chest and throat. In fact, Wyatt emphasized that all defendant said was that he had a knife and Harold had a 2 x 4. Wyatt further emphasized that defendant did not say he stabbed the deceased in the chest or cut him in the face, and that Wyatt never told anyone that he did. Neither did Wyatt testify that defendant told him that he and his brother had planned to next kill another man. Thus, the testimony of Crawford showed that defendant and his brother, contrary to Wyatt's statement, planned not only to rob the victim but also planned in advance

to kill him. Crawford's testimony further discloses, contradicting Wyatt's testimony, who struck each blow. Additionally, Crawford's testimony indicates that defendant and his brother had planned an additional murder, a fact not mentioned in Wyatt's testimony. Crawford's testimony goes far beyond corroboration. Actually, in some instances it flatly contradicts Wyatt's testimony.

Prior consistent statements of a witness to strengthen his credibility have been approved by this Court in many cases. *See* 1 Stansbury, N. C. Evidence § 51, pp. 146-47 (Brandis Rev. 1973), and cases cited therein. *See also* § 52, id., and cases therein cited for criticism of the North Carolina rule and the reasons for it. In *Lorbacher v. Talley,* 256 N.C. 258, 123 S.E. 2d 477 (1962), Justice Bobbitt (later Chief Justice) quoted with approval:

> "As stated by *Smith, C.J.,* in *Jones v. Jones,* 80 N.C. 246, 250: 'In whatever way the credit of the witness may be impaired, it may be restored or strengthened by this [proof of prior consistent statements] or any other proper evidence tending to insure confidence in his veracity and in the truthfulness of his testimony.' *Bowman v. Blankenship,* 165 N.C. 519, 81 S.E. 2d 746; *Brown v. Loftis,* 226 N.C. 762, 764, 40 S.E. 2d 421; Stansbury, *op. cit.* § 50. . . . "

See State v. Rose, 270 N.C. 406, 154 S.E. 2d 492 (1967). Such previously consistent statements, however, are admissible only when they are in fact consistent with the witness's testimony. *State v. Bagley,* 229 N.C. 723, 51 S.E. 2d 298 (1949); *State v. Melvin,* 194 N.C. 394, 139 S.E. 762 (1927); 1 Stansbury, N. C. Evidence § 52, pp. 150-51 (Brandis Rev. 1973). Nevertheless, if the testimony offered in corroboration is generally consistent with the witness's testimony, slight variations will not render it inadmissible. Such variations affect only the credibility of the evidence which is always for the jury. *State v. Bryant,* 282 N.C. 92, 191 S.E. 2d 745 (1972); *State v. Norris,* 264 N.C. 470, 141 S.E. 2d 869 (1965); *State v. Case,* 253 N.C. 130, 116 S.E. 2d 429 (1960), *cert. den.,* 365 U.S. 830, 5 L.Ed. 2d 707, 81 S.Ct. 717 (1961). However, "[i]f a prior statement of the witness, offered in corroboration of his testimony at the trial, contains additional evidence going beyond his testimony, the State is not entitled to introduce the 'new' evidence under a claim of corroboration. . . . " *State v. Brooks,* 260 N.C. 186, 132 S.E. 2d 354 (1963). *See State v. Strickland,* 276 N.C. 253,

173 S.E. 2d 129 (1970). Defendant's counsel should have moved to strike that part of Crawford's testimony which did not corroborate the testimony of Wyatt. *Gibson v. Whitton,* 239 N.C. 11, 79 S.E. 2d 196 (1953). This he failed to do. In *State v. Fowler,* 270 N.C. 468, 155 S.E. 2d 83 (1967), a capital case factually similar to this, testimony offered for the purpose of corroboration failed, in part, to corroborate. Defendant's counsel did not move to strike that part which did not corroborate. In the opinion, this question was asked by Justice Higgins: "Should not the Court have so acted on its motion and instructed the jury to disregard the testimony?" Justice Higgins, in answering this question in the affirmative and awarding a new trial, quoted with approval from *State v. McKoy,* 236 N.C. 121, 71 S.E. 2d 921 (1952), a capital case:

> " 'In this enlightened age the humanity of the law is such that no man shall suffer death as a penalty for crime, except upon conviction in a trial free from substantial error and in which the constitutional and statutory safeguards for the protection of his rights have been scrupulously observed. Therefore, in all capital cases reaching this Court, it is the settled policy to examine the record for the ascertainment of reversible error. *S. v. Watson,* 208 N.C. 70, 179 S.E. 455; *S. v. Stovall,* 214 N.C. 695, 200 S.E. 426; *S. v. Moore,* 216 N.C. 543, 5 S.E. 2d 719; *S. v. Williams,* 216 N.C. 740, 6 S.E. 2d 492; *S. v. Page,* 217 N.C. 288, 7 S.E. 2d 559; *S. v. Morrow,* 220 N.C. 441, 17 S.E. 2d 507; *S. v. Brooks,* 224 N.C. 627, 31 S.E. 2d 754; *S. v. West,* 229 N.C. 416, 50 S.E. 2d 3; *S. v. Garner,* 230 N.C. 66, 51 S.E. 2d 895. If, upon such an examination, error is found, it then becomes the duty of the Court upon its own motion to recognize and act upon the error so found. *S. v. Sermons,* 212 N.C. 767, 194 S.E. 469. This rule obtains whether the prisoner be prince or pauper.' "

While the defendant did assign as error a part of the charge in which the court recapitulated part of the corroborative testimony, he did not object at the time of the recapitulation. Neither did he assign as error that part of Crawford's testimony which went beyond and contradicted the testimony of Wyatt. Nevertheless, since we are dealing with a capital case, we take cognizance of the error *ex mero motu, State v. Fowler, supra; State v. Knight,* 248 N.C. 384, 103 S.E. 2d 452 (1958), and hold that the additional and contradictory testimony of Craw-

ford, offered as corroborating the witness Wyatt, constitutes prejudicial error and entitles defendant to a new trial.

Defendant next assigns as error the denial of his motions as of nonsuit at the close of the State's evidence and at the close of all the evidence. It is elementary that a motion as of nonsuit requires the trial court 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. Caron,* 288 N.C. 467, 219 S.E. 2d 68 (1975); *State v. Bolin,* 281 N.C. 415, 189 S.E. 2d 235 (1972); *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968). Regardless of whether the evidence is direct, circumstantial, or both, if there is evidence from which the jury could find that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be overruled. *State v. Cooke,* 278 N.C. 288, 179 S.E. 2d 365 (1971); *State v. Goines, supra.*

[2] The State's evidence in this case tends to show that Leo Jack Clark died of multiple injuries, inflicted by both blunt and sharp objects. Defendant admitted to Wyatt that he and his brother had a 2 x 4 piece of lumber and a knife when they decided to rob Clark and that "he bucked up on them." Defendant further admitted that he and his brother took $18.36 from Clark, cleaned their hands when they were through, and went to meet Reeves Webb before he returned to the abandoned shed. Although defendant's admissions do not include the actual use of the weapons against Clark, the evidence is sufficient to go to the jury on the charge of murder in the first degree, a murder committed in the perpetration of a robbery. G.S. 14-17; *State v. McLaughlin,* 286 N.C. 597, 213 S.E. 2d 238 (1975); *State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972); *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970).

[3] Defendant's final contention that the imposition of the death penalty results in cruel and unusual punishment and is therefore constitutionally impermissible, has been rejected by this Court in many recent decisions, including *State v. Robbins,* 287 N.C. 483, 214 S.E. 2d 756 (1975); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Honeycutt,* 285 N.C. 174, 203 S.E. 2d 844 (1974); *State v. Henderson,* 285 N.C. 1, 203 S.E. 2d 10 (1974); *State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974). We adhere to those decisions.

Other assignments of error relate to matters not likely to arise at a second trial and do not warrant discussion here. For the reasons stated, the defendant is entitled to a new trial.

New trial.

EARLINE COCKERHAM TAYLOR v. SHIRLEY WOOTEN BOGER

No. 33

(Filed 6 April 1976)

1. **Evidence § 49— expert testimony — necessity for hypothetical question**

When an expert witness testifies as to the facts based upon his personal knowledge, he may testify directly as to his opinion, but when the facts are not within the knowledge of the witness himself, the opinion of the expert must be based upon facts supported by evidence stated in a proper hypothetical question.

2. **Evidence § 49— hypothetical questions**

In asking an expert witness a hypothetical question, only such facts as are in evidence or such as the jury will be justified in inferring from the evidence should be included, and the witness should be asked whether in his opinion a particular event or condition could or might have produced the result in question; however, if the expert has a positive opinion on the subject, he should be allowed to express it without using the "could" or "might" formula.

3. **Evidence § 50— hypothetical question — medical testimony — erroneous exclusion**

The trial court erred in refusing to allow an orthopedic surgeon who treated plaintiff to answer a hypothetical question about the causal connection between phlebitis resulting from the accident and the development of varicose veins in plaintiff's right leg on the ground that the testimony would be "speculative" where another doctor had testified that when he first examined plaintiff she was suffering with phlebitis which he thought was the result of the accident and a back sprain sustained therein, the orthopedic surgeon had examined plaintiff and knew from his own knowledge that she had varicose veins, plaintiff testified she had varicose veins, and the orthopedic surgeon would have testified that in his opinion the phlebitis could have aggravated or caused the varicose veins which plaintiff now exhibits.

4. **Evidence § 44; Damages § 13— treatment and medical expenses in another state — competency**

In this action to recover damages for injuries received in an automobile accident, the trial court erred in refusing to allow plaintiff's testimony concerning medical treatment she received in Ohio

and the medical bills she incurred there where the record shows that plaintiff received treatment by an orthopedic surgeon in this State for a back injury received in the accident, when plaintiff moved to Ohio she was instructed by the North Carolina doctor to consult an orthopedic surgeon in Ohio if she continued to have pain, plaintiff testified she did see the suggested orthopedic surgeon in Ohio and would have testified, if allowed, that he treated her for the same injury for which she was treated in this State, and the North Carolina doctor testified that on plaintiff's return to this State, he treated her for the same injuries for which he had treated her prior to the time she went to Ohio.

ON petition by plaintiff for discretionary review of the decision of the Court of Appeals, reported in 27 N.C. App. 337, 219 S.E. 2d 290 (1975), affirming the judgment of *Kirby, J.*, 10 March 1975 Special Session of YADKIN Superior Court.

Plaintiff, Mrs. Earline Cockerham Taylor, instituted this action on 22 November 1972 to recover damages in the sum of $25,000 for injuries sustained in an automobile accident. She alleged that defendant's automobile crossed the center line of the highway into plaintiff's lane of travel and collided with her automobile. Plaintiff further alleged injuries to her head, neck, lower back and leg. Defendant answered denying plaintiff's allegations.

At trial, plaintiff attempted to establish that the blow received in the accident caused phlebitis in her right leg which led to the development of varicose veins. Dr. Adams, an orthopedic surgeon who treated plaintiff and testified as a witness for her, was asked a hypothetical question about the causal connection between the injury sustained in the accident and the development of varicose veins in the leg. The trial court refused to allow the doctor to answer the question on the grounds that the doctor's testimony would be "speculative."

Later in the trial, plaintiff attempted to introduce evidence concerning medical expenses incurred from plaintiff's treatment by a doctor in Ohio, where plaintiff's husband was transferred following the accident. The court disallowed this testimony. Plaintiff excepted to the exclusion of this evidence and to the court's refusal to allow Dr. Adams to answer the hypothetical question.

Only one issue was submitted to the jury: "What amount of damages, if any, is the plaintiff entitled to recover of the defendant?

ANSWER: $1200.00"

From judgment entered on the verdict, plaintiff appealed to the Court of Appeals. That court found no error.

We allowed petition for discretionary review on 6 January 1976.

Franklin Smith for plaintiff appellant.

Deal, Hutchins and Minor by Richard Tyndall for defendant appellee.

MOORE, Justice.

Plaintiff first assigns as error the refusal of the trial court to allow Dr. Adams to answer the following hypothetical question:

> "Doctor, assuming the Jury should find from the facts and from the evidence in the case, and by its greater weight, that Earline Cockerham Taylor was riding in a 1969 Chevrolet automobile when it was involved in a collision with a Volkswagen automobile on October 8, 1971, on U.S. 421 here in the Town of Yadkinville, North Carolina, and that she received a blow to her right leg during the collision, and this blow was below the knee of her right leg; and that she that day went to Hugh Chatham Memorial Hospital and was examined by Dr. Claude McNeill, who found that at that time that she had a disease called phlebitis and that he thereafter treated her for phlebitis; and that sometime thereafter, after the phlebitis had subsided, that Mrs. Taylor developed what is commonly called varicose veins in the area below her knee where the phlebitis had been treated by Dr. Claude McNeill; and that you examined her on March 5, 1975 and found that she did have varicose veins in her right leg below the knee, do you have an opinion, satisfactory to yourself, as to whether or not the blow or trauma received in the accident which caused the phlebitis, as to whether or not the phlebitis could or might have caused the varicose veins, a condition that you found in her leg when you examined her on March 5, 1975?"

In refusing to allow the witness to answer this question in the presence of the jury, the trial judge, on *voir dire,* said:

> " . . . In the opinion of the Court, the doctor never having treated the patient for this condition and having no

independent recollection and no notes indicating that he ever so much as examined her leg, let alone treated her for phlebitis, that it is too speculative for the purpose of an expert opinion at this time. . . . "

For the purpose of the record, the doctor was allowed to answer as follows:

"That the phlebitis in her leg could have aggravated or indeed caused the development of the varicose veins that she now exhibits."

Prior to the testimony of Dr. Adams, Dr. Claude McNeill, a general practitioner who had examined plaintiff a few days after the accident, testified that he diagnosed plaintiff's injuries as phlebitis in her right leg and a lumbar sprain in her lower back. Dr. McNeill further testified that he certainly thought the phlebitis was the result of the accident and the sprain. He also testified on *voir dire* that although plaintiff did not suffer from phlebitis at the time of trial, she did have varicose veins.

Plaintiff then called Dr. Richard Adams who was stipulated to be "a licensed practicing physician in the State of North Carolina, and a medical expert, specializing in the field of orthopedic surgery." Dr. Adams testified at length about the injury to plaintiff's back as the result of the accident. He was then asked whether he had ever examined her leg and he answered that he had. He was asked about his familiarity with phlebitis and varicose veins and asked to describe the relationship between the two. Defendant objected and the objection was sustained. Dr. Adams was then asked to step down off the stand and examine plaintiff's right leg. Defendant's objection was again sustained. Plaintiff then asked the doctor whether part of his training in orthopedic surgery included the study of phlebitis, to which he answered yes. Defendant again objected and the jury was excused.

On *voir dire,* Dr. Adams testified that during his year of general surgical training he spent half of that year studying vascular diseases and surgery of the vessels. He also testified that in his practice he deals with the total patient and some of those patients have varicose veins or phlebitis. The trial judge then asked Dr. Adams:

"JUDGE: In the interest of time, have you examined this lady [plaintiff], and do you have an opinion, satisfac-

tory to yourself, and to a reasonable degree of medical certainty, whether or not the condition she now has, varicose veins, that Dr. McNeill diagnoses, might have or could have been caused as a result of injury to her leg?

A. Yes.

JUDGE: What is your opinion about that?

A. That it could have. . . . "

The trial judge refused to allow Dr. Adams to answer this question before the jury.

[1] When an expert witness testifies as to the facts based upon his personal knowledge, he may testify directly as to his opinion, *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971); *Rubber Co. v. Tire Co.*, 270 N.C. 50, 153 S.E. 2d 737 (1967); *Service Co. v. Sales Co.*, 259 N.C. 400, 131 S.E. 2d 9 (1963), and when the facts are not within the knowledge of the witness himself, the opinion of an expert must be based upon facts supported by evidence stated in a proper hypothetical question, *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm., supra; Todd v. Watts*, 269 N.C. 417, 152 S.E. 2d 448 (1967); 1 Stansbury, N. C. Evidence § 136 (Brandis Rev. 1973). If the expert witness has personal knowledge of some of the facts but not all, a combination of these two methods may be employed. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm., supra; State v. David*, 222 N.C. 242, 22 S.E. 2d 633 (1942); 1 Stansbury, N. C. Evidence §§ 136 and 137 (Brandis Rev. 1973).

" . . . It is well settled in the law of evidence that a physician or surgeon may express his opinion as to the cause of the physical condition of a person if his opinion is based either upon facts within his personal knowledge, or upon an assumed state of facts supported by evidence and recited in a hypothetical question. [Citations omitted.] . . . " *Spivey v. Newman*, 232 N.C. 281, 284, 59 S.E. 2d 844, 847 (1950). *Accord Seawell v. Brame*, 258 N.C. 666, 129 S.E. 2d 283 (1963).

[2] In asking a hypothetical question, it is customary to incorporate in the question the relevant facts in evidence which counsel hopes will be accepted as true by the jury and to ask the witness his opinion based on such facts, if the jury shall believe them to be facts. *Cogdill v. Highway Comm.* and *Westfeldt*

v. Highway Comm., supra; Perkins v. Langdon, 237 N.C. 159, 74 S.E. 2d 634 (1953). In framing such a question, only such facts as are in evidence or such as the jury will be justified in inferring from the evidence should be included. The witness should be asked whether in his opinion a particular event or condition could or might have produced the result in question. *Teague v. Power Co.,* 258 N.C. 759, 129 S.E. 2d 507 (1963); *Beard v. R. R.,* 143 N.C. 136, 55 S.E. 505 (1906). However, if the expert has a *positive* opinion on the subject, he should be allowed to express it without using the "could" or "might" formula. *Mann v. Transportation Co.* and *Tillett v. Transportation Co.,* 283 N.C. 734, 748, 198 S.E. 2d 558, 568 (1973). *See* 1 Stansbury, N. C. Evidence § 137 (Brandis Rev. 1973).

[3] Applying these principles to the hypothetical question asked in this case, we hold that the trial court erred in ruling that the hypothetical question was too speculative for the purpose of an expert opinion. Dr. McNeill had testified that when he first examined plaintiff she was suffering with phlebitis which he thought was the result of the accident and the sprain sustained therein. Dr. Adams had examined plaintiff and knew from his own knowledge that she had varicose veins. Had he been allowed to answer the question, he would have testified that in his opinion the phlebitis in plaintiff's leg could have aggravated or indeed caused the development of the varicose veins that she now exhibits. Plaintiff herself later testified that she had varicose veins. Under these circumstances, the question was not too speculative for the purpose of an expert opinion.

The Court of Appeals, in passing upon the admissibility of this hypothetical question, stated:

> "We do not necessarily agree that the doctor's opinion should be excluded because it is 'speculative.' See *Lockwood v. McCaskill,* 262 N.C. 663, 138 S.E. 2d 541 (1964). However, we find no error in the ruling not to allow the answer.
>
> "The record discloses no evidence having been admitted prior to the hypothetical question concerning plaintiff's varicose veins. Thus the question contains facts which are not in evidence and which cannot be inferred from the evidence."

The trial court erroneously excluded the testimony of Dr. Adams concerning plaintiff's varicose veins. Furthermore, the hypothetical question set out above contained facts within the

personal knowledge of Dr. Adams or facts which had been testified to by other witnesses. We hold, therefore, that Dr. Adams should have been allowed to answer this question. *Cogdill v. Highway Comm.* and *Westfeldt v. Highway Comm., supra; State v. David, supra.*

[4] Plaintiff next assigns as error the trial court's refusal to allow her testimony concerning the treatment she received in Ohio and the medical bills she incurred there. Plaintiff testified that she had been referred to a doctor in Ohio by Dr. Adams. On objection by defendant, the trial court ruled that no evidence concerning the Ohio treatment would be admitted or admissible until Dr. Adams testified that he in fact did refer her to a doctor in Ohio. Dr. Adams did later so testify and was then asked whether plaintiff told him she did receive treatment. Defendant objected and the judge then ruled:

> "JUDGE: As I indicated in pretrial conference, I will allow the plaintiff to say only that she did, in fact, see a physician in Ohio. . . . Mr. Smith, the only question I will let you ask her pursuant to Dr. Adams' advice is, did you see a physician in Ohio—yes, period.
>
> MR. SMITH: Is she going to be able to name him?
>
> JUDGE: No, just that mere statement excluding medical bills."

While the jury was out deliberating the case, Mrs. Taylor was allowed to take the stand and give further testimony as follows:

> "When I moved to the State of Ohio in 1972, I was advised by Dr. Adams to see an orthopedic specialist in Ohio. I moved to Hamilton, Ohio. I did see an orthopedic doctor after I arrived there. His name was Carl Palechek. He was a medical doctor, specializing in orthopedic surgery. I don't remember the number of times I saw Dr. Palechek. I would say approximately eight times, but really I don't know. He treated me for my back. This was the same injury I had received in this automobile accident on October 8, 1971. He treated me for the lower back. This is the same area of the back that Dr. Adams testified that he treated me for. I was hospitalized during the course of his treatment. Dr. Adams advised me to see Dr. Carl Palechek. Dr. Palechek had me hospitalized in the Fort Hamilton Huss

Hospital. He put me in traction for ten days and I was given physical therapy. The hospital bill was $660.00, and some odd cents. I don't remember. Dr. Palechek's bill was $156.00 and some odd cents, but I don't remember the odd cents. The only thing Dr. Palechek told me when I came back to North Carolina was if I had other complications other than that what he just treated me for, he'd have to put me back in traction again."

The trial judge then stated:

"Let the record show that in the pretrial conference the plaintiff indicated a desire to offer evidence pertaining to medical treatment of the plaintiff while residing in Ohio; that the Court in its discretion indicated to the plaintiff's counsel and defendant's counsel that the Court would not admit such evidence without proper medical foundation. For that reason, or without proper medical foundation for that testimony, and the Court ruled that such testimony of medical treatment while in Ohio would be excluded for that reason; and further indicated to both counsel that the Court would allow the plaintiff to testify that she saw an orthopedic specialist in Ohio upon the recommendation of Dr. Richard Adams, the attending physician in North Carolina, if Dr. Adams' testimony indicated that he had, in fact, referred her to a specialist in the State of Ohio; and the Court further indicated to plaintiff's counsel that evidence relating to medical care while in the State of Ohio would be placed in the record out of the hearing of the Jury at the completion of the trial for such purposes as plaintiff's counsel might deem it important."

The Court of Appeals sustained this ruling, stating:

" . . . We find no error in the court's rulings. There is no evidence to show the necessity for plaintiff's treatment in Ohio (where she lived for awhile after the accident in North Carolina). Furthermore, there is no evidence that the medical expenses paid in Ohio were reasonable in amount."

The Court of Appeals relied on *Ward v. Wentz*, 20 N.C. App. 229, 201 S.E. 2d 194 (1973). Factually, that case is distinguishable from the case at bar. In that case, there was no

evidence that plaintiff had been referred by any doctor in North Carolina to any doctor in Florida. Her testimony was as follows:

> " 'While I was in Florida, I did incur medical expenses for injuries sustained in the accident. The first doctor that I saw was Dr. Hilliard, and he charged $50.00 and $62.00, that $112.00; the next doctor was Dr. Jackson and Dr. Annis, which together was $299.00, they are in the Watson Clinic. The next was Lakeland General Hospital for x-rays $65.00. The next was the physical therapist who charged $12.00 and $10.00, that's $22.00. Dr. Smith charged $12.00 for x-rays. Lee Memorial Hospital bill was $32.00. I bought prescription drugs while I was in Florida and paid approximately $80.00 for those. . . . ' "

There was no showing of the need for such services or that these services were required by the injury which she had sustained in the accident involved in that case.

In the present case, Dr. Adams instructed plaintiff to consult an orthopedic surgeon in Ohio if she continued to have pain. Plaintiff then testified that she did see the orthopedic surgeon in Ohio suggested by Dr. Adams, and would have testified, if allowed to do so, that he treated her for the same injury for which Dr. Adams had treated her. She would have further outlined the treatment given her and the amount of the bills incurred for such treatment. Dr. Adams testified that on plaintiff's return to North Carolina, he treated her for the same injuries for which he had treated her prior to the time she went to Ohio. These facts clearly distinguish this case from *Ward v. Wentz, supra.*

The trial court refused to allow the evidence of the medical bills to be introduced on the grounds that no proper medical foundation had been established. Plaintiff is, of course, entitled to damages only if they are the natural and proximate result of defendant's negligence. *Brown v. Neal,* 283 N.C. 604, 197 S.E. 2d 505 (1973); *King v. Britt,* 267 N.C. 594, 148 S.E. 2d 594 (1966); 3 Strong, N. C. Index 2d, Damages § 2, p. 165. Dr. Adams, plaintiff's physician in North Carolina, testified concerning his treatment of plaintiff's back injuries immediately following the accident and upon her return to North Carolina in 1975. In Dr. Adams's opinion, the injuries which he diagnosed and treated after the accident were the same injuries he treated on plaintiff's return to North Carolina. The plain-

tiff herself testified on *voir dire* that the doctor to whom Dr. Adams referred her in Ohio, Dr. Palechek, treated her for the same injury. "He treated me for my back. This was the same injury I had received in this automobile accident on October 8, 1971. He treated me for the lower back. This is the same area of the back that Dr. Adams testified that he treated me for." Defendant contends, however, that plaintiff was incompetent to testify concerning her treatment in Ohio for the reason that this is an area that requires expert testimony, citing *Gillikin v. Burbage,* 263 N.C. 317, 139 S.E. 2d 753 (1965). In *Gillikin,* however, the plaintiff attempted to establish by lay testimony that her ruptured disc resulted from a blow from a car door. No expert medical opinion was introduced to that effect and this Court held that this type of injury required expert medical testimony to establish causation. In present case, we are also dealing with a back injury, but here, two doctors, Dr. McNeill and Dr. Adams, testified that in their opinion plaintiff suffered injury to her back, a lumbarsacral sprain, and to her right leg, phlebitis, as a result of the automobile accident with defendant. Plaintiff simply testified that the same area of her back that had been treated by Dr. Adams was treated by Dr. Palechek, facts about which she was competent to testify.

As was said in *Kizer v. Bowman,* 256 N.C. 565, 576, 124 S.E. 2d 543, 551 (1962):

> "We think the rule applicable to damages in this case, and to the admission of evidence as to the cost of nurses, medical expenses, hospital bills, loss of time, *et cetera,* is well stated in *Sparks v. Holland,* 209 N.C. 705, 184 S.E. 552: ' . . . "in this class of cases [personal injuries] the plaintiff is entitled to recover as damages one compensation for injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor, or capacity to earn money." ' [Citations omitted.]"

See King v. Britt, supra; Mintz v. R. R., 233 N.C. 607, 65 S.E. 2d 120 (1951). In *Williams v. Stores Co., Inc.,* 209 N.C. 591, 184 S.E. 496 (1936), this Court approved the following charge

of the trial court on the issue of damages with respect to medical expenses:

> " 'Damages for personal injuries, such as those complained of in this action, include actual expenses for nursing, medical services, loss of time and earning capacity, mental and physical pain and suffering.
>
> " 'By actual expenses for nursing and medical expenses is meant such sum as the plaintiff has expended therefor in the past, or for which she has become indebted, and such further expenses for nursing and medical services as she will, in your best judgment, based upon the evidence in this case and by the greater weight thereof, be put to in the future, which flow directly and naturally from any injury she may be found by you to have sustained on account of the negligence of the defendants, complained of in this action.' " *Id.* at 601, 184 S.E. at 502.

Since evidence was allowed as to the fact of treatment, the trial court erroneously excluded the details of the treatment rereceived and the cost of that treatment.

Dr. Adams was qualified to testify to plaintiff's condition at the time of the trial and to answer the hypothetical question asked him. Plaintiff was entitled to testify as to the treatment she received in Ohio and the cost of that treatment. The exclusion of this testimony was error and entitles plaintiff to a new trial.

The decision of the Court of Appeals is reversed with direction that the cause be remanded to the Superior Court of Yadkin County for retrial in accordance with this opinion on the issue of damages only.

New trial.

STATE OF NORTH CAROLINA v. ELZIE McCALL

No. 20

(Filed 6 April 1976)

Criminal Law §§ 83, 162, 163— competency of wife to testify against husband — failure to object to jury argument and charge

Where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible

error, whether objection is interposed and exception noted or not; therefore, the trial court in a first degree murder prosecution erred in (1) allowing cross-examination of defendant with respect to his wife's failure to testify, (2) allowing the district attorney's jury argument concerning the failure of defendant's wife to testify, and (3) failing to instruct the jury that defendant's wife could not be compelled to testify against him and that the fact that defendant chose not to call his wife as a witness could not be used to the prejudice of the defense. G.S. 8-57.

DEFENDANT appeals from judgment of *Grist, J.*, July 1975 Criminal Session, TRANSYLVANIA Superior Court.

Defendant was placed on trial upon a bill of indictment, proper in form, charging him with first degree murder of Brent McCall on 26 January 1975 in Transylvania County.

The State's evidence tends to show that on 26 January 1975 defendant shot and killed Brent McCall with a 30-30 rifle. The homicide occurred in the yard of a house owned by Viola McCall and occupied by her son Brent McCall. The only persons present when the shooting occurred were Viola McCall, Brent McCall, and the defendant. A neighbor named Otis Morgan heard the shot and went to the scene. Defendant stated to Mr. Morgan that he had told Brent McCall "that if Brent McCall ever got into it with Elzie McCall again that he, Elzie McCall, would kill Brent and then Elzie said 'There he lays.' " Mr. Morgan testified that defendant was drinking and appeared to be under the influence of alcohol. No weapon was observed in Brent McCall's hand or on the ground in the area where his body was lying.

The State's evidence further tends to show that defendant and Viola McCall had been living together in defendant's trailer for about nine months. During that period defendant was separated from his lawful wife. He obtained a divorce in February 1975 and married Viola McCall on 26 April 1975.

The State's evidence further indicates that defendant got along well with Brent McCall except when Brent was drinking. Brent had a violent temper when drinking and would tear up the house and often assault his mother when she was present to clean and cook for him.

Following the shooting, officers were called and defendant was taken into custody. While being transported to jail, defendant was warned of his rights and stated he had nothing to hide.

He told the officers he had drunk about a half pint of whiskey in the eight hours preceding the shooting and had been asleep about three hours before he shot Brent McCall. He said that Brent had "beat[en] me and his mother three times and I told him that if he did it again, I would kill him."

Defendant testified as a witness in his own behalf. He said he arrived at Brent McCall's place of residence about 3 p.m. on 26 January 1975, went to bed and slept for about three hours. When he awakened, Brent McCall came into the bedroom and they had a friendly conversation. When Viola McCall finished mopping the kitchen, she got her pocketbook and prepared to leave. Brent McCall knocked some items from the counter to the kitchen floor, looked over at defendant and said, "You are going to buy me a pint of whiskey before you go home." When defendant told Brent he did not have the money to buy a pint of whiskey, Brent attacked defendant, knocking him to the floor. Brent McCall weighed about 180 pounds, while defendant weighed 140 pounds. After Brent knocked defendant down he took him by the right arm and began slinging him around. Defendant went to his truck and attempted to open the door, but Brent slammed the door shut and backed up against it, repeating his former assertion that defendant was not leaving until he bought Brent a pint of whiskey. Brent was in a serious rage by this time. Defendant opened the tool box on the side of his truck, got his gun and yelled for Viola who was coming off the porch. Viola McCall screamed as Brent, who was next to the porch, took a step forward and threw a rock. Defendant then raised his gun and pulled the trigger. After the shot, he put the rifle back in the tool box, ran to Otis Morgan's house nearby and asked Mr. Morgan to call the rescue squad and the sheriff's department. When Deputy Sheriff Fisher arrived defendant told him what had happened and got into the back seat of the deputy's car.

Defendant testified that Brent McCall had attacked him and Viola McCall on two or three other occasions but said he did not intend to kill Brent when he fired the gun. He said it was "a spur of the moment" thing and that he acted in self-defense. He said he was not under the influence of alcohol but was afraid of Brent McCall, knowing what he could do and what he had done in the past.

The evidence discloses that Brent McCall was twenty-five years of age and defendant was fifty-four.

The jury convicted defendant of murder in the first degree and he was sentenced to death. Defendant appealed and assigns errors discussed in the opinion.

Stepp, Groce, Pinales & Cosgrove by W. Harley Stepp, Jr. and Edwin R. Groce, attorneys for defendant appellant.

Rufus L. Edmisten, Attorney General; Thomas B. Wood, Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Defendant moved to nonsuit the first degree murder charge on the ground that evidence of premeditation and deliberation was insufficient to carry the capital charge to the jury. Denial of the motion is assigned as error. When the evidence is taken as true and considered in the light most favorable to the State, as we are required to do, it is sufficient to carry the case to the jury on all counts encompassed by the bill of indictment. We overrule this assignment without further discussion.

Viola McCall was an eyewitness to the shooting of her son by defendant on 26 January 1975. She thereafter married defendant on 26 April 1975. She attended defendant's trial but was not examined as a witness by him.

After defendant had testified that he and Viola McCall were not married on 26 January 1975 when the homicide occurred but "were making plans," the district attorney was permitted over objection to cross-examine him as follows:

> "Q. You knew if you married her she couldn't testify against you, didn't you?
>
> A. Yes, I knew it."

The district attorney then continued his cross-examination without further objection as follows:

> "Q. All right, you had been courting her for three years, and you hadn't married her during that three years, but as soon as she became eligible to testify against you as to what happened when you shot Brent, you married her in April, 1975, didn't you?
>
> A. I can't answer that question.
>
> Q. Why can't you answer it?
>
> A. Because you stated it wrong.

Q. Well, you just state to the jury how it happened then.

A. What?

Q. How you happened to marry Viola knowing that she could be compelled to testify against you after the killing in January, 1975, happened to marry her in April, 1975?

A. I put in for my divorce in November and I had a year to wait. I discussed the matter with Brent, and I discussed the matter of marriage with Viola. Viola and I had plans to marry long before this incident occurred. I filed separation papers in November of 1973, and to the best of my knowledge I got my divorce in February, 1975, in Asheville, North Carolina. Mr. Potts, my attorney, represented me in my divorce, and Mr. Potts is my lawyer in this case."

Thereafter, the district attorney, without objection, made the following argument to the jury:

"While we are talking about Viola, you know I was glad Mr. Potts pointed her out. Really, I was glad that Mr. Potts pointed her out to let you know that she was in the Courtroom. Let me tell you something the State of North Carolina cannot put her on the stand, but she can voluntarily go on the stand and her husband can call her. Her husband can call her on the stand if he wants to and Mr. Potts can put her on there. I can't touch her. I wish I could have, but Mr. Potts could put her on there. If what Elzie said was the truth, why didn't Mr. Potts put her on the stand? I'll tell you why he didn't put her on the stand because he knew I would have the right to examine her, cross examine her. The law of North Carolina is that a wife cannot testify against her husband. This is a good law, and I'm glad we have it, because the home ought to be the most important and that's the foundation of this country, is the home and the family, and until she married Brent—Elzie McCall in April, 1975, I could have put her on the stand. If this case had been tried in January or February, 1975, I could have put her on the stand and let her tell you exactly what she saw. She was standing right outside of the house. She said she was—that's Elzie's testimony. He said that she went right over to Brent right

after he was shot and gave him mouth to mouth resuscitation. Why in the world didn't she corroborate what her husband said about it, her present husband, if that's the way it happened? There was only three people there. That was Brent, Viola and Elzie, and Brent can't talk.

* * * *

"Is there any question in your mind that that young boy was lying right here when his mother came over to him and started giving him mouth to mouth resuscitation? Do you know what she did whenever she went down to South Carolina in April, 1975, and performed a ceremony of matrimony with this man right here? She sealed her lips forever to be required by the State of North Carolina to tell you the truth about what happened on January the 26th, 1975. *You ought to go take the flowers off your son's grave.* Any woman that would do that. It's just as bad as her going and taking the flowers off her son's grave, because he was a human being. He was entitled to live and because she wanted to have some personal enjoyment and pleasures with her boyfriend because he had worn out his previous wife, then she goes and seals her lips. Are you going to turn this man loose because of that? If you do, you do. I'll tell you it makes my blood boil and if there's anything that I could do under the law of the State of North Carolina, I'll guarantee you, I'd do it or I'd try to do it."

The quoted cross-examination of defendant constitutes his first assignment of error. The quoted argument of the district attorney to the jury constitutes defendant's second assignment of error. The failure of the trial court to instruct the jury that (1) defendant's wife could not be compelled to testify against him and (2) the fact that defendant chose not to call his wife as a witness could not be used to the prejudice of the defense, constitutes defendant's third assignment of error. These assignments being interrelated, we consider them together.

G.S. 8-57 reads in pertinent part as follows: "The husband or wife of the defendant, in all criminal actions or proceedings, shall be a competent witness for the defendant, but the failure of such witness to be examined shall not be used to the prejudice of the defense." By virtue of this statute defendant's wife was not a competent witness to testify against him, and her failure to testify for him could not be used to his prejudice.

In *State v. Porter*, 272 N.C. 463, 158 S.E. 2d 626 (1968), defendant was not represented by counsel. His wife was called by the State as a witness and testified that she saw what happened when defendant allegedly assaulted her sister. No exception was taken to his wife's testimony, but the question was raised on appeal to this Court. Held: "Ordinarily, failure to object in apt time to incompetent testimony will be regarded as a waiver of objection, and its admission is not assignable as error, but this rule is subject to an exception where the introduction or use of the evidence is forbidden by statute as here by the provisions of G.S. 8-57. When the evidence rendered incompetent by statute was admitted, it became the duty of the trial judge to exclude the testimony, and his failure to do so must be held reversible error whether exception was noted or not."

In *State v. Dillahunt*, 244 N.C. 524, 94 S.E. 2d 479 (1956), a State's witness testified without objection that defendant's wife made a statement that shortly before the assault for which her husband was on trial, the prosecuting witness passed her mother's house in a car and her husband followed him. Held: Under the provisions of G.S. 8-57 neither the husband nor the wife is competent to testify against the other, and the prohibition extends to declarations made by one spouse not in the presence of the other. "It is the duty of the presiding judge to exclude such evidence. Objection is not necessary." To like effect is *State v. Warren*, 236 N.C. 358, 72 S.E. 2d 763 (1952).

In *State v. Helms*, 218 N.C. 592, 12 S.E. 2d 243 (1940), the solicitor in his argument to the jury called attention to the fact that defendant's wife had not testified in his behalf. This occurred during the temporary absence of the judge who, upon return to the courtroom, sustained defendant's objection. Near the conclusion of the court's charge to the jury the judge stated that the law did not permit such comment and that the jury should not let the argument influence it. Held: The solicitor's comment violated the statute, C.S. § 1802 (now G.S. 8-57), was prejudicial, and "called for prompt, peremptory and certain caution to the jury, not only that the jury should disregard the argument but that the failure of the wife of defendant to be examined as a witness in his behalf should not be used to the prejudice of defendant. Even then, it may be fairly doubted that the harmful effects of such argument could have been dispelled from the minds of the jury. We are of the opinion, and hold, that merely sustaining the objection is not sufficient caution.

Nor does the caution later given by the court free the case of the prejudice already done to the rights of defendant."

In *State v. Watson,* 215 N.C. 387, 1 S.E. 2d 886 (1939), the solicitor, over objection, in the course of his argument to the jury commented upon the failure of the defendant to call his wife as a witness. Held: The argument of the solicitor runs counter to the prohibitory provisions of C.S. § 1802 (now G.S. 8-57) and is prejudicial error.

In *State v. Cox,* 150 N.C. 846, 64 S.E. 199 (1909), the State subpoenaed the wife of the defendant together with other witnesses. At trial the State tendered her to the defendant and the solicitor, in his argument to the jury, commented upon the failure of the defendant to corroborate his own testimony by the testimony of his wife. On objection made the court stated that the wife was not competent and would not be allowed to bear witness against her husband; that her testimony would be competent only in behalf of her husband and not against him; and that since she had not testified, the jury could not consider what she knew or did not know. In his charge, the court told the jury "it was not for the State to examine the wife of the defendant as a witness against her husband, but it was competent for the defendant to use her as a witness." Held: The tender of the wife by the State and the comments of the solicitor called attention to the failure of the defense to examine defendant's wife. The judge's neglect to instruct the jury not to consider such failure to use the wife as a witness was prejudicial error.

The provisions of G.S. 8-57, and decisions of this Court interpreting and applying them, impel the conclusion that where evidence is rendered incompetent by statute, it is the duty of the trial judge to exclude it, and his failure to do so is reversible error, whether objection is interposed and exception noted or not. *Hooper v. Hooper,* 165 N.C. 605, 81 S.E. 933 (1914). In such case it is the duty of the judge to act on his own motion. *State v. Porter, supra; State v. Ballard,* 79 N.C. 627 (1878). The rule applies with equal force to the argument of counsel when evidence forbidden by statute is argumentatively placed before the jury and used to the prejudice of the defense. When this occurs it is the duty of the judge *ex mero motu* to intervene and promptly instruct the jury that the wife's failure to testify and the improper argument concerning

that fact must be disregarded and under no circumstances used to the prejudice of the defendant.

For the reasons stated, defendant's first, second and third assignments are well taken and must be sustained. This requires a

New trial.

STATE OF NORTH CAROLINA v. ROGER GREENE

No. 38

(Filed 6 April 1976)

1. **Larceny § 7— disappearance of tractor and boggs — possession of boggs — insufficient evidence of larceny of tractor**

Evidence that a tractor and disk boggs which were attached to the tractor by a three-point hitch were stolen on 15 May, that defendant sold the boggs on 22 May, and that the boggs were very heavy and usually moved with a tractor, *held* sufficient to be submitted to the jury on the issue of defendant's guilt of larceny of the boggs but insufficient to be submitted on the issue of defendants' guilt of larceny of the tractor.

2. **Larceny § 4; Indictment and Warrant § 17— larceny indictment — ownership laid in owner and person in possession**

There was no fatal variance between an indictment charging larceny of disk boggs "of one Newland Welborn and Hershel Greene" and evidence that Greene had legal title to the boggs and that Welborn had borrowed them and had possession of them when they were stolen since both persons named in the indictment had a sufficient property interest in the boggs to support a larceny conviction, and since it is proper to allege both the real owner and the special owner in the indictment.

APPEAL by defendant from the decision of the Court of Appeals reported in 27 N.C. App. 718, 220 S.E. 2d 420 (1975), finding no error in the trial before *Wood, J.*, at the 17 February 1975 Superior Court Session of WILKES Superior Court. Defendant's right of appeal arises under G.S. 7A-30(2) from the dissenting opinion of Judge Martin.

Defendant was charged in the indictment as follows:

"THE JURORS FOR THE STATE UPON THEIR OATH PRESENT That Roger Greene late of the County of Wilkes on

the 16th day of May, 1974, with force and arms, at and in the County aforesaid, to-wit: *one Ford Diesel Tractor and one set of Long Brand Boggs* of the value of Thirty-Five hundred dollars, ($3,500.00) of the goods, chattels and moneys of one *Newland Welborn and Hershel Greene* then and there being found feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State." (Emphasis added.)

The evidence for the State tended to show that Newland Welborn was the owner of a Ford Diesel Tractor and Hershel Greene was the owner of a set of disk boggs. Welborn had borrowed the disk boggs from Greene, which on 15 May 1974 were attached to the tractor by way of a three-point hitch and were last seen about 8:30 p.m. on that date.

On 22 May 1974, Larry Pierce purchased a set of disk boggs from the defendant and paid him with a check for $125. It was the opinion of Pierce that the disk boggs had a market value of $125 to $175. When the purchaser saw the disk boggs at his home, they were on the ground near a panel truck. The defendant left the premises in the panel truck. Later Pierce repainted the disk boggs green.

On 4 October 1974, Hershel Greene saw a set of green-colored disk boggs at the residence of Larry Pierce. He examined and identified them as his disk boggs which he had loaned to Welborn. It was his opinion that they had a fair market value of $400.

Defendant offered no evidence.

The jury returned a verdict of guilty of felonious larceny, and the court imposed an active sentence.

Other facts necessary to the opinion will be set out therein.

Attorney General Rufus L. Edmisten by Special Deputy Attorney General James L. Blackburn and Associate Attorney Alan S. Hirsch for the State.

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

COPELAND, Justice.

In his assignments of error defendant raises two principal questions for our consideration:

1. Should the charge of felonious larceny of the tractor have been nonsuited?

2. As to the disk boggs, was there a fatal variance between the allegations in the bill of indictment and the proof offered by the State with regard to the ownership of them?

[1] As to the first question, we note that Judge Wood's final mandate to the jury was as follows:

> "[T]hat if . . . Roger Greene took and carried away a Ford 1970 model Ford Diesel 2000 Series and Long bogg disk, took and carried away this property from Newland Welborn and Hershel Greene . . . intending at the time to deprive Newland Welborn and Hershel Greene of its use permanently, and that the property was worth more than two hundred dollars, it would be your duty to return a verdict of guilty of felonious larceny."

When the evidence is considered in the light most favorable to the State, it shows that Welborn was the owner of the tractor and Hershel Greene was the owner of the disk boggs; that the disk boggs had been borrowed from Greene by Welborn and were last seen on 15 May 1974 at 8:30 p.m.; that the disk boggs were attached to the tractor by way of a three-point hitch; that on 22 May 1974, Larry Pierce purchased a set of disk boggs from defendant for $125; that these disk boggs were seen and identified by Hershel Greene on 4 October 1974 at the residence of Larry Pierce; that the fair market value of the disk boggs ranged from $125 to $400. There was no evidence of what happened to the tractor.

The defendant takes the position that under no theory of the law of "recent possession" or circumstantial evidence, is there sufficient evidence to go to the jury as to felonious larceny of the tractor.

Chief Justice Parker, speaking for our Court in *State v. Foster*, 268 N.C. 480, 485, 151 S.E. 2d 62, 66 (1966) lays down the conditions under which the "recent possession" rule operates. To bring this rule into play our Court said there must be proof of three things: "(1) That the property described

in the indictment was stolen, the mere fact of finding one man's property in another man's possession raising no presumption that the latter stole it; (2) that the property shown to have been possessed by accused was the stolen property; and (3) that the possession was recently after the larceny, since mere possession of stolen property raises no presumption of guilt. [Cases Cited]"

There was no evidence that the defendant had ever been in possession of the tractor. But the State contends that because the disk boggs were attached to the tractor by way of a three-point hitch and were very heavy and could not be readily moved without the use of a tractor, the circumstances permit the inference that the party that had recent possession of the disk boggs must have had recent possession of the tractor.

The majorty opinion of the Court of Appeals attempts to distinguish this case from *State v. Foster, supra.* The facts in *Foster* indicate the owner of a filling station secured it about 7:30 p.m. on 31 December 1965. He returned to the station before 2:00 a.m. on 1 January 1966 and found that there had been a breaking and entering. He discovered that six Phillips "66" tires were missing from the storeroom (these six tires consisted of two 775x14 Deluxe action tread, white wall tires; two 775x15 safety action tread, black wall tires; and two 825x14 premium action tread, white wall tires). He went to the grease pit and found his used battery charger missing. The evidence indicated that no breaking and entering was involved in taking this battery charger. On 5 January 1966 he saw and identified his used battery charger at the county jail. Shortly thereafter he saw two automobile tires and four other tires on a car at the police station. The six tires were the same size and tread design as those that were stolen from the service station, but were not positively identified by the owner. The value of his used battery charger and the six tires was more than $200. On 31 December 1965 the defendant and his brother, Jackie Foster, operated a garage in Charlotte. On 5 January 1966, a deputy sheriff went to this garage and found the battery charger. Also found were two new Phillips "66" black wall tires. The battery charger had been freshly repainted. On 4 January 1966 the defendant was seen driving a 1959 Oldsmobile. There were four new Phillips "66" white wall tires on the vehicle, which were later identified by the filling station operator as the same type and size as four of those stolen from the filling station.

On these facts our Court held that although these six tires were found in defendant's possession this was not enough evidence to raise a presumption of defendant's guilt since the doctrine of recent possession does not apply in the absence of evidence identifying the property found in defendant's possession as the identical property stolen. The case was returned to Superior Court for proper sentencing for misdemeanor larceny.

In *State v. Parker,* 268 N.C. 258, 150 S.E. 2d 428 (1966), there was evidence that a store had been broken into by breaking glass doors and five suits of clothes had been stolen. Shortly thereafter there was evidence that an unidentified person dropped something on the railroad track nearby that was later identified as a suit of clothes from the victim's store. This was the only suit of clothes recovered. A railroad employee gave chase but failed to catch the person. Shortly thereafter the defendant was apprehended walking up the railroad tracks from the direction where the agent had chased the unidentified figure. The defendant's hand had been cut, and there was blood on the coathanger that held the suit of clothes. The court held that there was no direct evidence placing the stolen goods in the possession of the defendant and that nonsuit should have been allowed.

We find a good statement of the law on "recent possession" in *State v. Baker,* 213 N.C. 524, 526, 196 S.E. 829, 830-31 (1938).

> "The presumption that the possessor is the thief which arises from the possession of stolen goods is a presumption of fact and not of law, and is strong or weak as the time elapsing between the stealing of the goods and the finding of them in the possession of the defendant is short or long. This presumption is to be considered by the jury merely as an evidential fact, along with the other evidence in the case, in determining whether the State has carried the burden of satisfying the jury beyond a reasonable doubt of the defendant's guilt. The duty to offer such explanation of his possession as is sufficient to raise in the minds of the jury a reasonable doubt that he stole the property, or the burden of establishing a reasonable doubt as to his guilt, is not placed on the defendant, however recent the possession by him of the stolen goods may have been. [Cases cited] The burden of establishing the defendant's

guilt beyond a reasonable doubt remains upon the State at all stages of the trial."

The disk boggs were operated by being connected to the tractor with a three-point hitch. Ordinarily the lift of the tractor is used to permit the disk boggs to be raised and thus facilitate turning, traveling on the highway, or avoiding destructive objects. But the lift or pulling arrangement did not have to be operated with this particular tractor. The disk boggs could be detached and operated with any other suitable tractor properly equipped. As a matter of fact, the evidence is that the disk boggs were apparently delivered to the purchaser, Larry Pierce, in a panel truck. Obviously the tractor could not lift the disk boggs into such a truck.

"Recent possession" is not evidence of guilt; it just raises an inference that will permit the case to go to the jury under proper instructions from the court. *State v. Foster, supra; State v. Parker, supra.* We believe the facts in *Foster* as to the larceny of the six tires made out a stronger case for the State than the facts in our case as to larceny of the tractor. In *Foster* the six tires were identified as being of the same type and size as those that were apparently stolen at the same time as the battery charger. It is true the tires were not identified positively, but there was considerable circumstantial evidence. The majority opinion of the Court of Appeals attempts to distinguish *Foster* because of circumstantial evidence in our case. However, there is absolutely no evidence fixing possession of the tractor in defendant at any time. Judge Martin in his dissenting opinion properly quoted the following:

> "The identity of the fruits of the crime must be established before the presumption of recent possession can apply. The presumption is not in aid of identifying or locating the stolen property, but in tracking down the thief upon its discovery." *State v. Jones,* 227 N.C. 47, 49, 40 S.E. 2d 458, 460 (1946).

We conclude that the defendant's unexplained possession of the disk boggs permits the inference that he stole the boggs, but it does not permit the further inference that he took the still missing tractor. Circumstantial evidence in this case is not sufficient to fill the gap. "Inference may not be based on inference. Every inference must stand upon some clear and direct evidence. . . . " *State v. Parker, supra* at 262, 150 S.E. 2d at 431.

We hold that *Foster* is controlling and the trial judge should have allowed the motion for nonsuit as to felonious larceny of the tractor.

[2] The second question raised is whether, as to the disk boggs, there is a fatal variance in the bill of indictment and the proof offered by the State with regard to ownership of them.

The indictment alleges in pertinent parts that "one Ford Diesel Tractor and one set of Long Brand Boggs . . . of one Newland Welborn and Hershel Greene" were stolen by defendant. The proof of the State indicated that Welborn had legal title to the tractor and that Greene had legal title to the disk boggs and had loaned them to Welborn, who was using them on his tractor for his farming.

In *State v. Jenkins,* 78 N.C. 478, 479 (1878) our Court enunciated the following rule with respect to larceny:

> "[T]he property [in the goods stolen] must be laid to be either in him who has the *general* property or in him who has a *special* property. It must at all events be laid to be in some one who has a *property* of some kind in the article stolen. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny; because having no *property,* his possession is the possession of his master."

The Court then gave the following example:

> "A is the general owner of a horse; B is the special owner, having hired or borrowed it, or taken it to keep for a time; C grooms it and keeps the stable and the key, but is a mere servant and has no property at all;—if the horse be stolen, the property may be laid to be either in *A or B;* but not in C although he had the actual possession and the key in his pocket." (Emphasis added.) *State v. Jenkins, supra* at 480. *Accord, State v. Allen,* 103 N.C. 433, 435, 9 S.E. 626, 627 (1889).

Since *Jenkins* was decided, the general law has been that the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest. *State v. Smith,* 266 N.C. 747, 147 S.E. 2d 165 (1966); *State v. Brown,* 263 N.C.

786, 140 S.E. 2d 413 (1965); *State v. Stinson,* 263 N.C. 283, 139 S.E. 2d 558 (1965); *State v. Law,* 228 N.C. 443, 45 S.E. 2d 374 (1947); *State v. Law,* 227 N.C. 103, 40 S.E. 2d 699 (1946); *State v. Hauser,* 183 N.C. 769, 111 S.E. 349 (1922); *State v. MacRae,* 111 N.C. 665, 16 S.E. 173 (1892); *State v. Allen, supra; State v. Powell,* 103 N.C. 424, 9 S.E. 627 (1889); *State v. Bishop,* 98 N.C. 773, 4 S.E. 357 (1887); *State v. Jenkins, supra; State v. Hardison,* 75 N.C. 203 (1876); *State v. Burgess,* 74 N.C. 272 (1876). *See generally* 4 Strong, N. C. Index 2d Indictment and Warrant § 17; 52A C.J.S. Larceny § 13; 50 Am. Jur. 2d Larceny § 167. If the person alleged in the indictment to have a property interest in the stolen property is not the owner or special owner of it, there is a fatal variance entitling defendant to a nonsuit.

Defendant cites *State v. Burgess, supra,* as authority for his position that there is a fatal variance. The bill of indictment in that case charged defendant with larceny of a pair of shoes, the property of Joshua Brooks. The proof indicated that the shoes belonged to one Hagler and that he had provided the firm of William Brooks & Son with leather to make him a pair of shoes. The firm was composed of William Brooks, Joshua Brooks and Henry Brooks. The firm was in possession of the finished shoes, holding them for the owner Hagler, when they were stolen. The firm had a lien on the shoes for making them. Joshua Brooks individually was not the bailee. Rather, he was one of three men who together owned the firm that was the bailee of the shoes. The indictment failed to allege either the owner Hagler or the bailee firm as having a property interest in the shoes.

The facts in *Burgess* are distinguishable from ours and certainly not controlling in this instance. In our case, there is no failure to name either the owner or special owner in the indictment. The indictment alleged that Welborn and Greene had a property interest. In fact, Welborn was the bailee or special owner of the disk boggs, and Greene had legal title to them.

Defendant contends that alleging a property interest in both Greene and Welborn automatically means that the allegation is that they are joint owners. That conclusion does not necessarily follow. The indictment does not specify the precise property interests held by Greene and Welborn. If defendant was not satisfied with the allegation as to ownership, he should

have sought a bill of particulars. G.S. 15-143 (replaced by G.S. 15A-925, effective 1 September 1975). *State v. Johnson,* 220 N.C. 773, 18 S.E. 2d 358 (1942). *See also State v. Everhardt,* 203 N.C. 610, 168 S.E. 738 (1932). *See generally* 4 Strong, N. C. Index 2d Indictment and Warrant § 13. Since both Greene and Welborn had property interests in the disk boggs, there is not even any obfuscation by the listing of any person's name who does not have a property interest in the stolen property. Since the property may be laid in the owner or the special owner, certainly it may be laid in both. This more fully informs defendant about the property stolen. The purpose of the requirement that ownership be alleged is to (1) inform defendant of the elements of the alleged crime, (2) enable him to determine whether the allegations constitute an indictable offense, (3) enable him to prepare for trial, and (4) enable him to plead the verdict in bar of subsequent prosecution for the same offense. *See State v. Carlson,* 171 N.C. 818, 89 S.E. 30 (1916). *See also People v. Harden,* 42 Ill. 2d 301, 247 N.E. 2d 404 (1969). Alleging both the real owner and the special owner further promotes this purpose.

We also note that the order in which the property was listed corresponded to the order that the title holders of the respective pieces of property were listed.

For the above reasons, there is no fatal variance, and the assignment of error is overruled.

We deem it unnecessary to discuss defendant's other assignments of error. Most of these relate to the two questions considered herein. Since the charge submitted to the jury permitted the verdict to be based upon the alleged larceny of the tractor, whereas a nonsuit as to the tractor should have been entered, there must be a new trial based solely on the alleged larceny of the disk boggs. If the evidence is substantially the same as at the first trial, defendant may be found guilty of felonious larceny or misdemeanor larceny or not guilty.

New trial.

TENNESSEE-CAROLINA TRANSPORTATION, INC. v. STRICK CORPORATION

No. 32

(Filed 6 April 1976)

Rules of Civil Procedure § 26— prohibition against further discovery — taking of deposition prohibited — no abuse of discretion

There was no prejudice to defendant or abuse of the trial court's discretion in entering an order prohibiting defendant from taking the deposition of an out-of-state expert witness, since the taking of the deposition would constitute discovery, further discovery had formerly been prohibited by the trial court, defendant had had the opportunity to discover the identity of this witness early in the proceedings but had not taken advantage of it, and the evidence sought by the deposition would be cumulative.

Chief Justice SHARP and Justices LAKE and COPELAND dissent.

ON *certiorari* to the North Carolina Court of Appeals.

On 10 July 1967 plaintiff, a Tennessee corporation licensed in eight states (including North Carolina) as a general commodities carrier entered into a contract with defendant, a Pennsylvania corporation, for the manufacture of 150 42-foot trailers to be built according to plaintiff's specifications at an agreed price of $5,695 per unit. The trailers were delivered f.o.b. defendant's Chicago factory during the months of August, September and October 1967. During the six months following delivery of the trailers two or three of the trailers sagged downward and bulged outward so as to make them unusable. Defendant at its expense repaired these trailers by installing aluminum reinforcement midway the top of the tops of the defective trailers. These repairs were completed in the early portion of 1968. No further problems were encountered until the period May through June 1970 when about nine trailers malfunctioned in a similar manner to those repaired in 1968.

Plaintiff instituted action in 1970 alleging that the malfunction of the trailers was due to improper design and manufacture on the part of the defendant, that although defendant made several attempts to repair some of these trailers, such repairs were ineffective and that defendant had refused to make further efforts to repair other malfunctioning trailers. Plaintiff sought damages in the amount of $670,000.

Defendant denied that any malfunction in the trailers was caused by faulty construction or design and further denied that any warranty covered the trailers.

This case has been before us on two other occasions. We granted a new trial on the original appeal (283 N.C. 423) because of error in admitting evidence concerning plaintiff's damages. On the second appeal (286 N.C. 235, opinion filed 11 December 1974) a new trial was granted, *inter alia*, because the trial judge erred in not allowing defendant's expert witness to testify in rebuttal of plaintiff's evidence to the effect that a portion of the several trailers' framework was made from metal that was too soft and that this caused the trailers to fail.

During the second trial at the 21 January 1974 Session of Mecklenburg Superior Court defendant, by cross-examination of Mr. Charles Youree, president of plaintiff corporation, discovered that plaintiff had employed an expert in metallurgy who lived in Atlanta, Georgia, to examine some of the trailers for the purpose of determining if the metal frames met contract specifications as to hardness. The expert's report was received about two years prior to the second trial. When plaintiff did not offer the testimony of this expert defendant sought by *subpoena duces tecum* to have plaintiff produce the expert's reports concerning his tests. The trial judge refused to require plaintiff to produce these subpoenaed documents on the ground that the material was privileged.

After we remanded for a new trial by our decision filed 11 December 1974, defendant moved for additional time for discovery by motion filed in January 1975. Plaintiff opposed the motion on the ground of privilege. Judge Snepp denied defendant's motion. In so ruling he cited an order of Judge Sam Ervin III, entered 15 October 1973 which, in part, provided that "no further discovery should be had unless by mutual consent of the parties."

On 27 May 1975 defendant gave notice of intent to take the depositions of George V. Aseff of Atlanta, Georgia, and Creed Headrick of Chattanooga, Tennessee. Plaintiff thereupon moved for an order of prohibition to forbid the taking of either deposition. Judge Snepp entered an order dated 13 June 1975 allowing defendant to take the deposition of Creed Headrick and prohibiting the taking of the deposition of George V. Aseff because it "would constitute discovery in violation of the former orders of this court." Defendant gave notice of appeal and tendered

appeal entries to Judge Snepp who entered an order on 20 June 1975 which adjudged and decreed "that the defendant does not have a right of appeal from the court's ruling contained in order entered on 13 June 1975, and its appeal, oft (sic), is by way of petition for certiorari to the North Carolina Court of Appeals." On 18 August 1975, plaintiff filed a motion with the Court of Appeals to dismiss defendant's appeal. This motion was allowed on 22 October 1975. Defendant appealed from this order pursuant to G.S. 7A-30(1) and also petitioned for discretionary review pursuant to G.S. 7A-31. We allowed defendant's petition for discretionary review on 6 January 1976 and on the same date denied plaintiff's motion to dismiss defendant's appeal.

Welling and Miller by George J. Miller and Charles M. Welling; Kennedy, Covington, Lobdell & Hickman by Hugh L. Lobdell for defendant appellant.

Wallace S. Osborne; William J. Waggoner; Robert D. McDonnell for plaintiff appellee.

BRANCH, Justice.

Defendant contends that the trial judge's ruling denying the taking of Mr. Aseff's deposition resulted in a denial of his constitutional right to due process because he was denied the right to present competent evidence in defense to plaintiff's claim. We do not agree. Defendant did not raise this question in the court below and we do not ordinarily consider constitutional questions which were not raised and passed upon in the court below. *Bland v. Wilmington,* 278 N.C. 657, 180 S.E. 2d 813; *Johnson v. Highway Commission,* 259 N.C. 371, 130 S.E. 2d 544. Further the judge's ruling involved a procedural matter embodied in our statutes and the question here presented is whether the trial judge erred in prohibiting defendant from taking the deposition of George V. Aseff because defendant did not know "what the testimony of the witness would be and the taking of said deposition would, therefore, constitute discovery which would be a violation of the former orders of this Court."

At the time of the entry of the order G.S. 1A-1, Rule 26 governed the taking of depositions when actions were pending.

The pertinent portion of that statute provided:

(a) *When depositions may be taken.*—After the commencement of an action and before a final judgment, any

party may take the testimony of any person, including a party, by deposition upon oral examination or written interrogatories for the purpose of discovery or for use as evidence in the action or for both purposes. The deposition may be taken without leave of court, except that leave, granted with or without notice, must be obtained if notice of the taking is served by the plaintiff within 30 days after commencement of the action. . . .

G.S. 1A-1, Rule 30(b) provided for orders of protection for parties and deponents. We quote that portion of the statute:

(b) *Orders for the protection of parties and deponents.*—After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the judge of the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated time or place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the judge or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from unreasonable annoyance, embarrassment, expense, or oppression.

We find no decisions in this jurisdiction offering guidance on the narrow question here presented. However, our rules are closely patterned upon the federal rules which have also been adopted and construed in other jurisdictions. We turn to these courts for aid.

The general rule is that orders denying or allowing discovery or depositions are not appealable. This rule does not apply to separate proceedings in discovery where the court's ruling disposes of every issue before it. Moore's Federal Prac-

tice § 26.83(3)(4). *Di Bella v. United States,* 369 U.S. 121, 7 L.Ed. 2d 614, 82 S.Ct. 654; *Merino v. Hocke,* 289 F. 2d 636; *Carolina Power & Light Co. v. Jernigan,* 222 F. 2d 951, *cert. denied,* 350 U.S. 837, 100 L.Ed. 746, 76 S.Ct. 74. This rule is consistent with our rule that appeal lies only from final judgment unless the order affects some substantial right and injury will result to appellant unless corrected before appeal from final judgment. *Lucas v. Felder,* 261 N.C. 169, 134 S.E. 2d 154; *Perkins v. Sykes,* 231 N.C. 488, 57 S.E. 2d 645. Further the granting or denial of this protective order was addressed to the trial judge's discretion and his ruling will not be disturbed absent a showing of abuse. *Tennessee Electric Power Co. v. T.V.A.,* 306 U.S. 118, 83 L.Ed. 543, 59 S.Ct. 366; *Chemical and Industrial Corp. v. Druffel,* 301 F. 2d 126; *West Pico Furniture Co. v. Superior Court,* 56 Cal. 2d 407, 15 Cal. Rptr. 119, 364 P. 2d 295; *Barnes v. Lednum,* 197 Md. 398, 79 A. 2d 520.

The United States Supreme Court considered a similar question in *Tennessee Electric Power Co. v. T.V.A., supra.* There plaintiff contended that the trial judge erred in failing to allow plaintiff to take the deposition of the public works administrator. The court, noting the failure of the plaintiff to timely take the requested deposition, ruled that plaintiff had failed to show any abuse of discretion on the part of the trial judge.

Sanden v. Mayo Clinic, 495 F. 2d 221 (8th Cir. 1974), is remarkably similar to the case before us for decision. In *Sanden* after the normal period of discovery had ended plaintiff sought to take the deposition of an out-of-state expert witness who was unable to appear at trial. The trial judge refused to modify a previous order limiting further discovery and on appeal his ruling was upheld by the 8th Circuit Court of Appeals.

It is a well-settled rule that the right to take a deposition may be ended by a rule of practice or by order of the trial judge. 8 Wright and Miller, Federal Practice and Procedure: Civil § 2038, n. 59. *Tennessee Electric Power Co. v. T.V.A., supra; Greyhound Lines, Inc. v. Miller,* 402 F. 2d 134; *Associated Metal & Minerals Corp. v. S. S. Geert Howaldt,* 348 F. 2d 457; *Price v. H. B. Green Transportation Line, Inc.,* 287 F. 2d 363.

Defendant argues that he acted seasonably in seeking to obtain the deposition of Mr. Aseff because he did not obtain

knowledge of this witness until the second trial in January 1974. However, even before the initial trial, defendant had the right pursuant to Rule 26(b) to discover "the identity and location of persons having knowledge of relevant facts." This defendant did not do even though he was granted additional time for discovery prior to the second trial. Further, it appears that at the second trial defendant offered expert testimony on the very question about which he seeks to examine plaintiff's expert. It is true that there is some indication that Mr. Aseff tested some of the trailers two years before the second trial. Nevertheless defendant fails to show when his expert or experts made their tests or examinations. In the present posture of this case it appears that the evidence sought by deposition would be cumulative. Thus defendant has failed to show substantial prejudice resulting from the trial judge's order or that there was abuse of discretion on the part of the trial judge in entering the order.

After hearing oral argument of counsel and upon closely examining this record, we conclude that we acted improvidently in allowing defendant's petition for discretionary review and in denying plaintiff's motion to dismiss defendant's appeal.

Appeal dismissed.

Chief Justice SHARP and Justices LAKE and COPELAND dissent.

AIDA T. WHITE v. CARL L. WHITE

No. 56

(Filed 6 April 1976)

Parent and Child § 7— consent judgment for child support — continuance of obligation beyond child's majority

A court may enforce by contempt proceedings its order, entered by consent, that child support payments be made beyond the time for which there is a duty to provide support.

ON *certiorari* to review the decision of the Court of Appeals, 25 N.C. App. 150, 212 S.E. 2d 511 (1975) (Opinion by *Morris, J.*, concurred in by *Britt and Arnold, JJ)*, reversing a judgment of the BUNCOMBE County District Court. This case was docketed and argued as No. 13 at the Fall Term 1975.

The facts are set out in full in the Court of Appeals' decision. Briefly, they are as follows: In October, 1962, plaintiff was granted an absolute divorce from defendant. The divorce judgment awarded her custody of two children of the marriage, Tony, born August 17, 1946, and Marco, born May 8, 1954, and further ordered that defendant pay $50.00 per week for the support of these children beginning November 6, 1962. Defendant never fully complied with this support order.

In July, 1970, plaintiff, alleging defendant's noncompliance, moved that defendant be required to show cause, if any, why he should not be adjudged in contempt; that arrearages due be determined; and that an appropriate support order for Marco be entered. Tony by this time was an adult.

On September 10, 1970, the Buncombe County District Court entered the following order:

> "THIS CAUSE, coming on to be heard before the Undersigned Judge Presiding upon the Plaintiff's Affidavit and Motion and Citation issued in this cause on the 16th day of July, 1970, and the Defendant's Answer, and before hearing evidence it appears to the Court from statement of counsel for the respective parties that the matters and things in controversy have been compromised, settled and adjusted, and that the parties desire that the Court enter this Order by and with their consent;
>
> IT IS NOW, THEREFORE, ORDERED that the Judgment heretofore entered in this cause be, and the same is hereby modified to the extent that the Defendant pay into the Office of the Clerk of the Superior Court of Buncombe County, North Carolina, for the use and benefit of his minor son, Marco White, the sum of TWENTY-FIVE AND NO/100 ($25.00) DOLLARS per week beginning Monday, September 14, 1970, and a like payment on each Monday thereafter until September 13, 1971, at which time said payments shall be increased to THIRTY-FIVE AND NO/100 ($35.00) DOLLARS per week and continue thereafter on each Monday until September 11, 1972, at which time said weekly payments shall terminate and end; that thereafter the Defendant shall pay to said minor child and/or the college attended by him, the sum of TWO THOUSAND and NO/100 ($2,000.00) DOLLARS annually for education expenses for said minor child for each year that said minor

child remains in college up to four (4) years; that said annual payments shall be made in installments as said minor child shall be required to pay tuition and room and board charges to such college as he shall hereafter attend;

IT IS FURTHER ORDERED that the Plaintiff shall be entitled to claim said minor son, Marco White, as a dependent for State and Federal income tax purposes for the years 1967, 1968, 1969, 1970 and 1971, and that thereafter the Defendant shall be entitled to claim said minor child as a dependent for said purpose;

IT IS FURTHER ORDERED that the Defendant be relieved of any obligation for payment to the Plaintiff of arrearage as may be due pursuant to the terms of the original Judgment entered in this cause, it being the intent of the parties for the Plaintiff to forgive the Defendant of any and all arrearage;

* * *

THIS, the 10 day of September, 1970.

s/ MAX O. COGBURN
Judge, General County
Court, Buncombe County,
North Carolina"

The consents of both parties and their respective counsel were endorsed on the order.

In September, 1974, plaintiff again moved that defendant show cause why he should not be adjudged in contempt for failing to comply with the September 10, 1970, order. In support of this motion she alleged that defendant had paid only $1500.00 toward Marco's college education, that $500.00 was due for the 1972-73 school year, $2000.00 for the 1973-74 school year, and that defendant was in arrears in the sum of $2500.00.

This motion came on for hearing before Israel, J., of the Buncombe County District Court on November 20, 1974. Upon finding, among other things, that plaintiff did not contend that Marco was physically or mentally incapable of his own support, that Marco attained the age of 18 years on May 8, 1972, that defendant had made all weekly support payments required by the September 10, 1970, order, that defendant had paid $1500.00 toward Marco's college education for the year 1972-73 and had made no further payments for that year or for the 1973-74

year, Judge Israel concluded that "Defendant's legal obligation to support Marco White or to comply with the Order of September 10, 1970, ended when Marco White attained the age of eighteen years on May 8, 1972, and the Court is without authority to go behind or to inquire into the contentions of the parties or matters and things existing prior to the entry of the Consent Order of September 10, 1970, and should deny the Plaintiff's request to determine the arrearage." Judge Israel then dismissed plaintiff's motion in its entirety.

Plaintiff appealed. The Court of Appeals reversed and remanded the case.

Riddle and Shackelford, P.A., by Robert E. Riddle and George B. Hyler, Jr., attorneys for plaintiff appellee.

McGuire, Wood, Erwin & Crow, by William F. Wolcott III, attorneys for defendant appellant.

EXUM, Justice.

We allowed defendant's petition for further review to consider whether the decision of the Court of Appeals conflicts with our decision in *Shoaf v. Shoaf*, 282 N.C. 287, 192 S.E. 2d 299 (1972). We are satisfied there is no such conflict. The Court of Appeals properly distinguished *Shoaf*. We approve not only the decision of the Court of Appeals but also the careful research and reasoning upon which it is based.

The question presented here is whether a court may enforce by contempt proceedings its order, entered by consent, that child support payments be made beyond the time for which there is a duty to provide support. For the reasons and authorities given in the Court of Appeals' opinion and those given hereinafter, we answer affirmatively.

Shoaf does not hold to the contrary. The question we here consider was not presented in *Shoaf*. There was no consent in *Shoaf* to a court order requiring child support beyond the child's minority. Indeed, the judgment in that case expressly provided that "payments for child support shall continue until such time as said minor child reaches his majority or is otherwise emancipated." When the *Shoaf* judgment was entered on June 11, 1970, twenty-one was by common law the age of majority. Effective July 5, 1971, the General Assembly changed the age of majority to eighteen years. N. C. Gen. Stats. 48A-1, 48A-2

(1975 Cum. Supp.). The Court in *Shoaf* held, simply, that when the legislature changed the age of majority to eighteen the court was without authority to require support after the Shoaf child reached eighteen. There was nothing in the *Shoaf* consent judgment, as there is here, which purported to enlarge that authority.

That the decision in *Shoaf* rested primarily on the language of the judgment is clear from this excerpt from the opinion:

> "*The clear wording of the judgment* does not require or permit [plaintiff's] interpretation. The liability [of defendant], always subject to change, continues from the time of the order, until, *according to its terms,* the child reaches his majority or otherwise becomes emancipated." (Emphases added.)

We held in *Mullen v. Sawyer,* 277 N.C. 623, 178 S.E. 2d 425 (1971) that the obligation in a consent judgment requiring a father to "assume the burden of a four-year college education for each of [his] children at the college of his choosing" could be enforced in an action on the contract against the father's estate notwithstanding that this obligation "clearly exceeded the requirements of the common law." The father in *Shoaf,* however, could not have been required in a contract action to provide more support than he had agreed to. In the case at bar defendant concedes that under *Mullen* defendant's obligations under the September 10, 1970, order could be enforced in a contract action against him.

We hold that this Order may also be enforced by contempt proceedings. That the order is based on an agreement of the parties makes it no less an order of the court once it is entered. *Bunn v. Bunn,* 262 N.C. 67, 136 S.E. 2d 240 (1964) and cases cited. It is likewise no less an order of the court, once entered, notwithstanding that the portion of it here in question could not have been lawfully entered without defendant's consent. His consent made this portion of the order, once entered, lawful. Any person guilty of "[w]ilful disobedience of any . . . order lawfully issued by any court" may be punished for contempt. N. C. Gen. Stat. 5-1(4) (1969).

The decision of the Court of Appeals is

Affirmed.

IN THE MATTER OF JUDGE E. E. CRUTCHFIELD

No. 97

(Filed 17 December 1975 — Fall Term)

1. **Judges § 7— misconduct in office — proceeding before Judicial Standards Commission**

A proceeding before the Judicial Standards Commission is neither criminal nor civil in nature but is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges.

2. **Judges § 7; Judgments § 1— responsibility for judgment**

A judge may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else.

3. **Judges § 7— misconduct in office — absence of benefit to judge**

The conduct of a judge is not precluded from being prejudicial to the administration of justice and that which brings the judicial office into disrepute by the fact that the judge received no personal benefit, financial or otherwise, from such conduct.

4. **Judges § 7— misconduct in office — motive — results of conduct**

Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers.

5. **Judges § 7— misconduct in office — limited driving privileges upon ex parte request — censure by Supreme Court**

A district court judge, upon recommendation of the Judicial Standards Commission, is censured by the Supreme Court for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" based upon the judge's action in signing judgments granting limited driving privileges to two defendants upon a mere *ex parte* application of counsel for defendants without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard, when in truth the judgments were supported neither in fact nor in law and were beyond the jurisdiction of the district court judge who signed them.

Justice LAKE dissenting.

Appearances:

E. A. Hightower, C. Frank Griffin, Henry L. Kitchin, for Judge E. E. Crutchfield, Respondent.

Millard R. Rich, Jr., Deputy Attorney General, for Judicial Standards Commission.

ORDER OF CENSURE

This matter is before the Court upon the Recommendation of the Judicial Standards Commission (Commission) filed with us on August 13, 1975, that Judge E. E. Crutchfield, a judge of the General Court of Justice, District Court Division, Twentieth Judicial District (Respondent), be censured for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute," as this phrase is used in Article IV, Section 17(2) of the North Carolina Constitution and N. C. Gen. Stat. 7A-376 (1974 Cum. Supp.). Having considered the record in the matter consisting of the verified complaint and answer filed with, the evidence heard by, and the findings of fact, conclusions, and Recommendation made by the Commission, and the briefs for Respondent and Commission filed with us (Respondent having elected not to argue the matter orally) we note the following procedure before and Findings of the Commission and we make the following Conclusions of Law and Order of Censure:

PROCEDURE BEFORE AND FINDINGS OF THE COMMISSION

1. This proceeding was instituted before the Commission on December 12, 1974, by the filing of a verified complaint which alleged in substance that Respondent had engaged in wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that he had:

(a) on May 6, 1974, signed a "Judgment Allowing Limited Driving Privilege" to one William B. Byrd despite the facts that Byrd when arrested and charged with driving a vehicle while under the influence of intoxicating liquor on April 6, 1974, refused to take the breathalyzer test and had not, as of May 6, 1974, even been tried for the offense;

(b) on May 4, 1974, signed a "Judgment Allowing Limited Driving Privilege" to one Lybon H. Nance despite the facts that Nance when arrested and charged with driving a vehicle while under the influence of intoxicating liquor on April 20, 1974, refused to take the breathalyzer test and Respondent was not the judge who tried Nance for the offense; and

(c) neither of the judgments was filed with the Clerk of Court nor forwarded to the North Carolina Department of Motor Vehicles.

2. Respondent filed a verified answer admitting these allegations.

3. Upon due notice, Respondent was accorded a full adversary hearing before the Commission on April 3, 1975, at which time he was represented by counsel. At the hearing Respondent stipulated that the Commission could consider as evidence:

(a) the Court records pertaining to the driving under the influence of intoxicating liquor charges against Byrd and Nance;

(b) statements obtained from Byrd, Nance and Mrs. Nance by an agent of the State Bureau of Investigation;

(c) a letter Respondent had previously written to the Commission dated July 19, 1974;

(d) Respondent's earlier oral statement given to an agent of the State Bureau of Investigation;

(e) the complaint and answer; and

(f) Respondent's own sworn testimony before the Commission.

During the hearing, Respondent also consented to the Commission's considering statements taken from attorneys Charles Brown and Fred Stokes, whose clients were the beneficiaries of the judgments in question, by an agent of the State Bureau of Investigation.

4. Upon considering this evidence the Commission found certain facts as follows:

"7. That on April 6, 1974, William Brooks Byrd, Route 1, Box 56, Norwood, North Carolina, was arrested in Stanly County by North Carolina State Highway Patrolman C. B. Blackmon, and charged with driving under the influence of intoxicating liquor and the possession of tax paid liquor with the seal broken in the passenger area of an automobile.

"8. That the said William B. Byrd, at the time of his arrest, refused to take a breathalyzer test.

"9. That on or about May 6, 1974, Respondent signed a 'Judgment Allowing Limited Driving Privilege' to said Byrd and in which Judgment it was recited that he had been convicted of driving a motor vehicle while under the influence of alcohol and which Judgment granted to him limited driving privileges as provided by G.S. 20-179.

"10. That on the date said Judgment was signed, to wit: May 6, 1974, the said Byrd had not been tried on said charges of driving under the influence of intoxicating liquor and possession of tax paid whiskey and that said case was not tried until May 18, 1974.

"11. That Respondent held no hearing with reference to the request of the said Byrd that he be allowed limited driving privileges, made no inquiry with reference to whether a trial of the said Byrd had been held and if so, by whom or as to whether or not the said Byrd had been convicted of driving under the influence of intoxicants.

"12. That said Judgment and copies were signed by Respondent in the law offices of the attorney representing the said Byrd, at said attorney's request; that no copy of said Judgment was filed with the Clerk of the Superior Court of Stanly County nor was any copy sent to the Department of Motor Vehicles in Raleigh, as required by the provisions of G.S. 20-179.

"13. That Respondent was aware at the time he signed said Judgment that only the Trial Judge was authorized by the provisions of G.S. 20-179 to allow limited driving privileges to the person convicted, and was likewise aware of the fact that the form of said Judgment set out in said statutes referred to a hearing and recited a conviction of such defendant in allowing said restricted driving privileges. That Respondent was likewise aware that the Department of Motor Vehicles was required to revoke the driving privilege of any person arrested for driving under the influence of intoxicants who refused to take a breathalyzer test and was aware that such a person was not entitled under the applicable statutes, to receive restricted driving privileges.

"14. That on or about April 20, 1974, Lyvon Hampton Nance, 742 Best Street, Albemarle, North Carolina, was arrested in Stanly County by C. H. Sluder, a North Carolina State Highway Patrolman, and was charged with driving under the influence of intoxicants.

"15. That said Nance refused to take a breathalyzer test.

"16. That on or about May 6, 1974, the said Nance was found guilty of driving under the influence of intoxicants by District Court Judge A. A. Webb, who was the Trial Judge presiding over the trial of said case.

"17. That on or about May 6, 1974, Respondent signed a 'Judgment Allowing Limited Driving Privilege' in favor of the said Nance even though Respondent had not been the Trial Judge presiding over the trial of said Nance and even though Nance was not eligible to receive a limited driving privilege because of his refusal to take a breathalyzer test.

"18. That Respondent held no hearing with reference to the request of the said Nance that he be allowed limited driving privileges, made no inquiry with reference to whether a trial of the said Nance had been held, and if so, by whom.

"19. That Respondent signed said Judgment and copies thereof in the law offices of Nance's attorney and that copy of said Judgment was not filed in the Office of the Clerk of Superior Court of Stanly County, nor was a copy sent to the North Carolina Department of Motor Vehicles in Raleigh.

"20. That Respondent was aware at the time he signed said Judgment that only the Trial Judge was authorized by the provisions of G.S. 20-179 to allow limited driving privileges to the person convicted, and was likewise aware of the fact that the form of said Judgment set out in said statute referred to a hearing. That Respondent was likewise aware that the Depart-

ment of Motor Vehicles was required to revoke the driving privilege of any person arrested for driving under the influence of intoxicants and who refused to take a breathalyzer test and was aware that such a person was not entitled under the applicable statutes to receive restricted driving privileges.

5. In order to meet squarely Respondent's arguments urging us to reject the Commission's Recommendation we observe that the uncontradicted (except where noted) evidence before the Commission tends to show the following facts:

(a) Respondent signed each judgment in question at the request of a reputable, local attorney who had never in the past misled him (there is some evidence that Respondent signed the Byrd judgment at the request of Byrd himself but we will assume for purposes of this order, in accordance with Respondent's testimony before the Commission, the request for each judgment came from the defendant's attorney);

(b) the attorney in each case prepared each judgment for Respondent's signature but otherwise made no express representations of any fact material to the judgment upon which Respondent relied;

(c) Respondent did not personally benefit, financially or otherwise, by reason of his signing either judgment.

CONCLUSIONS OF LAW AND ORDER OF CENSURE

1. The Commission's findings are supported by the evidence. They are indeed not contradicted by any evidence. We, consequently, affirm these findings.

[1] 2. This proceeding is neither criminal nor civil in nature. It is an inquiry into the conduct of a judicial officer, the purpose of which is not primarily to punish any individual but to maintain due and proper administration of justice in our State's courts, public confidence in its judicial system, and the honor and integrity of its judges. *In Re Diener,* 268 Md. 659, 304 A. 2d 587 (1973) cert. denied, 415 U.S. 989; *In Re Kelly,* 238 So. 2d 565 (Fla. 1970) cert. denied, 401 U.S. 962; *Memphis and Shelby County Bar Association v. Vick,* 40 Tenn. App. 206, 290 S.W. 2d 871 (1955) cert. denied, 352 U.S. 975.

[2] 3. A judgment is an act of the court, not counsel. Respondent may not escape responsibility for any judgments signed by him by delegating their preparation to counsel or anyone else. "The trial judge cannot be too careful to make certain that his judgments and orders are accurate and complete, regardless of who takes the primary responsibility of preparing them." The National Conference of State Trial Judges, The State Trial Judge's Book 197 (2d ed. 1969).

[3] 4. That Respondent received no personal benefit, financial or otherwise, from signing these judgments does not preclude this conduct from being prejudicial to the administration of justice and that which brings the judicial office into disrepute. Whether a judge receives any personal benefit from his conduct has been held to be "wholly irrelevant" to the inquiry. *In Re Diener, supra* at 670, 304 A. 2d at 594.

[4] 5. Whether the conduct of a judge may be characterized as prejudicial to the administration of justice which brings the judicial office into disrepute depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers. *Geiler v. Commission on Judicial Qualifications,* 10 Cal. 3d 270, 515 P. 2d 1, 110 Cal. Rptr. 201 (1973) cert. denied 417 U.S. 932.

6. Respondent's conduct in signing these judgments in question without any semblance of an inquiry to determine either the factual or legal basis for them strikes at the very heart of the adjudicatory process. The gravamen of his offense is not so much that his judgments were contrary to law, beyond his jurisdiction to enter, or that some of the facts recited therein were indisputably false. The gravamen is that Respondent made no effort to ascertain whether his judgments were supported in law and in fact. "We have not the smallest doubt . . . that the disposition of cases for reasons other than an honest appraisal of the facts and the law, as disclosed by the evidence presented, will amount to conduct prejudicial to the proper administration of justice whenever and however it may be defined or whoever does the defining." *In Re Diener, supra* at 671, 304 A. 2d at 594.

7. The result of Respondent's conduct was a gross abuse by him of those provisions of our Motor Vehicle Statutes relat-

ing to driving privileges for persons charged and not tried and charged and convicted of driving while under the influence of intoxicants, particularly N. C. Gen. Stats. 20-16.2(c) and 20-179(b).

8. Respondent's judgments under these circumstances in the eyes of any knowledgeable observer were bound to prejudice the administration of justice and to bring the judicial office into disrepute.

9. The failure of Respondent to make due inquiry into the facts and law upon which these judgments were based and his execution of them upon a mere *ex parte* application of counsel for defendants also violates Canon 3(A)(4) of the North Carolina Code of Judicial Conduct, 283 N.C. 771, 772, which provides that "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding." Codes of judicial conduct may "usefully be consulted to give meaning to the constitutional standards." *Spruance v. Commission on Judicial Qualifications*, 13 Cal. 3d 778, 796, 532 P. 2d 1209, 1221, 119 Cal. Rptr. 841, 853 (1975); *accord, Geiler v. Commission on Judicial Qualifications, supra.*

[5] 10. We conclude, finally, that Respondent's execution of each "Judgment Allowing Limited Driving Privilege" upon a mere *ex parte* request without making any effort or conducting any inquiry to ascertain whether the facts recited in the judgments were true and whether he was lawfully entitled to enter the judgments and without giving the State an opportunity to be heard when in truth the judgments were supported neither in fact nor in law and were beyond Respondent's jurisdiction to enter constituted a gross abuse by Respondent of important provisions of our Motor Vehicle Statutes and amounted to "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" as this phrase is used in Article IV, Section 17(2) of the North Carolina Constitution and N. C. Gen. Stat. 7A-376 (1974 Cum. Supp.), and for this conduct Respondent ought to be censured in accordance with the Recommendation of the Judicial Standards Commission.

Now, therefore, it is ORDERED that Judge E. E. Crutchfield, Respondent herein, be and he is hereby censured by this Court.

Done by the Court in Conference, this 17 day of December, 1975.

Exum, J.
For the Court

Justice LAKE dissenting.

My dissent does not reflect any doubt on my part that certain acts of the respondent, purportedly in the performance of his judicial duties, as shown in the evidence in the record before us, were reprehensible, prejudicial to the administration of justice and of such nature as to bring the judicial office into disrepute and thus merit the censure of this Court and of all right minded citizens. The basis of my dissent is the much more fundamental principles of law, declared in the Due Process and Equal Protection Clauses of the Constitution of this State and of the United States.

Since this is the first proceeding to reach this Court under G.S. Ch. 7A, Art. 30, by which the Judicial Standards Commission was created and without which it has no authority, and since such a proceeding is of significant interest to the public, the bench and the bar, I believe the constitutional deficiencies of the statute should be dealt with by this Court even though not specifically raised by the respondent. The attention of the General Assembly being so directed to these deficiencies, it can, if it deems proper, enact at its forthcoming session a new and valid statute to carry out the mandate laid upon it by Art. IV, § 17, of the Constitution of North Carolina, ratified at the general election of 1972.

For the present I pass over the interesting question of whether the General Assembly may lawfully enact legislation creating and empowering such a Commission, at a time when the Constitution does not authorize it, by making the effectiveness of its enactment contingent upon the ratification of a then pending constitutional amendment. See, Session Laws of 1971, Ch. 590.

Article I, § 19, of the Constitution of North Carolina declares:

> "No person shall be * * * disseized of his * * * privileges * * * or in any manner deprived of his life, liberty

or property, but by the law of the land. No person shall be denied the equal protection of the laws * * * ."

The Fourteenth Amendment to the Constitution of the United States declares:

" * * * nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is my view that the statute by which that Commission was created, and which is its sole source of power or authority, violates these basic principles. For that reason, this Court cannot, and does not, derive therefrom authority to enter the present order.

It will be observed that this Court does not purport to enter this order as an exercise of its general supervisory power over proceedings of the other courts of this State, including that over which Judge Crutchfield was elected by the people of his district to preside. See: Constitution of North Carolina, Art. IV, § 12(1); *Dantzic v. State*, 279 N.C. 212, 219, 182 S.E. 2d 563. Consequently, this dissenting opinion does not relate to an order of censure entered in the exercise of that power. Obviously, it does not relate to a judgment entered by the Senate, sitting as the Court for the Trial of Impeachments. See, Constitution of North Carolina, Art. IV, § 4.

In the present proceeding, no court has heard any evidence or made any finding of fact. This Court has simply reviewed the record transmitted to it by an administrative agency, has concluded the evidence in the record supports findings made by that agency and has acted in accordance with its recommendation. The jurisdiction of this Court over the subject matter of this proceeding is derivative and can rise no higher than its source—the proceeding before the Judicial Standards Commission. The jurisdiction of a court over the subject matter is always a proper inquiry for that court, whether raised by the litigants or not.

The Act of 1971 creating the Judicial Standards Commission purports to establish a procedure, other than impeachment, whereby a judge may be censured or removed from his office. The Act provides, G.S. 7A-376, that a judge "removed for other than mental or physical incapacity receives no retirement com-

pensation, and is disqualified from holding further judicial office." Thus, the Act purports to provide a means whereby a judge may be deprived of retirement benefits for which he has, while in office, made substantial payments to the State Retirement Fund, may be deprived of the office to which he has been elected by the people for a specified term of years, and may be denied the right, held by every other qualified voter of the State, to seek election to any judicial office so long as he lives.

The Constitution of North Carolina, Art. XI, § 1, declares:

> "*Punishments.* The following punishments only shall be known to the laws of this State: Death, imprisonment, fines, *removal from office,* and *disqualification to hold and enjoy any office of honor, trust, or profit under this State.*" (Emphasis added.)

While the majority opinion in this matter is technically correct in saying this is not a criminal proceeding, since it is a proceeding not brought or tried in any court of justice, it is neither technically nor substantially correct to say its purpose is not to punish the respondent for alleged wrongdoing. Removal from office and disqualification thereafter to hold office are expressly declared by the Constitution to be punishments. If it were not so, common sense would require the conclusion that to remove a judge from office, deny him the retirement compensation for which he has paid, and disqualify him for life to hold judicial office again is a far more serious punishment than a fine of fifty dollars for speeding or even imprisonment for thirty days.

In my view, a formal order of this Court, follows a publicized recommendation of an official State agency, censuring a judge for misconduct in office, is a severe punishment. To say it is not, because the purpose of the Court is to maintain the public's confidence in its judicial system, is equivalent, in law and in fact, to saying execution for crime is not punishment therefor because the purpose is to improve the environment. In any event, nothing in this record indicates that the Judicial Standards Commission ever notified this respondent that the purpose of its proceeding was to censure him rather than remove him from office. A recommendation by it for removal was a distinct possibility until its actual recommendation was made at the end of the proceeding.

Even a judge charged with misconduct in office is entitled to a fair trial before a fact finding body which has not already

determined his probable guilt to its own satisfaction. Even an accused judge is entitled to the basic constitutional protections afforded by Due Process and Equal Protection Clauses to one suspected of rape, murder, burglary, robbery or embezzlement.

As the Constitution of North Carolina, Art. I, § 35, states, "A frequent recurrence to fundamental principles is absolutely necessary to preserve the blessings of liberty." Two of these are expressed in the Due Process and the Equal Protection Clauses. The 1972 Amendment to the Constitution, Art. IV, § 17, authorizing the General Assembly to enact legislation providing for removal and censure of judges obviously contemplated that it would do so within the limitation of those clauses.

G.S. 7A-376 provides:

> "*Upon recommendation of the Commission,* the Supreme Court may censure or remove any justice or judge for wilful misconduct in office, wilful and persistent failure to perform his duties, habitual intemperance, conviction of a crime involving moral turpitude, or conduct prejudicial to the administration of justice that brings the judicial office into disrepute."

Under this statute, this Court may act only upon a recommendation of the Judicial Standards Commission, an administrative agency. This statute, and the remaining sections comprising the Judicial Standards Commission Act, G.S. Ch. 7A, Art. 30, establish no standard or guide-line whatsoever by which to determine whether the Commission shall recommend, or this Court shall impose, the punishment of censure or the infinitely more severe punishment of removal, loss of retirement benefits and disqualification to hold further judicial office. The Commission, in its unbridled discretion, for unstated reasons, political, personal or otherwise in nature, can choose between the two on a case by case basis, recommending the extreme penalty of removal of one judge and the much milder censure of another judge though their conduct be identical, or though the judge to be censured be found to have accepted bribes and the judge to be removed be found to have done nothing worse than sign without authority (as Judge Crutchfield is said to have done) orders granting permission to operate a motor vehicle. Such statutory invitation to gross favoritism by an administrative agency in the choice of punishment to be imposed for wrongdoing is not consistent with the Equal Protection Clause. Com-

pare, *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 2d 346. To hold such a statute invalid it is not required that actual abuse of such unlimited discretion be shown.

G.S. 7A-377 is the only statutory provision relating to the procedure before the Judicial Standards Commission. It provides:

> "(a) Any citizen of the State may file a written complaint with the Commission concerning the qualifications or conduct of any justice or judge of the General Court of Justice, and thereupon *the Commission shall make such investigation as it deems necessary. The Commission may also make an investigation on its own motion. The Commission is authorized to issue process* to compel the attendance of witnesses and the production of evidence, to administer oaths, to punish for contempt, *and to prescribe its own rules of procedure.* No justice or judge shall be recommended for censure or removal unless he has been given a hearing affording due process of law. *All papers filed with and proceedings before the Commission are confidential, unless the judge involved shall otherwise request.* The recommendation of the Commission to the Supreme Court, and the record filed in support of the recommendations are not confidential. Testimony and other evidence presented to the Commission is privileged in any action for defamation. No other publication of such testimony or evidence is privileged, except that the record filed with the Supreme Court continues to be privileged. At least five members of the Commission must concur in any recommendation to censure or remove any justice or judge. A respondent who is recommended for censure or removal is entitled to a copy of the proposed record to be filed with the Supreme Court, and if he has objections to it, to have the record settled by the Commission. He is also entitled to present a brief and to argue his case, in person and through counsel, to the Supreme Court. A majority of the members of the Supreme Court voting must concur in any order of censure or removal. The Supreme Court may approve the recommendation, remand for further proceedings, or reject the recommendation. A justice of the Supreme Court or a member of the Commission who is a judge is disqualified from acting in any case in which he is a respondent.

"(b) The Commission is authorized to employ an executive secretary to assist it in carrying out its duties. *For specific cases, the Commission may also employ special counsel or call upon the Attorney General to furnish counsel. For specific cases, the Commission may also employ an investigator or call upon the Director of the State Bureau of Investigation to furnish an investigator.* While performing duties for the Commission such executive secretary, special counsel, or investigator shall have authority throughout the State to serve subpoenas or other process issued by the Commission in the same manner and with the same effect as an officer authorized to serve process of the General Court of Justice."

Obviously, this statute makes the Judicial Standards Commission the investigator, the accuser, the prosecutor, the jury to find the facts, and the determiner of the sentence to be recommended. If this be due process of law, it would be difficult to find a procedural violation of that basic constitutional right. Even one accused of the most vicious crime is not placed on trial before a petit jury drawn from the police department which investigated the report of the crime, the grand jury which indicted him and the staff of the prosecuting attorney.

Nothing in the statute provides for putting in evidence the initial complaint filed with the Commission, or even disclosing to the accused judge the name of his accuser or the complaint filed. On the contrary, the statute provides the complaint shall be confidential, unless the accused judge, prior to seeing it, requests otherwise; that is, requests that it be made public. Likewise, nothing in the statute requires or contemplates putting in evidence, at the hearing before the Commission, the reports it receives from its investigators, or the calling of such investigators for cross-examination. Yet, the Commission has received these reports, which, necessarily, are largely hearsay and conclusions of the investigator based upon unspecified data, and, on the basis of these, has made its initial determination of the probable guilt of the respondent before he is even duly notified that a hearing will be conducted. Again, the statute does not provide for, or appear to contemplate, a public hearing. Such a Star Chamber proceeding is not consistent with due process of law.

Again, the statute delegates to this administrative body unlimited authority "to prescribe its own rules of procedure."

The General Assembly has prescribed at length and in detail the procedure by which the several courts of justice in this State are to hear the parties and determine the facts in both civil and criminal actions, but this administrative body is set free to sail on an uncharted sea, to write its own rules of procedure, and to amend them at will. This is "delegation run riot" and violates both Art. II, § 1, and Art. I, § 6, of the Constitution of North Carolina. It is no answer to say the statute provides the respondent judge must be "given a hearing affording due process of law" when the statute, itself, gives the Commission unbridled discretion to prescribe and amend its rules of procedure and confers upon it the combined roles of investigator, accuser, prosecutor and finder of fact.

The statute authorizes the Commission to recommend, and this Court, upon such recommendation, to impose the extreme penalty of removal from office, forfeiture of retirement benefits and disqualification, for life, to hold any judicial office, if, by such a proceeding, the Commission finds the judge has been guilty of "conduct prejudicial to the administration of justice that brings the judicial office into disrepute." This does not mean wilful misconduct, for that word "wilful," specifically used to modify "misconduct in office," is omitted in this specification. It does not mean misconduct in office, or criminal conduct in or out of office, or habitual intemperance on or off the bench, or neglect of official duties, for all of these things are specified by the statute as distinct grounds for censure or removal. What conduct, not falling within any of these other specified categories of behavior, constitutes "conduct prejudicial to the administration of justice that brings the judicial office into disrepute?" The statute does not say. No judge can possibly determine, in advance of Commission action against him, what conduct by him, in or out of his courtroom, will be asserted by the Commission as ground for his censure or removal. Could it be supposed for a moment that, consistent with the Due Process Clause, a fine of fifty dollars or a sentence to imprisonment for twenty-four hours could be imposed for "conduct prejudicial to the administration of justice that brings the judicial office in disrepute?" Yet, this statute provides that this Commission can recommend and this Court thereupon can impose, ex post facto, removal from office upon this charge, *and that is precisely the charge on which Judge Crutchfield is now censured.* If ever there was a "vague and over broad" statutory statement of a ground for the imposition of punishment, it is this one—"con-

duct prejudicial to the administration of justice that brings the judicial office into disrepute." The Due Process Clause simply will not permit censure or removal of a judge upon such a charge. See: *In Re Burrus,* 275 N.C. 517, 531, 169 S.E. 2d 879; *Surplus Store, Inc. v. Hunter,* 257 N.C. 206, 125 S.E. 2d 764; *State v. Hales,* 256 N.C. 27, 32, 122 S.E. 2d 768; 16 AM. JUR. 2d, Constitutional Law, § 552; 16A C.J.S., Constitutional Law, § 580.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

BANK v. GILLESPIE

No. 53 PC.

Case below: 28 N.C. App. 237.

Petition for discretionary review under G.S. 7A-31 allowed 6 April 1976.

BATTLE v. CLANTON

No. 6 PC.

Case below: 27 N.C. App. 616.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

CITY OF HIGH POINT v. FARLOW

No. 44 PC.

Case below: 28 N.C. App. 343.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

DAVIS v. MOBILE HOMES

No. 38 PC.

Case below: 28 N.C. App. 13.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

GRISSOM v. DEPT. OF REVENUE

No. 52 PC.

Case below: 28 N.C. App. 277.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

HENDERSON COUNTY v. OSTEEN

No. 88 PC.

Case below: 28 N.C. App. 542.

Petition for discretionary review under G.S. 7A-31 allowed 6 April 1976.

HOMANICH v. MILLER

No. 82 PC.

Case below: 28 N.C. App. 451.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

IN RE LANCASTER

No. 50 PC.

Case below: 28 N.C. App. 295.

Petition for discretionary review under G.S. 7A-31 allowed 8 April 1976. Motion by Thurman P. Thomas to dismiss appeal for lack of substantial constitutional question denied 8 April 1976.

IN RE PAUL

No. 98 PC.

Case below: 28 N.C. App. 610.

Petition for discretionary review under G.S. 7A-31 denied 5 April 1976. Motion of Attorney General to dismiss appeal allowed 5 April 1976.

IN RE WILL OF ROSE

No. 59 PC.

Case below: 28 N.C. App. 38.

Petition by First Baptist Church of Arlington for discretionary review under G.S. 7A-31 denied 6 April 1976.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

INSURANCE CO. v. CURRY

No. 55 PC.

Case below: 28 N.C. App. 286.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

INVESTMENTS v. HOUSING, INC.

No. 70 PC.

Case below: 28 N.C. App. 385.

Petition for discretionary review under G.S. 7A-31 allowed 5 April 1976.

PRITCHETT v. THOMPSON

No. 78 PC.

Case below: 28 N.C. App. 458.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

PROPERTIES, INC. v. KO-KO MART, INC.

No. 96 PC.

Case below: 28 N.C. App. 532.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. ANDERSON and PRETTY

No. 79 PC.

Case below: 28 N.C. App. 591.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 April 1976.

STATE v. BOLTON

No. 85 PC.

Case below: 28 N.C. App. 497.

Petition for discretionary review under G.S. 7A-31 denied 5 April 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 April 1976.

STATE v. BURKE

No. 87 PC.

Case below: 28 N.C. App. 469.

Petition for discretionary review under G.S. 7A-31 denied 5 April 1976.

STATE v. CARLTON

No. 92 PC.

Case below: 28 N.C. App. 573.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 April 1976.

STATE v. CHANDLER

No. 75 PC.

Case below: 28 N.C. App. 441.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 April 1976.

STATE v. GARDNER

No. 71 PC.

Case below: 28 N.C. App. 484.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. GOSS and STATE v. BRADSHER

No. 83 PC.

Case below: 28 N.C. App. 592.

Petition by defendant Goss for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. HAMILTON

No. 74 PC.

Case below: 28 N.C. App. 591.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. HEAD

No. 101 PC.

Case below: 28 N.C. App. 592.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976. Appeal dismissed 6 April 1976.

STATE v. HUNT

No. 76 PC.

Case below: 28 N.C. App. 591.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. HURLEY

No. 81 PC.

Case below: 28 N.C. App. 478.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. KARBAS

No. 49 PC.

Case below: 28 N.C. App. 372.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. LEWIS and WILLIAMS

No. 91 PC.

Case below: 28 N.C. App. 591.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. LITTLE

No. 89 PC.

Case below: 28 N.C. App. 729.

Petition for discretionary review under G.S. 7A-31 denied 5 April 1976.

STATE v. McNEIL

No. 47 PC.

Case below: 28 N.C. App. 347.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. PORTEE

No. 84 PC.

Case below: 28 N.C. App. 507.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

STATE v. SCALES

No. 92 PC.

Case below: 28 N.C. App. 509.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

STATE v. SMITH

No. 67 PC.

Case below: 28 N.C. App. 411.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

TAYLOR v. TRIANGLE PORSCHE-AUDI, INC.

No. 37 PC.

Case below: 27 N.C. App. 711.

Petition for discretionary review under G.S. 7A-31 denied 6 April 1976.

ELIZABETH E. CROCKETT, JOHN S. PROCTOR, JR. AND BARBARA H. PROCTOR v. FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF CHARLOTTE

No. 36

(Filed 14 May 1976)

1. **Mortgages and Deeds of Trust §§ 15, 19— "due-on-sale" clause — use to require increased interest — no unlawful restraint on alienation**

A "due-on-sale" clause in a deed of trust which permits the lender to accelerate the maturity date of the note upon a transfer of the security property without consent of the lender does not constitute an unlawful restraint on alienation when the clause is used for the sole purpose of requiring the transferee to pay an increased rate of interest on a loan for which there is no prepayment penalty, notwithstanding the security of the lender was not threatened by the transfer, where there is no showing that the lender acted fraudulently, inequitably, oppressively or unconscionably in its demand for increased interest rates in return for its consent to the transfer.

2. **Mortgages and Deeds of Trust §§ 15, 19— "due-on-sale" clause — use to collect higher interest**

The language of a "due-on-sale" clause in a deed of trust permitted the lender to accelerate the debt for the sole purpose of collecting a higher interest rate upon a transfer of the security property.

3. **Mortgages and Deeds of Trust § 19; Uniform Commercial Code § 4— "due-on-sale" clause — inapplicability of U.C.C.**

Statute providing that where an acceleration clause purports to give the creditor the right to accelerate "at will" or "when he deems himself insecure" or in words of similar import, the creditor may accelerate only if he has a "good faith" belief that the prospect of payment or performance is impaired, G.S. 25-1-208, does not apply to an acceleration clause, such as a "due-on-sale" clause, which is conditioned on an act or default within the control of the debtor.

Justice LAKE dissenting.

APPEAL by defendant from judgment entered by *Snepp, J.*, at the 22 September 1975 Session of MECKLENBURG County Superior Court, heard prior to determination by the Court of Appeals under G.S. 7A-31.

Plaintiffs brought this action for the purpose of permanently restraining defendant from accelerating the debt secured by a deed of trust and for damages in the amount of $50,000. Summary judgment for plaintiffs was allowed, the court decreeing that "defendant has no lawful right to call its loan due upon a transfer of the property securing said loan from the plaintiff Crockett to the plaintiffs Proctor." The question of defendant's

liability for damages and the amount of damages, if any, was ordered to remain upon the civil issue docket to come on for trial in the normal progress of the docket. The court denied defendant's request for summary judgment.

Stipulation of facts by the parties tends to show the following:

Defendant is the holder of a promissory note for $80,000 dated 13 February 1968, which is secured by deed of trust on three apartment buildings located in Mecklenburg County, North Carolina.

The original debtor conveyed the real estate to plaintiff Crockett by deed dated 10 October 1968. Plaintiff Crockett expressly assumed the outstanding $79,691.95 of the indebtedness through a provision contained in the deed and through an Assumption Agreement with defendant dated 15 October 1968.

The promissory note held by defendant contains the following provision with respect to acceleration of the maturity date of the loan:

> "*If undersigned shall fail* to remain a member of this Association, or if default be made in the payment of any installment under this note, or *in the performance or observance of any of the covenants or agreements of any instrument now or hereafter evidencing or securing this note, the entire principal sum and accrued interest shall at once become due and payable without notice at the option of the holder of this note. . . .*" (Emphasis supplied.)

The deed of trust securing payment of the above described promissory note also contains the following provision, hereinafter referred to as the "due-on-sale clause":

> "WITH RESPECT TO REPAYMENT OF THE INDEBTEDNESS HEREBY SECURED AND PERFORMANCE OF MORTGAGOR'S OTHER AGREEMENTS . . . :
>
> a) That Mortgagor shall promptly (and in any event within the times stipulated) perform and comply with each and every of Mortgagor's agreements and obligations as herein and in the promissory note provided, and as imposed upon Mortgagor by the by-laws of Association, and if default shall be made in the payment of the indebtedness evidenced by said note, or of the interest on same, or of any

of either, or in payment of any taxes, charges, assessments or insurance premiums, as above provided, including monthly payments or next due taxes and hazard insurance premiums, or if default be made with reference to keeping said premises in good order and condition as herein provided, or if Mortgagor shall fail to perform any other term, condition or obligation of this deed of trust, of the note hereby secured, or of the by-laws of Association, *or if the property herein conveyed is transferred without the written assent of Association, then in all or any of said events the full principal sum with all unpaid interest thereon shall at the option of Association, its successors or assigns, become at once due and payable without further notice and irrespective of the date of maturity expressed in said note;*" (Emphasis supplied.)

The note expressly provided that there would be no penalty for prepayment of the loan.

On 29 April 1975 plaintiffs Proctors entered into an agreement with plaintiff Crockett to purchase the security property provided they were able to secure written approval from defendant for them to assume the outstanding balance of existing indebtedness at the seven per cent (7%) interest rate specified in the note.

Defendant advised plaintiffs that it would approve the transfer to the Proctors upon their execution of an Assumption Agreement in which they would agree to pay a higher rate of interest, to-wit nine and three-quarters per cent (9¾%) interest on the outstanding balance of the loan being assumed by them. Defendant agreed to release Crockett from further liability upon execution of the Assumption Agreement by the Proctors.

The Proctors refused to execute the requested Assumption Agreement, and this action was instituted to determine the right of defendant to require a higher rate of interest in the assumption of loan agreement as a condition to its approval of a transfer of the security property. Plaintiff Crockett also seeks money damages from the refusal of defendant to permit the transfer and assumption of the loan at the seven per cent (7%) interest rate.

The Proctors were already members of defendant Association and had a loan which was current. The refusal of defend-

ant to allow continuation of the loan after the requested transfer was not based on fear that the security property might become impaired or a desire to hold the current debtor directly responsible.

The defendant advised the plaintiffs that the maturity date of the note would be accelerated in the event of a transfer of said property without its consent.

Mraz, Aycock, Casstevens & Davis by John A. Mraz and Robert P. Hanner II, for plaintiff appellees.

Perry, Patrick, Farmer & Michaux by Roy H. Michaux, Jr., for defendant appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard by L. P. McLendon, Jr., and Michael D. Meeker, for the North Carolina Savings and Loan League, Inc. as amicus curiae.

COPELAND, Justice.

There is one principle question for us to determine: Does defendant, as beneficiary under a deed of trust containing the language above described, have a lawful right to require the proposed purchasers of the property secured by said deed of trust to agree to pay an increased rate of interest as a condition to its assent to a transfer of the security property and the assumption of the loan?

Plaintiff contends that since the due-on-sale clause permits defendant to declare the entire debt due and payable when the owner of the property (mortgagor) sells it without the consent of the beneficiary in the deed of trust, it is a restraint on alienation and contrary to public policy and therefore void.

Our Court has consistently held that a condition annexed to the creation of an estate in fee simple disabling the conveyee from alienating it for any period of time is void as a restraint on alienation. *Welch v. Murdock,* 192 N.C. 709, 135 S.E. 611 (1926); *Christmas v. Winston,* 152 N.C. 48, 67 S.E. 58 (1910); *Pritchard v. Bailey,* 113 N.C. 521, 18 S.E. 668 (1893); *Munroe v. Hall,* 97 N.C. 206, 1 S.E. 651 (1887); *Dick v. Pitchford,* 21 N.C. 480 (1837). Similarly, we have held such restraints void where alienation is restricted to a limited class. *Norwood v. Crowder,* 177 N.C. 469, 99 S.E. 345 (1919); *Brooks v. Griffin,* 177 N.C. 7, 97 S.E. 730 (1919). Likewise, we have consistently held that a condition annexed to the creation of an estate in fee

simple which for any period of time causes a forfeiture of the estate upon alienation is void as a restraint on alienation. *Latimer v. Waddell,* 119 N.C. 370, 26 S.E. 122 (1896); *Twitty v. Camp,* 62 N.C. 61 (1866); *Pardue and wife v. Givens and others,* 54 N.C. 306 (1854). Furthermore, we have treated restraining provisions in the form of covenants in the same manner as if they had been written as conditions. *Lee v. Oates,* 171 N.C. 717, 88 S.E. 889 (1916).

Also, we have held that the doctrine against restraints on alienation applies to equitable estates as well as legal estates. *Lee v. Oates, supra; Dick v. Pitchford, supra.* We have applied the restraints doctrine to conditions annexed to the creation of (legal and equitable) life estates. *Lee v. Oates, supra; Wool v. Fleetwood,* 136 N.C. 460, 48 S.E. 785 (1904); *Dick v. Pitchford, supra.* Additionally, we have held that a provision annexed to the creation of an estate in fee simple giving the conveyor a right for an indefinite time and at an unspecified price to repurchase the land when it is sold is void as a restraint on alienation. *Hardy v. Galloway,* 111 N.C. 519, 15 S.E. 890 (1892).

We have also held that restraints against partition or division are void. *Mangum v. Wilson,* 235 N.C. 353, 70 S.E. 2d 19 (1952); *Johnson v. Gaines,* 230 N.C. 653, 55 S.E. 2d 191 (1949).

In *Lee v. Oates, supra,* we noted that an estate created with a condition annexed which prevented a married woman from anticipating her separate equitable estate was a recognized exception to the restraints doctrine. So long as the married woman had not become discovert by death or by absolute divorce, the policies in favor of protecting the married woman's separate equitable estate from the control of her husband outweighed the policies against restraints on alienation.

We have also held that a condition against alienation annexed to the creation of a charitable trust is an exception to the restraints doctrine. *Trust Co. v. Construction Co.,* 275 N.C. 399, 168 S.E. 2d 358 (1969). Of course, this restraint may be modified by the courts under their equitable powers in order to preserve the trust estate or protect the *cestuis que trustent* upon the happening of some exigency, contingency, or emergency not anticipated by the trustor.

The due-on-sale clause involved in the present case does not cause the kind of substantial or direct restraint on aliena-

tion involved in the previous cases considered by this Court and held to be invalid. Plaintiff-trustor-borrower is not disabled from alienating his realty to any class for any period of time. Likewise, his realty is not subject to forfeiture for any period of time upon an attempted alienation. There is also no restraint preventing partition or division of the realty for any period of time. Furthermore, no one has a right for an indefinite time and at an unspecified price to repurchase the land when it is sold. Instead, plaintiff-trustor-borrower has an absolute right to alienate his realty as he chooses at any time to any willing buyer without the realty being forfeited on account of the transaction or being subject to an unrestricted right to repurchase.

Merely by paying off the loan, plaintiff-trustor-borrower or the prospective conveyee can comply with the due-on-sale clause and insure that upon alienation the buyer will not lose his property by exercise of the right to foreclose. It is significant that requiring the loan to be paid off does not involve an extraction of a penalty. Unless the debtor pursues another course of action, the creditor is merely returned the still outstanding amount of the loan that was made to facilitate plaintiff's original purchase. Thus, there is no real freezing of assets or discouragement of property improvement on account of the due-on-sale clause since the property can be freed by simply paying off the loan. Moreover, the due-on-sale clause is part of an overall contract that facilitates the original purchase and, thus, promotes alienation of property. Additionally, North Carolina has approved employment of an acceleration clause in a mortgage, a note secured by a mortgage, and an unsecured note. *Walter v. Kilpatrick*, 191 N.C. 458, 132 S.E. 148 (1926); *Bizzell v. Roberts*, 156 N.C. 272, 72 S.E. 378 (1911); *Trust Company v. Duffy*, 153 N.C. 62, 68 S.E. 915 (1910).

One factor that significantly affects the nature of this acceleration clause so far as the restraints doctrine is concerned is the fact that the creditor's right to accelerate arises only when the realty is alienated. Thus, the practical effect of the due-on-sale clause when it is considered in isolation is that the owner is encouraged not to alienate his property *if* it would be more advantageous to enjoy a loan which has become favorable because of changed interest rates in the market. This is what may be termed a hindrance or an indirect restraint on alienation. As defined in L. Simes & A. Smith, *The Law of Future Interests* § 1112 (2d Ed. 1956), "An indirect restraint on

alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability." Indirect restraints historically have been restricted by the rule against perpetuities and related rules and have not been as harshly struck down as the classical direct restraints. L. Simes & A. Smith, *supra* at § 1116. The classical direct restraints include the previously discussed provisions in a deed, will, contract or other instrument which, by their express terms, or by implication of fact, purport (1) to prohibit alienation of the estate which was granted by that instrument or (2) cause a forfeiture of the estate which was granted by that instrument upon an attempted alienation. Also, a covenant in an instrument of conveyance or contract in which the promisor agrees not to alienate the property that he has been granted therein involves a direct restraint. *See generally* L. Simes & A. Smith, *supra* at § 1131.

Continuing our consideration of this particular due-on-sale clause and loan contract, we find noteworthy that under the loan agreement entered into in this case, plaintiff could prepay at anytime without penalty. Thus, defendant-beneficiary-lender would lose any profit or advantage he otherwise would have if he retained the loan, interest rates declined, and plaintiff prepaid. Although plaintiff-trustor-borrower might have to pay a re-financing charge, he would be able to prepay whenever he chose and take advantage of lower interest rates in the market. Plaintiff would not have to wait for an alienation of the property before being permitted to take advantage of changed interest rates. Thus, as between plaintiff-trustor-borrower and defendant-beneficiary-lender, plaintiff is in a more favorable position for taking advantage of fluctuations in interest rates assuming the due-on-sale clause is permissible. If the due-on-sale clause is not permissible, the plaintiff would have an even superior position. Additionally, we note that a lender could have charged a prepayment penalty of 1% for prepayment of a loan within the first year of the loan under G.S. 24-10, but otherwise no prepayment penalty would have been permissible. Thus, in order to balance the ability of lender and borrower to take advantage of fluctuations in interest rates, equities favor the limited adjustment permissible by the due-on-sale clause.

Although the freedom to contract is limited by the restraints doctrine and the policy reasons therefore, the equities

in this case indicate that the policy factors behind the restraints doctrine are not really affected under the circumstances of this case. In fact, a fair contractual agreement would appear to support a loan with no prepayment penalty and a due-on-sale clause. The immediate buyer has the security of having the ability to pay off his loan at no greater than the initial interest rate, and he can get a more favorable loan if interest rates decline. The lender can get a more favorable loan agreement if interest rates rise and there is a new owner of the realty.

In essence, it is the lender who has provided the opportunity for the initial purchaser to buy the realty. It seems fair for the lender to be able to contract to receive an increased interest rate, on the very loan that is facilitating transfer of the property, in the event the original purchaser decides he is not going to continue ownership or pay off the loan so as to have full equity in the realty. A prime purpose of the loan was to enable the buyer to purchase the realty. If the buyer sells before he obtains full equity, this purpose ceases. Under our free enterprise system the lender may lend his money under such terms as maximize his profits within the limits set by law. As the court stated in *Cherry v. Home Sav. & Loan Assn.*, 276 Cal. App. 2d 574, 81 Cal. Rptr. 135 (1969), the due-on-sale clause is employed by sensible lenders to minimize their risks and avoid losing the benefit of future increases in the interest rate.

In the absence of a due-on-sale clause, plaintiff-trustor-borrower would receive a premium for a favorable loan assumption when he sold his realty. This premium would be the result of the long term loan contract and a fortuitous rise in interest rates. By operation of the due-on-sale clause plaintiff is not able to realize this premium. Upon sale of the realty plaintiff receives the fair market value of the realty without further benefiting from the loan he received.

"The policy against restraints on alienation is said to be based upon the belief that restraints remove property from commerce, concentrate wealth, prejudice creditors, and discourage property improvements." A. Casner & W. Leach, *Cases and Text on Property* 1008 (1969 Ed.); *accord,* Volkmer, *The Application of the Restraints on Alienation Doctrine to Real Property Security Interests,* 58 Iowa L. Rev. 747, 750 (1973) [hereinafter cited as Volkmer]; *see also* L. Simes & A. Smith, *supra* at §§ 1133-35; Schnebly, *Restraints upon the Alienation*

of Legal Interests, 44 Yale L. Rev. 961 (1934-35) [hereinafter cited as Schnebly]; Comment, *The Development of Restraints on Alienation since Gray,* 48 Harvard L. Rev. 373, 401-406 (1934-35). We cannot see how any of these policy factors or other equitable factors can be unfavorably affected by the use of the due-on-sale clause under the circumstances of this case. Also, we do not feel that approval of this kind of due-on-sale clause in connection with a loan for which there is no penalty for prepayment will bring about any confusion or uncertainty in the land law.

Restatement of Property § 410, Comment a, at 2429 (1944) reasons that restraints on alienation may be justified "if the objectives behind the imposition of the restraint are sufficiently important to outweigh the social evils which flow from the enforcement of the restraint or if the interference with the power of alienation is so insignificant that no appreciable harm results from the enforcement of the restraint." The due-on-sale clause in this case is justified under these criteria.

Furthermore, under the circumstances of this case, the practical effect upon alienation is so insignificant or speculative that no appreciable harm has been shown to result from enforcement of the due-on-sale clause. Numerous buyer and seller preferences determine the practical alienability of property as well as the actual effect a due-on-sale clause has on the practical alienability of property. Additionally, the practical effect on restraining alienation is no greater in this case than that in many areas where a practical restraint has traditionally been permitted. Moreover, the policy reasons for upholding the due-on-sale clause employed under the circumstances of this case are equally sound. Examples of these other areas include (1) trusts and powers of revocation and appointment, (2) the spendthrift trust permitted by G.S. 41-9 (limited to a trust for relatives of the grantor of property yielding an annual income at the time of the transfer of no greater than $500 and lasting no longer than the life of the relative). *Fowler v. Webster,* 173 N.C. 442, 92 S.E. 157 (1917), (3) future interests (because they require the joint action of two or more persons to effect a complete alienation), (4) restrictions and restraints imposed on leaseholds and life estates and (5) other factors affecting free marketability of property. *See Coast Bank v. Minderhout,* 61 Cal. 2d 311, 392 P. 2d 265, 38 Cal. Rptr. 505 (1964); L. Simes & A. Smith, *supra* at §§ 1115, 1168; Schnebly.

Because of the economic and legal problems involved, a number of law review articles have elaborated on this problem. Bonanno, *Due on Sale and Prepayment Clauses in Real Estate Financing in California in Times of Fluctuating Interest Rates —Legal Issues and Alternatives,* 6 U. of San. Fran. L. Rev. 267 (1971-72); Volkmer; Warren, *Is the Practice of Raising the Interest Rate in Return for Not Exercising an Acceleration Clause on Assumption of a Mortgage Illegal in Texas as a Restraint on Alienation?* 13 S. Tex. L.J. 296 (1971-72); Comment, *Mortgages—A Catalogue and Critique on the Role of Equity in the Enforcement of Modern-Day "Due-on-Sale" Clauses,* 26 Ark. L. Rev. 485 (1972-73); Comment, *Mortgages: Restrictions on Transfer of the Fee—Effect of Due-on-Sale Clauses,* 28 Okla. L. Rev. 418 (1975); Comment, *Acceleration Clauses as a Protection for Mortgagees in a Tight Money Market,* 20 S.D. L. Rev. 329 (1975); Comment, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability,* 27 Stan. L. Rev. 1109 (1974-75); Comment, *Debt Acceleration on Transfer of Mortgaged Property,* 29 U. of Miami L. Rev. 584 (1975); Note, *The Case for Relief from Due-on-Sale Provisions: A Note to Hellbaum v. Lytton Savings and Loan Association,* 22 Hastings L. J. 431 (1970-71).

Under the facts of this case, the due-on-sale clause was validly exercised even though the security property was not impaired and the transfer of the security property did not affect repayment of the original loan. Courts in other jurisdictions have recognized that a valid reason for exercise of a due-on-sale clause is to obtain higher interest rates or accelerate repayment of the loan (in effect determining that the clause is *reasonable per se* unless there is a showing of fraud, duress or inequitable or unconscionable conduct on the part of the lender). *Coast Bank v. Minderhout, supra; Cherry v. Home Sav. & Loan Assn., supra; Malouff v. Midland Federal,* 181 Colo. 294, 509 P. 2d 1240 (1973); *People's Savings Assn. v. Standard Industries,* 22 Ohio App. 2d 35, 257 N.E. 2d 406 (1970); *Gunther v. White,* 489 S.W. 2d 529 (Tenn. 1973); *Mutual Federal S. & L. v. American Med. Services,* 66 Wis. 2d 210, 223 N.W. 2d 921 (1974); *Mutual Fed. S. & L. Asso. v. Wisconsin Wire Wks.,* 58 Wis. 2d 99, 205 N.W. 2d 762 (1973). There is a split of authority on this point, and other cases have indicated that the due-on-sale clause can be validly exercised only if the security of the lender is threatened. *Tucker v. Pulaski Fed. S. & L.,* 252

Ark. 849, 481 S.W. 2d 725 (1972); *Tucker v. Lassen Sav. & Loan Assn.*, 12 Cal. 3d 629, 526 P. 2d 1169, 116 Cal. Rptr. 633 (1974); *La Sala v. American Sav. & Loan Assn.*, 5 Cal. 3d 864, 489 P. 2d 1113, 97 Cal. Rptr. 849 (1971) (due-on-encumbrance clause); *Clark v. Lachenmeier*, 237 So. 2d 583 (Fla. Ct. App. 1970); *Baker v. Loves Park Savings & Loan Association*, 61 Ill. 2d 119, 333 N.E. 2d 1 (1975) (restraint held to be reasonable).

These classifications inherently are subject to interpretation since they entail generalizations concerning cases involving specific fact situations. *Baltimore Life Insurance Company v. Harn*, 15 Ariz. App. 78, 486 P. 2d 190 (1971), *cert. denied*, 108 Ariz. 192, 494 P. 2d 1322 (1972), is an example of a case dealing with high prepayment penalties as well as the fact that the clause was not exercised for security purposes. The court concluded that an award of some $20,000 in penalties and attorneys fees by operation of an acceleration clause would be unconscionably harsh considering the fact that the action to accelerate and foreclose was an equitable proceeding. The facts of this case render classification impractical, as is also true with respect to *Lane v. Bisceglia*, 15 Ariz. App. 269, 488 P. 2d 474 (1971), a subsequent Arizona case citing *Baltimore Life Insurance Company*.

[1] In conclusion, we believe that insofar as the second line of cases prohibits exercise of due-on-sale clauses except for security purposes, it is too restrictive in its approach and, under the circumstances of this case where there were no prepayment penalties, it was appropriate to exercise the due-on-sale clause even though the security of the lender was not threatened.

As was wisely said by Justice Higgins speaking for our Court in *Roberson v. Williams*, 240 N.C. 696, 700, 701, 83 S.E. 2d 811, 814 (1954), "Ordinarily, when parties are on equal footing, competent to contract, enter into an agreement on a lawful subject, and do so fairly and honorably, the law does not permit inquiry as to whether the contract was good or bad, whether it was wise or foolish." "It is the simple law of contracts that 'as a man consents to bind himself, so shall he be bound [cases cited].'" *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E. 2d 277, 283 (1945).

We, therefore, hold that in the absence of allegations and proof that the lender acted fraudulently, inequitably, oppres-

sively or unconscionably in its demand for increased interest rates in return for the lender's consent to the sale, then the exercise of the due-on-sale clause is reasonable and not invalid as a restraint on alienation.

[2] Plaintiff additionally contends that the language of the deed of trust does not permit defendant to accelerate the debt for the sole purpose of collecting a higher interest rate upon a transfer of the security property. This contention is without merit. The language of the contract is unambiguous:

> "[I]f the property herein conveyed is transferred without the written assent of Association, then . . . the full principal sum with all unpaid interest thereon shall at the option of Association, its successors or assigns, become at once due and payable without further notice and irrespective of the date of maturity expressed in said note."

This language does not purport to restrict Association from withholding assent and accelerating except for security purposes. Where the terms of the contract are not ambiguous, the express language of the contract controls in determining its meaning and not what either party thought the agreement to be. *Howell v. Smith,* 258 N.C. 150, 128 S.E. 2d 144 (1962); *Casualty Co. v. Teer Co.,* 250 N.C. 547, 109 S.E. 2d 171 (1959).

[3] Plaintiff's final contention is that G.S. 25-1-208 precludes defendant from accelerating the debt. Assuming *arguendo* that this statute applies to contracts involving land, we note that it imposes a "good faith" standard on the creditor where it is agreed that he may accelerate the debt at his option. Where the acceleration clause purports to give the creditor the right to accelerate "at will" or "when he deems himself insecure" or in words of similar import, the creditor may accelerate only if he has a "good faith" belief that the prospect of payment or performance is impaired. "Good faith" is defined in G.S. 25-1-201(19) as "honesty in fact in the conduct or transaction concerned." G.S. 25-1-208 imposes this "good faith" standard only on insecurity-type clauses. These clauses are clearly distinguished from default-type clauses (such as the due-on-sale clause involved in our case) where the right to accelerate is *conditioned* upon the occurrence of a condition which is within the control of the debtor. See Volkmer. For this reason G.S. 25-1-208 is inapplicable to our case and provides no relief for plaintiff.

The amicus curiae brief, in addition to presenting an argument under state law similar to that of defendant, asserts that federal law preempts the field insofar as "due-on-sale" clauses in loan instruments of federal savings and loan associations are concerned. The amicus curiae then argues that under federal law the due-on-sale clause involved in this case is valid. At no time have the parties in this action addressed themselves to the question of the applicability of federal law or incorporated by reference the amicus curiae brief. Under Rule 28, N. C. Rules of Appellate Procedure, 287 N.C. 669, 741 (Appendix 1975), appellate review is limited to the arguments upon which the parties rely in their briefs. Moreover, the amicus curiae argues only one side of the federal question and does not fully present the evidence necessary for a determination on this issue. Under these circumstances the question of the applicability of federal law is not properly presented for consideration.

We conclude that the trial judge should have rendered summary judgment for defendant and his decision must be

Reversed.

Justice LAKE dissenting.

On 13 February 1968, Domar Corporation made its note in the amount of $80,000 payable in monthly installments, with interest at 7 per cent, to First Federal Savings & Loan Association. The note was secured by a deed of trust on real estate on which several apartment houses, each containing numerous rental apartments, are located. The interest rate could not be changed so long as Domar owned the property and was not in default. The note provides for acceleration of its maturity at the option of the holder in event of failure of the maker to remain a member of the Association, default in the payment of any installment, or default "in the performance or observance of any of the covenants or agreements of any instrument now or hereafter evidencing of securing this note."

The deed of trust contains covenants by the mortgagor that it will pay all taxes, keep the property insured, keep the premises in good order and not permit any waste thereof and will comply with the provisions of the note and the bylaws of the lending Association. The deed of trust provides for acceleration of the maturity of the note upon default in any of these respects and further provides that "if the property herein con-

veyed is transferred without the written assent of Association," the maturity date of the note may be accelerated, at the option of the Association, and the deed of trust foreclosed.

It will be observed that the deed of trust does not contain a "covenant or agreement" by the maker of the note that it will not, without the assent of the Association, transfer the land. It merely provides that if such transfer occurs the Association may accelerate the maturity of the note. Consequently, a transfer of the land without the assent of the Association is not a default by the maker of the note "in the performance or observance of any of the covenants or agreements of any instrument * * * evidencing or securing" the note. Thus, the accelerating event stated in the note, itself, is not activated by such transfer of the land.

It will be further observed that the provision for acceleration of the maturity date of the note, upon transfer of the property without the assent of the Association, does not expressly extend to transfers by owners subsequent to the mortgagor. This provision is in a section of the deed of trust appearing under a caption reading: "WITH RESPECT TO REPAYMENT OF THE INDEBTEDNESS HEREBY SECURED AND PERFORMANCE OF MORTGAGOR'S OTHER AGREEMENTS; WITH RESPECT TO FORECLOSURE." Apparently, the mortgagor was a corporation engaged in the development of real estate and the construction for resale of apartment houses and, possibly other residences, thereon. Since such mortgagor could reasonably be expected to transfer promptly such property to a grantee, intending to make it, in whole or in part, the home of the grantee's family, the lending association could well be concerned with the identity of the first such transferee but have a less substantial interest in subsequent transferees who would, normally, take the property after the debt had been substantially reduced.

In the present instance, the accelerating event, as now construed by the money lender, is a "sleeper" provision, tucked away in the printed portion of the deed of trust so that its meaning, as now asserted by the money lender, would not readily catch the attention of a mortgagor, or a subsequent purchaser of the property, reading the deed of trust. A moderately alert and wary reader could easily assume the provision contemplated that the mortgagee's assent to a subsequent conveyance would not be unreasonably withheld and that the provision was intended only to protect the mortgagee's security.

In my opinion, it would not readily occur to such a reader, usually a person inexperienced in real property development and financing, purchasing a home for his family, that this seemingly innocuous clause meant the money lender could refuse to consent to a sale of the property to a purchaser of unimpeachable credit and character and foreclose unless the money lender was paid a toll on the transaction.

If such be the meaning of the clause, as the majority opinion seems to hold, the demandable toll could be $1,000, or any other fixed lump sum, just as easily as it could be an increase in the interest rate. I recognize that the language used in the present deed of trust is without qualification and so is entirely susceptible of the construction the money lender and the majority opinion now put upon it. To prevent this clause from being a loan shark's trap for the unwary borrower, it should state explicitly that it is intended to permit the money lender to increase the interest rate or to require any other penalty to be paid to the lender.

In the particular case before us on this appeal, the original mortgagor appears to have been a real estate developer and builder of houses for resale and the specific property was commercial in nature (apartment houses). Thus, this mortgagor and the Crocketts were engaged in dealing in and financing property commercial in nature. The more customary borrower from a savings and loan association is a prospective home owner, less sophisticated in the intricate patterns of real estate financing, contemplating a resale of the property as a remote possibility of secondary importance, or is a home owner compelled by some financial difficulty to borrow and limited in ability to shop about for the most favorable terms. The majority opinion makes no distinction between these types of borrowers and the rule it now establishes for the first time in this State is, apparently, intended to apply to all loans secured by mortgages or deeds of trust.

Provisions for acceleration of the maturity of a long term note, and for a resulting foreclosure of the deed of trust securing it, are fraught with danger of oppression of the debtor by the money lender. These instruments are, almost invariably, upon printed forms prepared by counsel for the money lender. Such provisions should be strictly construed. If there were no other reason for doing so, it is my view that the equitable relief against acceleration of the maturity of this note and foreclosure

of the deed of trust should have been granted on the ground that the acceleration clause, properly construed, does not permit acceleration and foreclosure upon the facts here stipulated. There are, however, in my opinion, other sufficient reasons for affirming the judgment of the Superior Court.

The stipulated facts upon which the case was heard and determined in the Superior Court show (paraphrased and renumbered):

(1) On 10 October 1968, eight months after the note and deed of trust were executed, Domar Corporation conveyed the property to Mrs. Crockett and her husband, its deed to them providing that the grantees "specifically assume and agree to pay the present unpaid balance of said indebtedness as part of the purchase price for this conveyance."

(2) The defendant Association was not notified of and did not consent to this transfer prior thereto, but, on the day when the transfer to the Crocketts occurred, it was notified thereof by Domar Corporation. Five days later, the Crocketts, in response to the defendant's requirement that she do so, executed an "Assumption Agreement" which stated that the defendant consented to the conveyance of the premises to the Crocketts, and the Crocketts "hereby assume and agree to pay said mortgage indebtedness, evidenced by said note and mortgage and to perform all of the obligations provided therein." (Again, it will be observed that neither in the deed of trust, nor in the note secured thereby, was there any covenant by the original mortgagor that it would not convey the land without the assent of the defendant Association. Thus, there was no "obligation" assumed by the Crocketts with reference to any retransfer of the property by them. It is not lightly to be assumed by us that this was an inadvertence of the draftsman of the deed of trust for it is, at least, equally reasonable to assume that the draftsman was carefully seeking to avoid an express covenant restraining the alienation of the property for fear that such covenant might be declared against public policy by this Court.)

(3) For nearly five years the Crocketts made regular payments upon the note to the defendant. Mr. Crockett then died. For two more years Mrs. Crockett continued to make all such payments to the defendant, there being no suggestion in the record that the defendant was requested to or did assent to the transfer of the property, by operation of law, to Mrs. Crockett as the surviving tenant by the entireties.

(4) On 24 April 1975, two years after the death of her husband, Mrs. Crockett contracted to convey the property to her co-plaintiffs, Mr. and Mrs. Proctor, the contract providing that it was contingent upon the ability of the purchasers "to assume First Federal 7% loan" and to obtain the written approval from the defendant Association of such assumption "at 7% interest."

(5) Mr. and Mrs. Proctor are presently members of the defendant Association and have a loan from it which loan is "current."

(6) The defendant Association refused to approve the transfer of the property and assumption of the loan by Mr. and Mrs. Proctor unless they would agree to pay "an increased rate of interest on said indebtedness."

(7) This refusal of the defendant to consent to the requested transfer and assumption "is not based on fear that the security property may become impaired" or upon a desire of the defendant to maintain "direct responsibility of the current debtor (Mrs. Crockett)." (Of course, such transfer of the property and assumption of the indebtedness by Mr. and Mrs. Proctor would not release Mrs. Crockett from her liability to the defendant upon her own assumption of the indebtedness represented by the note of Domar Corporation.)

(8) As a result of the refusal of the defendant to consent to the conveyance to Mr. and Mrs. Proctor, without an agreement by them to pay a higher rate of interest upon the balance due on the note, Mr. and Mrs. Proctor refused to consummate the proposed transaction with the plaintiff, Mrs. Crockett.

(9) Mrs. Crockett "is willing to consummate the said transaction without being released from further liability to the defendant."

(10) Mrs. Crockett's contract with the Proctors provided for a sale of the property for $88,415.95, which was $24,500 in excess of the amount remaining unpaid on the note to the defendant. (Thus, that note had been reduced from $80,000 to approximately $55,000. Nothing in the record suggests that the mortgaged property has deteriorated in value so as to impair the defendant's security.)

In this action the plaintiffs seek: (1) A declaratory judgment that the defendant's refusal to consent to the transfer

of the property is "arbitrary, unreasonable and capricious" and is in violation of G.S. 25-1-208; (2) a declaratory judgment that the provision in the deed of trust for acceleration of the maturity date of the note upon a transfer of the property without the consent of the defendant is unenforceable; (3) a preliminary injunction and a permanent injunction restraining the defendant from accelerating the maturity of the note in the event of a transfer of the property by the plaintiff Crockett; and (4) damages.

The Superior Court denied the defendant's motion for summary judgment, granted a like motion by the plaintiffs and adjudged that "the defendant has no lawful right to call its loan due upon a transfer of the property securing said loan from the plaintiff Crockett to the plaintiffs Proctor." The court reserved for trial the claim of Mrs. Crockett for damages.

The question for decision on this appeal (apart from the question of construction above discussed) is: Under the law of this State, may the holder of a note, secured by a deed of trust on real estate, accelerate the maturity of the note and foreclose the deed of trust upon a conveyance of the property by the owner of the equity of redemption without consent of the holder of the note, the deed of trust providing for such acceleration at the option of the holder and the only reason for the holder's refusal to consent to the conveyance being the transferee's refusal to agree to pay a higher rate of interest than that stated in the note?

This is a matter of first impression in this Court. There is substantial diversity among the decisions of the courts of other states which have considered the question.

Such acceleration provisions are commonly referred to as "Due-on-Sale Clauses." One group of decisions takes the view that a "Due-on-Sale Clause" is not invalid per se, but its exercise will not be permitted unless the proposed transfer threatens the security interest of the holder of the note. Cases illustrating this view are: *Tucker v. Pulaski Federal Savings & Loan Assoc.*, 252 Ark. 849, 481 S.W. 2d 725 (1972); *Baltimore Life Ins. Co. v. Harn*, 15 Ariz. App. 78, 486 P. 2d 190 (1971); *LaSale v. American Savings & Loan Assoc.*, 5 Cal. 3d 864, 489 P. 2d 1113 (1971); *Tucker v. Lassen Savings & Loan Assoc.*, 12 Cal. 3d 629, 526 P. 2d 1169 (1974); *Clark v. Lachenmeier* (Fla. Ct. App.), 237 So. 2d 583 (1970); *Baker v. Loves Park Savings*

& Loan Assoc., 61 Ill. 2d 119, 333 N.E. 2d 1 (1975). A second view is that a "Due-on-Sale Clause" is valid when reasonable, a demand for higher interest not being sufficient, per se, to make the action of the lender unreasonable. This view is illustrated by *Cherry v. Home Savings & Loan Assoc.*, 276 Cal. App. 2d 574 (1969); *Malouff v. Midland Federal Savings & Loan Assoc.*, 181 Colo. 294, 509 P. 2d 1240 (1973); *Gunther v. White*, 489 S.W. 2d 529 (Tenn. 1973); *Mutual Federal Savings & Loan Assoc. v. American Medical Services, Inc.*, 66 Wis. 2d 210, 223 N.W. 2d 921 (1974). A third view is that a "Due-on-Sale Clause" is valid and enforceable regardless of the lender's reason for exercising his option to accelerate. Though the decisions in this group are not entirely clear, it is illustrated by *Coast Bank v. Minderhout*, 61 Cal. 2d 311, 392 P. 2d 265 (1964); and *Stith v. Hudson City Savings Institution*, 313 N.Y.S. 2d 804 (N.Y. Misc. 1970). Thus, the decisions by the courts of other states do not provide for us a clear guide. The majority opinion appears to adopt the third of these views.

It has long been settled that a clause in a note permitting the holder to accelerate its maturity and, thereupon, to foreclose a deed of trust securing the note, is not invalid, per se, and does not impair negotiability. Thus, in *Walter v. Kilpatrick*, 191 N.C. 458, 132 S.E. 148 (1926), a clause providing for acceleration of an entire series of notes upon failure of the maker to pay, when due, any note in the series, or interest thereon, was held valid and enforceable and not to impair the negotiability of the note. In *Bizzell v. Roberts*, 156 N.C. 272, 72 S.E. 378 (1911), in sustaining a similar provision for acceleration upon default by the maker in payments of an installment of his indebtedness, this Court, speaking through Justice Hoke, said:

> "Authority here and elsewhere is to the effect that where a debt is payable in installments, and same is secured by a mortgage containing provision that the entire debt shall mature on failure to pay the interest or specified portions of the principal as it comes due, or any other *reasonable stipulation looking to the care and preservation of the property* or the maintenance of the lien thereon, such stipulation, *in the absence of circumstances tending to show fraud or oppression or 'unconscionable' advantage*, is enforceable as a valid contract obligation." (Emphasis added.)

G.S. 25-1-208, a part of the Uniform Commercial Code adopted in this State in 1965, provides:

> "*Option to accelerate at will.*—A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or 'when he deems himself insecure' or in words of similar import shall be construed to mean that he shall have power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the power has been exercised."

This provision of the Uniform Commercial Code does not extend to an accelerating clause in which the accelerating event is some act or default by the debtor, such as conveyance of the mortgaged land, or default in a payment. However, it is indicative of a legislative concern for the protection of debtors from oppressive and unreasonable acceleration of the due date of their obligations calculated to extort from the debtor more collateral or some other benefit to the creditor.

G.S. 25-2-302, a portion of the Uniform Commercial Code, originally omitted when the Code was enacted in this State but added by the Session Laws of 1971, Chapter 1055, provides:

> "*Unconscionable contract or clause.*—(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> "(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the party shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

This provision of the Uniform Commercial Code, by the express provision of the Act inserting it into the Code, does not apply to transactions entered into prior to 1 October 1971. Thus, it does not apply to this case. However, this statute also is indica-

tive of a legislative policy to guard debtors against "unconscionable" provisions in their contracts.

The courts have authority, in proper cases, to declare provisions in a contract unenforceable because they are contrary to the public policy. *Lamm v. Crumpler,* 233 N.C. 717, 65 S.E. 2d 336 (1951); *Burbage v. Windley,* 108 N.C. 357, 12 S.E. 839 (1891); *Covington v. Threadgill,* 88 N.C. 186, 189 (1883). Thus, in *Tinsley v. Hoskins,* 111 N.C. 340, 16 S.E. 325 (1892), this Court held unenforceable a provision in a note that, in event the note was not paid when due and had to be collected by legal process, the maker would pay an attorney's fee in addition to the principal and interest due on the note. The Court said that such contract was oppressive and contrary to public policy. This was followed in *Bank v. Lumber Co.,* 128 N.C. 193, 38 S.E. 813 (1901), and other cases. Thus, the power of courts to declare provisions in notes unenforceable because oppressive and contrary to public policy is clear. Especially is this true when the court is called upon to exercise its equity powers.

G.S. 24-10(d) provides:

> "(d) Any lender may charge any person * * * that assumes a loan made under the provisions of G.S. 24-1.1, where the principal amount assumed is not more than fifty thousand dollars ($50,000) and is secured by real property, a fee not to exceed one percent (1%) of the principal amount due or twenty-five dollars ($25.00), whichever is less."

This statute does not apply to the present case because the unpaid balance upon the loan exceeds $50,000, and also because the statute was not enacted until 1971, after the present note and deed of trust were executed. However, it is strongly indicative of a legislative intent to protect mortgagors against demands of the money lender for more than nominal fees upon sale of the mortgaged property to a purchaser who assumes the mortgage debt.

It is true that the quality of the mortgagee's security may be impaired by a conveyance of the mortgaged property to an irresponsible person who will permit the property to fall into disrepair or otherwise cause it to deteriorate in value. It does not follow, however, that a "Due-on-Sale Clause" is reasonably necessary for the protection of the mortgagee. Virtually all carefully prepared mortgages and deeds of trust today contain pro-

visions requiring the mortgagor to keep the property in repair and to avoid waste. A clause permitting acceleration of the maturity of the note and foreclosure of the deed of trust for violation of such a covenant is customary and clearly valid. There is such a clause in the deed of trust involved in this litigation. A general acceleration clause set into operation by a conveyance of the property to anyone not approved by the mortgagee is closely akin to a provision for acceleration when the holder of the note "deems himself insecure." Because such a clause subjects the debtor to the grave risk of oppression by an arbitrary holder, G.S. 25-1-208 provides that acceleration of maturity under such a clause is permitted only if the holder "in good faith believes that the prospect of payment or performance is impaired." It is my view that the same result should be reached by the courts when the holder seeks to accelerate the maturity of the note because of a conveyance of the mortgaged property which cannot, in good faith, be claimed to impair the holder's security for the payment of the debt. Where, as here, the note and deed of trust provide for acceleration in event the mortgagor fails to keep the property in repair, a "Due-on-Sale Clause" cannot be justified on the theory that it is a reasonable safeguard against waste of the security.

In the present case, it is clear that the proposed conveyance from Mrs. Crockett to Mr. and Mrs. Proctor presents no threat to the security interest of the defendant in the property or to the defendant's right otherwise to enforce payment of the note. The conveyance of the property to Mr. and Mrs. Proctor, whether or not they assume the payment of the indebtedness, does not release Mrs. Crockett from her liability arising from her own assumption of the mortgage debt. Obviously, there is no reasonable basis for the defendant to suppose that such conveyance will endanger its security interest in the property. It is stipulated that the Proctors, themselves, own other property upon which this defendant holds a deed of trust and their indebtedness thereon is not in default. Indeed, it is stipulated that the defendant's withholding of its approval of the proposed transfer from Mrs. Crockett to the Proctors has no relation to any fear of impairment of the security by reason of such transfer.

The sole reason for the defendant's refusal to approve the transfer and for its threat to accelerate the maturity of the note and to foreclose the deed of trust is that the defendant thereby

seeks to coerce an increase in the interest hereafter to be paid on the unpaid portion of the principal of the note. It is my view that this is sheer extortion and the Superior Court was correct in refusing to permit the defendant to use the acceleration clause for this purpose. In my view the money lender's withholding of the approval of the transfer under these circumstances is unconscionable. The defendant, like Shylock in the Merchant of Venice, says, "So says the bond, doth it not, Noble Judge? * * * Those are the very words." Merchant of Venice, Act IV, Scene 1. The majority opinion agrees that it is "so nominated in the bond" and, therefore, reverses the judgment of the Superior Court.

In reaching this conclusion, the majority opinion says the provision in the contract is clear, the parties to the contract were on equal footing when they entered into the agreement, "As a man consents to bind himself, so shall he be bound," and the debtor can avoid acceleration and foreclosure by simply paying off the debt or refraining from conveying his property.

As I read the majority opinion, it holds that use of a "Due-on-Sale Clause" for the sole purpose of requiring an increase in the rate of interest is reasonable and not oppressive and, therefore, entitled to the protection of the court. In the present case, the mortgaged property is not a single family residence but is a block of apartment houses. The mortgagor and Mrs. Crockett are thus investors in business property. They may, therefore, be on approximately "equal footing" with the defendant. The majority opinion, however, does not rest upon this circumstance. It extends, apparently, to mortgages of typical family residences. When so extended, even if not when applied to the present case, the entire basis for the majority opinion seems to be utterly unrealistic.

Consider the case of the typical young couple buying a home. Their purpose is not investment for profit but acquisition of a residence. They borrow substantially all of the purchase price because they cannot pay cash for the property. Substantially all of their own funds become tied up in the property. After a time the husband's employer transfers him to another city, or a better employment opportunity in another city presents itself. When it moves the family must acquire a new residence. As before, they do not have the ability to do so unless they can get their money out of their present residence by a sale of it. It is a matter of common experience that most of

their prospective buyers are in a comparable financial condition so that they cannot purchase the house, for its fair value, unless they can assume the existing mortgage or refinance it. If the prospective purchaser has to refinance the house, the cost of such financing must, as a practical matter, come, in whole or in part, out of the price he is otherwise willing to pay the seller. To permit the mortgagee to charge the prospective purchaser a higher rate of interest, or a substantial fixed sum, for the privilege of carrying on the existing mortgage is, in effect, a penalty upon the seller, for it must inevitably reduce what he will receive from the sale of his house.

In such a situation it is completely unrealistic to say that the homeowner and the money lender were on equal footing in making the original contract and equally unrealistic to say that the homeowner can avoid the loss resulting fom the threat to accelerate the due date of his note by paying off the mortgage or by refraining from selling his home. He has to sell and he cannot pay off the mortgage. This use of the acceleration clause to coerce an increase in the rate of interest is oppressive, extortionate and unconscionable.

Consider, again, the homeowner who loses his job, suffers disabling illness or some like financial disaster. He borrows and mortgages his property through necessity, not in order to speculate. It is utterly unrealistic to say he has equal bargaining ability with the money lender. If finally he must sell his home because his financial storm continues to rage, is it not unreasonable and oppressive to permit the money lender further to drive his net price down by threatening to foreclose unless the prospective purchaser will agree to pay a higher rate of interest? It is small consolation to such a man to be told, "Well, you don't have to sell; just pay off your mortgage."

Such use of the acceleration clause to extract a higher rate of interest is clearly a restraint upon alienation of the property. This would clearly appear if the provision were that the mortgagor must pay the mortgagee $1,000 if he conveyed the property without consent of the mortgagee. There is no difference in nature or in effect between such a provision and a provision permitting the mortgagee to accelerate the maturity date and foreclose the mortgage unless the proposed purchaser pay the mortgagee a higher rate of interest. Such a restraint on alienation of real property should be held contrary to public policy and void. See: *Schwren v. Falls,* 170 N.C. 251, 87 S.E. 49

(1915); *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58 (1910); *Latimer v. Waddell*, 119 N.C. 370, 26 S.E. 122 (1896); *Pritchard v. Bailey*, 113 N.C. 521, 18 S.E. 668 (1893); 5 Tiffany on Real Property, 3d Ed., 1343; Annot., 42 A.L.R. 2d 1243, 1302. "Although written as an acceleration clause, the due-on-sale clause directly and fundamentally burdens a mortgagor's ability to alienate as surely and directly as the classical promissory restraint." Volkmer, The Application of the Restraints on Alienation Doctrine to Real Property Security Interests, 58 Iowa L. Rev. 774 (1973).

It is my view that a "Due-on-Sale Clause" is valid only when the mortgagee shows a reasonable basis for belief that the proposed transfer will adversely affect his security interest in the mortgaged property in a way which the covenant to keep in repair will not remedy. It being stipulated in the record that this is not true in the present case, the judgment of the Superior Court should be affirmed.

STATE OF NORTH CAROLINA v. CHARLES ALVIN BROWER AND JAMES CANNON JOHNSON

No. 25

(Filed 14 May 1976)

1. **Constitutional Law § 29— motion to quash — systematic exclusion of Negroes — opportunity for investigation**

Trial court's summary denial of defendant's motion to quash the petit jury array on the ground of systematic exclusion of Negroes therefrom did not deny defendants a reasonable time and opportunity to investigate and present evidence in support of their motion where counsel was appointed almost five months previously and defendants could have investigated all aspects of the alleged systematic racial exclusion during such time, defendants supported their motion only with inadequate affidavits, and the record contains nothing to suggest that defendants desired more time to procure additional evidence on the question.

2. **Constitutional Law § 29— systematic racial exclusion — blacks in county — black veniremen — insufficient showing**

Defendants' showing by affidavit that 24 percent of the population of the county is black while only 13.56 percent of the veniremen called were black was insufficient to make out a *prima facie* case of systematic racial exclusion from the petit jury array which the State was required to rebut since there was no showing that the selection procedures in any manner provided a clear and easy oppor-

tunity for racial discrimination, and there was no showing that for a substantial period of time there has been only token representation of the Negro race upon the juries of the county.

3. Criminal Law § 15; Jury § 2— change of venue — special venire — pretrial publicity

In this prosecution for first degree murder, the trial court did not err in the denial of defendants' motion for a change of venue or, in the alternative, for a special venire from another county on the ground of unfavorable pretrial publicity where two newspaper articles attached to the motion were factual, not inflammatory, in nature, each juror questioned stated unequivocally that he had formed no preconceived notions of defendants' guilt or innocence and could render a verdict uninfluenced by anything he read in the newspaper, and the record does not disclose that defendants exhausted their peremptory challenges or that they accepted any juror objectionable to them.

4. Criminal Law §§ 9, 112— failure to instruct on "mere presence"

In this prosecution of two defendants for murder committed in the perpetration of armed robbery, the evidence did not require the trial court to instruct the jury on the insufficiency of "mere presence" at the scene of the crime to establish complicity in the commission of that crime where all the evidence, including the testimony of each defendant, tended to establish actual participation by each defendant in the robbery, and the gist of each defendant's testimony was that his participation in the robbery was coerced by the other.

5. Criminal Law § 7— duress as defense to crime

While it is generally held that duress is a defense to a killing done by another in the commission of a lesser felony participated in by the defendant under coercion, such duress must consist of threatening conduct which produces in the defendant (1) a reasonable fear of (2) immediate (or imminent) (3) death or serious bodily harm.

6. Criminal Law § 7— duress — insufficiency of evidence to require instruction

In this prosecution of two defendants for murder committed in the perpetration of an armed robbery, defendants' evidence did not require the court to instruct the jury on the defense of duress where the first defendant testified that he participated in the robbery only because the second defendant told him to do so and because he was "afraid," although he could not say what he was afraid of; the second defendant testified that he was unaware the first defendant was going to commit the robbery and that when the first defendant announced the holdup, he told the second defendant not to worry about it; and neither defendant offered any evidence that the other forced him to participate in the actual robbery or threatened him in any way.

7. Criminal Law § 11— failure to instruct on accessory after the fact

The trial court in a prosecution for murder committed in the perpetration of an armed robbery did not err in failing to charge on accessory after the fact where all the evidence tended to show actual participation by both defendants in the robbery.

8. **Criminal Law § 6; Homicide § 8— murder in perpetration of robbery — effect of drug intoxication**

In a prosecution for murder committed in the perpetration of robbery, defendant could not be guilty of murder in the first degree under the felony-murder rule if at the time the victim was killed defendant was so under the influence of drugs that he was utterly incapable of forming a specific intent to rob.

9. **Criminal Law § 6; Homicide § 8— drug intoxication — insufficiency of evidence to require instruction**

In a prosecution for murder committed in the perpetration of robbery, the trial court did not err in failing to instruct the jury as to defendant's purported inability to formulate a specific felonious intent due to drug intoxication where the only evidence concerning drugs was the testimony of a codefendant that he and defendant "had some drugs" on the day of the crime while driving to Montgomery County where the crime occurred, there was no evidence as to the nature and quantity of drugs ingested or their effect, if any, upon defendant at the time of the crime, and defendant testified unequivocally that neither defendant nor his codefendant had taken any drugs while driving to Montgomery County.

10. **Criminal Law § 92— consolidation of cases for trial**

Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other.

11. **Criminal Law § 92—consolidation of cases for trial — discretion of court**

Whether defendants who are jointly indicted should be tried jointly or separately is generally in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal.

12. **Criminal Law §§ 92, 95; Constitutional Law § 31— consolidation of cases — codefendant's use of out-of-court statement**

There is no merit in defendant's contention that the consolidation of his murder trial with that of a codefendant charged with the same crime deprived him of a fair trial by enabling the codefendant to use an out-of-court statement which inculpated defendant and exonerated the codefendant since the State did not offer the contents of the codefendant's statement, and each defendant testified in his own behalf and was subject to cross-examination by the other.

13. **Criminal Law § 91— continuance — discretion of court — motion based on constitutional right**

A motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling thereon is not subject to review absent abuse of discretion; however, if the motion is based on a right guaranteed by the federal and state constitutions, the

question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal.

14. Criminal Law § 91— motion for continuance — absence of witness

In this prosecution for murder committed in the perpetration of a robbery, the trial judge did not abuse his discretion or deprive defendant of his constitutional right to confront his accusers with other testimony when he denied defendant's motion for continuance based upon the absence of a witness who would have testified that he and others had been requested by a codefendant to transport the codefendant from Randolph County to the victim's pawnshop in Montgomery County, although the testimony would have tended, weakly at best, to corroborate defendant's testimony of his intent when he left Randolph County, since defendant's intent when he entered the victim's pawnshop, not when he left Randolph County, was the crucial point.

15. Criminal Law § 114— evidence not summarized as established fact

The trial court in a murder prosecution did not summarize a portion of a witness's testimony as established fact and thereby express an opinion in violation of G.S. 1-180.

16. Criminal Law § 71— intent to assist codefendant — shorthand statement of fact

In this prosecution for murder committed in the perpetration of armed robbery, testimony that after the shorter of the two robbers forced two persons to lie on the floor, the shorter man went over with the taller man "to assist him" was competent as a shorthand statement of fact since the witness was not expressing an opinion as to the shorter defendant's intent but was simply narrating a sequence of events during the commission of the crime.

17. Criminal Law § 77— exclusion of self-serving declaration

In a murder prosecution wherein a witness testified that he did not attempt to question defendant at 3 o'clock "because of his condition," the court properly sustained the State's objection to a question as to whether defendant complained about his condition since the question sought to elicit a self-serving declaration at a time when defendant had not been upon the witness stand.

18. Criminal Law § 63— mental capacity — lay witness

Even a lay witness who has observed another, or conversed with him, or had dealings with him, and who has had a reasonable opportunity based thereon to form an opinion satisfactory to himself as to the mental condition of such person, may give his opinion in evidence upon the issue of mental capacity.

19. Criminal Law § 63— defendant's appearance — exclusion of testimony

The trial court did not err in the exclusion of testimony as to whether defendant appeared to be normal when the witness saw defendant in Southern Pines since the witness was not asked to state his opinion as to defendant's mental condition and there was no showing that the witness had a reasonable opportunity to observe defendant and be able to form such an opinion.

20. Criminal Law §§ 43, 95— admission of photograph — failure to give limiting instructions — absence of request

The trial court did not err in failing to instruct the jury that a photograph was admitted only for illustrative purposes in the absence of a request for limiting instructions.

21. Criminal Law §§ 86, 95— prior convictions — failure to give limiting instructions — absence of request

In absence of a timely request, the trial court did not err in failing to instruct the jury that evidence of defendant's prior convictions was admitted only for purposes of impeachment.

22. Constitutional Law § 33; Criminal Law § 48— right to remain silent — failure to contradict codefendant's statement

While the record contains several references to the fact that defendant made no in-custody statement, there is no basis for defendant's argument that the State prejudicially compromised his right to remain silent by inferring culpability from his failure to make a statement contradicting his codefendant's statement which tended to incriminate defendant.

23. Criminal Law § 73— testimony by one defendant — identification of gun — hearsay

In a prosecution for murder committed in the perpetration of a robbery, testimony by one defendant that prior to the crime the owner of a pistol brought it into a room where defendants were engaged in a conversation and stated that he had bought the pistol from the victim, and that this same pistol was the one used by the second defendant during the robbery was competent to identify the perpetrators of the crime, as well as to show a design or plan, and did not constitute inadmissible hearsay.

24. Criminal Law § 86— familiarity of defendant with robbery — no necessity for limiting instructions

The trial court did not err in failing to give the jury limiting instructions regarding evidence of prior criminal convictions when defendant answered negatively a question not objected to as to whether he was familiar with robbery.

25. Criminal Law § 66— lineup — in-court identification

The trial court did not err in permitting a murder victim's wife to make an in-court identification of defendant where the court made findings supported by the evidence on *voir dire* that a pretrial lineup procedure was not impermissibly suggestive and that the witness's in-court identification of defendant was of independent origin and based on her observations of defendant during commission of the crime.

26. Homicide § 31— judgments — erroneous recitation of verdict — remand for correction

Where judgment in a first degree murder case erroneously recites that the jury returned for their verdict that defendant "shall suffer the penalty of death by asphyxiation," the case is remanded so that the judgment may be corrected to show the verdict of guilty

of murder in the first degree rendered by the jury and the death sentence imposed by the court.

DEFENDANTS appeal from judgments of *Tillery, J.*, 21 July 1975 Session, MONTGOMERY Superior Court.

In separate bills of indictment, drawn in conformity with G.S. 15-144, each defendant is charged with the murder of John Farley Hall on 19 February 1975 in Montgomery County.

The State's evidence tends to show that on and prior to 19 February 1975 John Farley Hall and his wife operated a pawnshop in their home in Mount Gilead, Montgomery County. About 10 a.m. the two defendants arrived in a dirty white and blue Chevrolet. They entered the building and, while Mr. Hall was showing them a television set, defendant Johnson pulled a pistol from his belt and said, "This is a holdup." Defendant Brower grabbed a rifle that was leaning against the wall of the living room and directed Mrs. Hall and Mr. Burris, a neighbor who was present, to go into the dining room and lie on the floor. They did so. Meanwhile, Mr. Hall was resisting and defendant Johnson warned Mr. Hall several times to cease his resistance or he would be killed. Mr. Hall continued to resist and Johnson killed him with three shots from the pistol. Both men then left in Johnson's car.

Roger Jarrell, a Pepsi-Cola driver, arrived on the scene shortly before defendants left the building. One of them pointed a .22 automatic rifle at him, and he asked them not to shoot him. The other defendant was putting a pistol in his belt as he came out of the door. When they got into the old white car with a blue top, Mr. Jarrell noted the license number was CWT-171. When the car left he entered the building and found Mr. Hall, his face covered with blood, lying on the floor. He was dead. Mr. Jarrell then called the police, described the car and the individuals in it, and furnished the license number.

Later the same day when defendants were apprehended in Moore County, their car was searched by the police who found six handguns and a leather pouch containing $8.80 in change and some .22 ammunition, all of which items were identified as having come from the Hall residence. Defendant Brower had $128 in one of his socks.

At the trial Mrs. Hall positively identified defendant Johnson as the man with the pistol who shot and killed her husband.

She also positively identified defendant Brower as the man who picked up the rifle and forced her and Mr. Burris to lie on the floor. She said she recognized Brower as the man who had pawned a tape player for $15 just two days prior to the killing.

Defendant Brower, twenty-four years of age, testified as a witness in his own behalf. He said he put five dollars' worth of gasoline in defendant Johnson's car and Johnson agreed to take him from Asheboro, where they both lived, down into Montgomery County to get some clothes. On the way down they "had some drugs." They ultimately arrived at the residence of Sam Stanback "where my clothes were," and while there they drank beer and observed a pistol Stanback said he bought from Mr. Hall. Stanback and defendant Johnson then went into the kitchen and talked privately. When they returned Johnson said, "Ride on up the road with me here," and when they got in the car Johnson said, "I'm going up here to this place where you pawned your tape player, . . . I just want to see what type place it is." When they arrived Mr. Hall invited them in. After some conversation defendant Johnson pulled a gun, started waving it and said, "This is a stickup." Johnson instructed him to get the rifle and bring the other people into the room, and he obeyed. Johnson told him to see if Mr. Burris had a pocketbook, "and I got his wallet and stuck it up in my shirt. I was getting ready to turn back around, I had the rifle in my hand, and that's when I heard the shots." Defendant Brower testified that the pistol was the same one Johnson got from Sam Stanback. He said he gave the Burris pocketbook to Johnson while they were going down the road in the car following the killing and that Johnson later gave him a roll of money while they were in a restaurant "and told me to put it in my sock." He admitted on cross-examination that he had pawned a tape player with Mr. Hall for $15 on 17 February 1975, two days before the robbery and killing. He denied that he went to Mr. Hall's place of business to rob him and insisted he did not know Johnson intended to rob him. He stated that he had been taking drugs which affected him to some extent, "but I wasn't high to the extent that I didn't know what was going on."

Defendant Johnson, thirty-four years old, testified as a witness in his own behalf. He said he lived in Asheboro and had seen defendant Brower around town for about two months. A mutual friend asked him to take Brower to a pawnshop in Biscoe where Brower said he wanted to redeem his father's

pistol. He agreed to do so, and they left together on the morning of 19 February 1975 after Brower put five dollars' worth of gas in the car. They drove to Mount Gilead but Johnson said he was under the impression they were in Biscoe. Upon arriving at Mr. Hall's house, Brower asked about a television and also about a tape player. While they were waiting for the television to warm up, Brower said, "This is a robbery," whereupon Johnson said, "Man, what in the hell are you doing?" Brower replied, "Don't worry about it." Johnson testified he then grabbed the rifle and told Mrs. Hall and Mr. Burris to lie on the floor. Johnson testified he then turned and ran out the door with the rifle in his hand. He was followed by Brower, who was carrying a brown paper bag. Johnson said that he threw the rifle out of the car three or four blocks down the street and told Brower to get out. Instead, Brower pulled "that silver pistol" out of the bag and told him to drive. Two or three miles later Brower said he wanted to stop and get something to eat, so they stopped, walked over to the Kentucky Fried Chicken place, went inside and ordered. "I went to the rest room, and when I came out I walked over going to the gas station to call the police. Before I could get to the telephone, an officer came and arrested me."

Both defendants were convicted of murder in the first degree and sentenced to death. Their appeal assigns errors discussed in the opinion.

Charles H. Dorsett, attorney for defendant appellant Brower.

Carl W. Atkinson, Jr., attorney for defendant appellant Johnson.

Rufus L. Edmisten, Attorney General, and James E. Magner, Jr., Assistant Attorney General, for the State of North Carolina.

HUSKINS, Justice.

Defendants move to quash the petit jury array on the ground that potential Negro jurors were systematically excluded solely on the basis of race. In support of their motion to quash defendants submitted identical affidavits alleging that 24 percent of the population of Montgomery County is black (1970 Census of Population, "General Population Characteristics of North Carolina," Table 34, page 125, marked Defendants' Exhibit A), while only 8 (or 13.56 percent) of the 59 veniremen

drawn and available to serve were black. The trial court denied the motion on the ground that the supporting affidavits were insufficient to establish a basis for quashal. Defendants argue that the court erred in summarily denying their motion to quash without giving them an opportunity to offer further evidence and without requiring the State to show affirmatively an absence of systematic exclusion. This is the first assignment discussed in defendants' briefs.

[1] Defendants correctly assert that when the array is challenged on the ground of systematic racial exclusion the challenger is entitled to reasonable time and opportunity to investigate and present evidence. *See State v. Perry*, 248 N.C. 334, 103 S.E. 2d 404 (1958). Even so, there is no evidence in this record that defendants were not accorded that right. Counsel was appointed on 28 February 1975. Almost five months had elapsed during which defendants could have investigated all aspects of the alleged systematic exclusion of Negroes from the jury box of Montgomery County. Yet they supported their motion only with inadequate affidavits, and the record contains nothing to suggest that defendants desired more time to procure additional evidence on the question. We perceive no error incident to undue haste in passing upon the challenge to the array.

Defendants' argument presupposes that the affidavits were sufficient to make out a prima facie case of systematic racial exclusion which the State was required to rebut. We now examine the disputed validity of that supposition.

The following established legal principles have long been approved by both state and federal courts:

1. If the conviction of a Negro is based on an indictment of a grand jury or the verdict of a petit jury from which Negroes were excluded by reason of their race, the convicton cannot stand.

2. If the motion to quash alleges racial discrimination in the composition of the jury, the burden is upon the defendant to establish it. But once he establishes a prima facie case of racial discrimination, the burden of going forward with rebuttal evidence is upon the State.

3. A defendant is not entitled to demand a proportionate number of his race on the jury which tries him nor on the venire from which petit jurors are drawn.

4. A defendant must be allowed a reasonable time and opportunity to inquire into and present evidence regarding the alleged intentional exclusion of Negroes because of their race from serving on the grand or petit jury in his case. Whether he was afforded a reasonable time and opportunity must be determined from the facts in each particular case.

5. The mere denial by officials charged with the duty of listing and summoning jurors that there was no intentional, arbitrary or systematic discrimination on the ground of race is insufficient to overcome a prima facie case.

6. A jury list is not discriminatory because it is drawn from the tax list of the county. Nor is a jury commission limited to sources specifically designated by the statute.

7. An accused has no right to be indicted or tried by a jury of his own race or even to have a representative of his race on the jury. He does have the constitutional right to be tried by a jury from which members of his own race have not been systematically and arbitrarily excluded.

[2] Decisions, both state and federal, supporting these principles are cited and discussed in *State v. Spencer*, 276 N.C. 535, 173 S.E. 2d 765 (1970), and *State v. Cornell*, 281 N.C. 20, 187 S.E. 2d 768 (1972). In the case before us defendants contend that their showing by affidavits that 24 percent of the population of Montgomery County is black while only 13.56 percent of the veniremen called were black makes out a prima facie case of systematic racial exclusion. Not so.

The courts have never announced precise mathematical standards for demonstrating systematic racial exclusion. Rather, they emphasize a case-by-case factual analysis. Even when there is "striking" statistical evidence of disparity between the ratio of the races in population and jury service, or of the progressive elimination of potential Negro jurors through the selection process, the courts have considered such evidence, *standing alone*, insufficient to constitute a prima facie case of systematic discrimination. *See Alexander v. Louisiana*, 405 U.S. 625, 31 L.Ed. 2d 536, 92 S.Ct. 1221 (1972); *Swain v. Alabama*, 380 U.S. 202, 13 L.Ed. 2d 759, 85 S.Ct. 824 (1965). *Accord, State v. Cornell, supra.* To establish a prima facie case, defendants are generally required to produce not only statistical evidence establishing that blacks were underrepresented on the jury but also evidence that the selection procedure itself was not racially neutral, or

that for a substantial period in the past relatively few Negroes have served on the juries of the county notwithstanding a substantial Negro population therein, or both. *See Alexander v. Louisiana, supra; Whitus v. Georgia,* 385 U.S. 545, 17 L.Ed. 2d 599, 87 S.Ct. 643 (1967); *Arnold v. North Carolina,* 376 U.S. 773, 12 L.Ed. 2d 77, 84 S.Ct. 1032 (1964); *Eubanks v. Louisiana,* 356 U.S. 584, 2 L.Ed. 2d 991, 78 S.Ct. 970 (1958); *Norris v. Alabama,* 294 U.S. 587, 79 L.Ed. 1074, 55 S.Ct. 579 (1935); *State v. Cornell, supra; State v. Ray,* 274 N.C. 556, 164 S.E. 2d 457 (1968); *State v. Wright,* 274 N.C. 380, 163 S.E. 2d 897 (1968); *State v. Yoes* and *Hale v. State,* 271 N.C. 616, 157 S.E. 2d 386 (1967); *State v. Lowry* and *State v. Mallory,* 263 N.C. 536, 139 S.E. 2d 870, *appeal dismissed and cert. denied,* 382 U.S. 22, 15 L.Ed. 2d 16, 86 S.Ct. 227 (1965); *State v. Wilson,* 262 N.C. 419, 137 S.E. 2d 109 (1964).

Defendants' evidence in this case establishes at most that blacks were approximately 11 percent underrepresented on the venire from which the petit jury was drawn. There is no evidence as to what portion of the 24 percent black population of Montgomery County was actually eligible for jury service. There is no evidence disclosing the sources from which the names of the veniremen were chosen and no evidence that such sources identified prospective jurors by race. In short, there is no evidence that the selection procedures in any manner "provided a clear and easy opportunity for racial discrimination." *Alexander v. Louisiana, supra.* There is no evidence disclosing the number of Negroes serving on juries in Montgomery County prior to the selection of the venire in question and no evidence of repeated substantial discrepancies between the number of Negroes drawn for jury duty and the number to be anticipated in view of the racial ratio in the source materials. In short, there is no evidence to support a finding that for a substantial period of time there has been only token representation of the Negro race upon the juries of Montgomery County. In the absence of such evidence, "[w]e cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10 percent." *Swain v. Alabama, supra. Accord, State v. Cornell, supra.*

Defendants have failed to carry the burden of establishing a prima facie case of intentional racial discrimination in the composition of the jury. Hence the State had nothing to rebut,

and the trial judge correctly denied the motion challenging the array. This assignment is overruled.

[3] The next assignment of error discussed in defendants' briefs is addressed to denial of their motion for a change of venue or, in the alternative, for a special venire from another county. G.S. 1-84; G.S. 9-12.

Motions for change of venue or special venire are addressed to the sound discretion of the trial judge and, absent abuse of discretion, his rulings will not be disturbed on appeal. *State v. Thompson,* 287 N.C. 303, 214 S.E. 2d 742 (1975); *State v. Blackmon,* 280 N.C. 42, 185 S.E. 2d 123 (1971).

In support of their motion defendants attached two newspaper articles appearing in the *Montgomery Herald* on 20 February 1975, one day after the commission of the crime, and on 17 July 1975, less than one week before the term of court at which defendants were tried. These newspaper accounts are factual—not inflammatory—in nature and appear to be well within the bounds of propriety. *See State v. Harrill,* 289 N.C. 186, 221 S.E. 2d 325 (1976); *State v. Thompson, supra; State v. Jarrette,* 284 N.C. 625, 202 S.E. 2d 721 (1974); *State v. Mitchell,* 283 N.C. 462, 196 S.E. 2d 736 (1973). Moreover, although several of the jurors stated they had read Exhibits A and B, every juror questioned stated unequivocally that he had formed no preconceived notions of defendants' guilt or innocence and could render a verdict uninfluenced by anything he read in the newspaper. Furthermore, the record does not disclose that defendants exhausted their peremptory challenges or that they accepted any juror objectionable to them. Thus, neither abuse of discretion nor prejudice has been shown. *State v. Thompson, supra.* This assignment is without merit and is overruled.

We now turn to the question whether the trial judge erred by (1) failing to instruct the jury on the distinction between aiding and abetting and "mere presence" and (2) denying defendant Johnson's motion to instruct the jury on the crime of accessory after the fact. In their briefs, defendants combine the assignments presenting these questions, and we consider them in like manner here.

[4] There is nothing in the record to indicate that either defendant requested an instruction on the insufficiency of "mere presence" at the scene of a crime to establish complicity in the

commission of that crime. We need not decide whether the trial judge in this case was obligated by G.S. 1-180 to so instruct without a request therefor. We hold on the facts of this case that such an instruction was properly omitted. Here, defendants were prosecuted on the theory that they had acted in concert to commit a robbery which culminated in the shooting death of Mr. Hall and thus were guilty of first degree murder under the felony-murder provisions of G.S. 14-17. *See State v. Simmons,* 286 N.C. 681, 213 S.E. 2d 280 (1975); *State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972); *State v. Hairston* and *State v. Howard* and *State v. McIntyre,* 280 N.C. 220, 185 S.E. 2d 633 (1971); *State v. Rich,* 277 N.C. 333, 177 S.E. 2d 422 (1970); *State v. Haynes,* 276 N.C. 150, 171 S.E. 2d 435 (1970).

The State's evidence tends to show that defendants entered Mr. Hall's pawnshop together, Johnson brandished a pistol and announced a holdup, Brower picked up an unloaded rifle and ordered Mrs. Hall and Mr. Burris to lie on the floor while he robbed Mr. Burris of his wallet, and Johnson shot and killed Mr. Hall when he continued to resist. Defendants then fled in Johnson's car with a sack of pistols and a sum of money taken in the holdup. When defendants were apprehended two hours later, six handguns and a leather pouch were found in the car and Brower had $128 in cash hidden in his sock. This evidence fully supports the State's theory of the case.

Evidence for Bower tended to show that he accompanied Johnson to the pawnshop not knowing that Johnson intended to rob anyone. He said he participated in the robbery only because Johnson told him to do so and because he was "afraid," although he could not say what he was "afraid of."

Johnson's evidence was to the effect that he entered the pawnshop unaware that Brower intended to rob or kill anyone. Johnson grabbed the rifle "to protect himself" and forced Mr. Burris and Mrs. Hall to the floor to prevent Mr. Burris from getting violent with defendant Brower. Johnson said that he started toward the door, heard a shot, and ran to his car. Brower followed him, pulled a pistol from a bag, and told him to drive.

All of the evidence, including the testimony of each defendant, tends to establish actual participation by each defendant in the robbery. The evidence shows considerably more than "mere presence" during the robbery and murder of Mr. Hall, and a charge on "mere presence" was not required. G.S. 1-180 requires

only that the trial judge declare and explain the law "arising on the evidence" with respect to all substantial features of the case. *State v. Dooley,* 285 N.C. 158, 203 S.E. 2d 815 (1974); *State v. Everette,* 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Duboise,* 279 N.C. 73, 181 S.E. 2d 393 (1971). This requirement was satisfied in the case at bar.

[5, 6] Apparently the gist of each defendant's testimony is that his participation in the underlying felony was coerced by the other. While we find no decision of this Court directly on point, the majority rule elsewhere is that duress is a defense to a killing done by another in the commission of a lesser felony participated in by the defendant under coercion. "It is generally held . . . that duress must consist of threatening conduct which produces in the defendant (1) a reasonable fear of (2) immediate (or imminent) (3) death or serious bodily harm." LaFave and Scott, *Handbook on Criminal Law,* § 64, p. 377 (1972), and cases cited therein. Defendant Brower stated that he didn't know what he was "afraid of," and defendant Johnson testified that when Brower announced the holdup, he told Johnson not to worry about it. Neither defendant offered any evidence that the other forced him to participate in the actual robbery or threatened him in any way. Such evidence falls woefully short of the preceding standard and is insufficient to require an instruction on the defense of duress. That the jury disbelieved both defendants is quite understandable.

[7] There is no merit in the contention that the judge should have charged on the crime of accessory after the fact. "A participant in a felony may no more be an accessory after the fact than one who commits larceny may be guilty of receiving the goods which he himself had stolen. . . . How may an accessory after the fact render assistance to the principal felon if he himself is the principal felon?" *State v. McIntosh,* 260 N.C. 749, 133 S.E. 2d 652 (1963), *cert. denied,* 377 U.S. 939, 12 L.Ed. 2d 302, 84 S.Ct. 1345 (1964).

The assignments of error encompassing the foregoing contentions are overruled.

Failure of the trial judge to instruct the jury relative to defendant Johnson's suggested inability to formulate a specific felonious intent due to drug intoxication constitutes Johnson's eleventh assignment of error. We examine the question briefly.

[8] Where a specific intent is an essential element of the offense charged, as here, intoxication may negate the existence of that intent. If at the time Mr. Hall was killed defendant Johnson was so under the influence of drugs that he was utterly incapable of forming a specific intent to rob, he could not be guilty of murder in the first degree under the felony murder rule. *State v. Propst,* 274 N.C. 62, 161 S.E. 2d 560 (1968). This is so because an essential element of the underlying felony of robbery would be lacking, and the murder would not have been committed in the perpetration of the specified felony. *State v. Simmons, supra.*

[9] In this case the only evidence concerning drugs was the testimony of defendant Brower that he and Johnson "had some drugs" while driving to Montgomery County on the day of the crime, but that he, Brower, "wasn't high to the extent that I didn't know what was going on." There is no evidence from any source as to the nature and quantity of drugs ingested or their effect, if any, upon defendant Johnson at the time the crime was committed. *See State v. Simmons, supra; State v. Fowler,* 285 N.C. 90, 203 S.E. 2d 803, *cert. granted,* 419 U.S. 963, 42 L.Ed. 2d 177, 95 S.Ct. 223 (1974); *State v. Crews,* 284 N.C. 427, 201 S.E. 2d 840 (1974); *State v. Hamby* and *State v. Chandler,* 276 N.C. 674, 174 S.E. 2d 385 (1970), *death sentence vacated,* 408 U.S. 937, 33 L.Ed. 2d 754, 92 S.Ct. 2862 (1972). *Compare State v. Propst, supra.* In fact, when questioned whether *either* defendant had taken any drugs while en route to Montgomery County, defendant Johnson replied *unequivocally* that they had *not.* Upon such evidence an instruction on behalf of defendant Johnson on the law with respect to drug intoxication was not required. This assignment is overruled.

We next consider whether the trial court erred in consolidating the trials of Brower and Johnson and denying their motions for a severance. This question is preserved and argued only by Brower and is the basis for his ninth and fifteenth assignments of error.

[10, 11] Consolidation of cases for trial is generally proper when the offenses charged are of the same class and are so connected in time and place that evidence at trial upon one indictment would be competent and admissible on the other. *State v. Taylor,* 289 N.C. 223, 221 S.E. 2d 359 (1976); *State v. Bass,* 280 N.C. 435, 186 S.E. 2d 384 (1972). As a general rule, whether defendants who are jointly indicted should be

tried jointly or separately is in the sound discretion of the trial court, and, in the absence of a showing that appellant has been deprived of a fair trial by consolidation, the exercise of the court's discretion will not be disturbed upon appeal. *State v. Taylor, supra; State v. Jones,* 280 N.C. 322, 185 S.E. 2d 858 (1972).

[12] Defendant Brower argues that the order of consolidation deprived him of a fair trial because it enabled his codefendant Johnson to use an otherwise inadmissible out-of-court statement (which exonerated Johnson and inculpated Brower) to suggest Brower's guilt. Nothing in the record supports this argument. The State did not offer the contents of defendant Johnson's extrajudicial statement. Moreover, each defendant elected to testify in his own behalf and was subject to cross-examination by the other. *See State v. Wright,* 282 N.C. 364, 192 S.E. 2d 818 (1972). *Compare Bruton v. United States,* 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968); *State v. Fox,* 274 N.C. 277, 163 S.E. 2d 492 (1968). Defendant Brower has shown neither abuse of discretion nor prejudice to his defense as a result of the consolidation. These assignments are therefore overruled.

Defendant Johnson assigns as error the denial of his motion for a continuance based upon the absence of the witness Pee Wee Johnson. He contends he was thus denied his constitutional right to confront his accusers with other testimony in violation of the Sixth and Fourteenth Amendments to the Federal Constitution and Article I, sections 19 and 23 of the State Constitution.

The record reflects that a subpoena for Pee Wee Johnson had been issued on 8 July 1975 and personally served on the witness on 14 July 1975; that apparently said witness was present in the courtroom prior to arraignment of defendants, and when his absence was discovered after arraignment, a second subpoena was issued on 22 July 1975 but never served since the witness could not be located. Defense counsel informed the court of Pee Wee Johnson's name and stated that his testimony would establish that prior to the date of Mr. Hall's murder defendant Brower requested Pee Wee Johnson and others in Randolph County to transport Brower to Mr. Hall's place of business in Montgomery County. Denial of Johnson's motion for a continuance due to the absence of Pee Wee Johnson constitutes defendant Johnson's eighteenth assignment of error.

[13] It is settled law that a motion for continuance is ordinarily addressed to the sound discretion of the trial court and its ruling is not subject to review absent abuse of discretion. *State v. Smathers,* 287 N.C. 226, 214 S.E. 2d 112 (1975); *State v. Robinson,* 283 N.C. 71, 194 S.E. 2d 811 (1973); *State v. Stinson,* 267 N.C. 661, 148 S.E. 2d 593 (1966). However, if the motion is based on a right guaranteed by the federal and state constitutions, the question presented is one of law and not of discretion and the ruling of the trial court is reviewable on appeal. *State v. Harrill, supra; State v. Smathers, supra; State v. Rigsbee,* 285 N.C. 708, 208 S.E. 2d 656 (1974). The question presented here is one of law rather than discretion, for "[t]he right to . . . face one's accusers and witnesses with other testimony [is] guaranteed by the Sixth Amendment to the Federal Constitution which is made applicable to the states by the Fourteenth Amendment, and by Article I, sections 19 and 23 of the Constitution of North Carolina." *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296 (1972).

[14] Defendant Johnson contends he was prejudiced because the testimony of his absent witness would have established Johnson's nonfelonious intentions in agreeing to drive Brower to Mr. Hall's place of business. We find this argument unpersuasive. Assuming Pee Wee Johnson would have testified that he and others had been requested by Brower to transport him from Randolph County to Mr. Hall's place of business in Montgomery County, such testimony would have tended, weakly at best, to corroborate defendant Johnson's testimony regarding the circumstances which took him to Mr. Hall's place of business on the day of the crime. Such evidence, had it been offered at the trial, would have had little, if any, probative value with respect to defendant's intentions immediately prior to and during the commission of the robbery. Indeed, the intent with which defendant Johnson left Randolph County has little weight when the totality of the evidence is considered. *His intent when he entered Mr. Hall's pawnshop is the crucial point.* We hold that denial of Johnson's motion for a continuance did not constitute an abuse of discretion and did not deprive said defendant of his constitutional right to confront his accusers with other testimony. *Cf. State v. Baldwin,* 276 N.C. 690, 174 S.E. 2d 526 (1970); *State v. Patton,* 260 N.C. 359, 132 S.E. 2d 891 (1963), *cert. denied,* 376 U.S. 956, 11 L.Ed. 2d 974, 84 S.Ct. 977 (1964). In our view, Pee Wee Johnson's testimony, had it been

available and admitted, would not have affected the result. This assignment is overruled.

Defendant Brower contends the trial court erred in admitting certain evidence and in failing to instruct the jury with respect to various portions of it. In his brief, Brower discusses his third, fourth, seventh, twenty-fourth, twenty-seventh, twenty-eighth, thirtieth, thirty-first, thirty-second and thirty-third assignments of error as subsections of one assignment. We shall endeavor to deal with them in like fashion, although the disorganized format has made our task more difficult.

[15] Brower first argues that the trial court summarized a portion of Mrs. Hall's testimony as established fact, thereby expressing an opinion in violation of G.S. 1-180. This argument has no merit. Defendant did not object or otherwise call to the court's attention the error allegedly committed in summarizing the State's evidence. "Any error or omission in the statement of the evidence must be called to the attention of the court at the trial to avail the defendant any relief on his appeal." *State v. Thompson,* 226 N.C. 651, 39 S.E. 2d 823 (1946). *See State v. McClain,* 282 N.C. 396, 193 S.E. 2d 113 (1972). However, be that as it may, during his final mandate to the jury the trial judge emphasized that he had no opinion and intended to express no opinion by anything he had said or done in the course of the trial. Under these circumstances the jury obviously understood that the court was merely reviewing what the State's evidence tended to show, rather than expressing opinions that certain facts had been established. *State v. Mitchell,* 260 N.C. 235, 132 S.E. 2d 481 (1963), relied on by defendant, is factually distinguishable. Viewing the charge as a whole, it contains no expression of opinion in violation of G.S. 1-180. *See State v. Poole,* 289 N.C. 47, 220 S.E. 2d 320 (1975).

[16] Defendant Brower next argues under this assignment that the trial court erred in allowing the State's witness Wade Burris to testify over objection that after the shorter of the two robbers, identified as Brower, forced Mr. Burris and Mrs. Hall to lie on the floor and after he took Mr. Burris's pocketbook, the shorter man "went over with the taller man [identified as defendant Johnson] *to assist him.*" (Emphasis added.) Defendant contends the witness was thus erroneously permitted to draw inferences concerning defendant's intention. We find no merit in this argument. It is true that ordinarily a witness may not give his opinion of another person's intention. 1 Stansbury,

North Carolina Evidence § 129 (Brandis rev. 1973), and cases cited therein. Nevertheless, the witness Burris was not expressing his opinion that Brower intended to assist defendant Johnson. Rather, the statement was simply a narration of the sequence of events during the commission of the crime. It was a shorthand statement of fact. *State v. Goines,* 273 N.C. 509, 160 S.E. 2d 469 (1968); 1 Stansbury, North Carolina Evidence §§ 124, 125, 129 (Brandis rev. 1973). Moreover, almost identical testimony had been given previously by the witness Burris without objection. Defendant's subsequent objection to evidence of the same or similar import is of no avail. *State v. Sanders,* 288 N.C. 285, 218 S.E. 2d 352 (1975); *State v. Stegmann,* 286 N.C. 638, 213 S.E. 2d 262 (1975); *State v. Van Landingham,* 283 N.C. 589, 197 S.E. 2d 539 (1973). This assignment is overruled.

Defendant Brower's third argument encompassed by this assignment fails to relate his discussion to any specific exception in the record. *See* Rule 10, Rules of Appellate Procedure, 287 N.C. 670, 698 (Appendix 1975). Reference is made to the testimony of two unnamed witnesses regarding Brower's mental capacity. Defendant contends that one of the witnesses was not allowed to testify regarding Brower's complaints of headaches, but the only testimony in the record on that subject was given by defendant Johnson who quoted Brower as stating a couple of times that "he had a headache" but did not wish to stop for a drink or any medication to alleviate it.

[17] By a voyage of discovery through the record, we learn that Brower's Exception No. 28 is addressed to a statement of the witness Brady that he did not attempt to question Brower at 3 o'clock "because of his condition." When asked whether Brower complained about his condition, the court sustained the State's objection. The question sought to elicit a self-serving declaration at a time when Brower had not been upon the witness stand. As such, it was properly excluded. 1 Stansbury, North Carolina Evidence § 140 (Brandis rev. 1973), and cases cited therein. Furthermore, the record reflects that defendant obtained the benefit sought by the testimony of the witness Brady before and after the exclusion in question. In any event, the answer which the witness Brady would have given had he been permitted to do so was not placed in the record. Therefore we cannot know whether the ruling by the trial court was prejudicial. *State v. Robinson,* 280 N.C. 718, 187 S.E. 2d 20 (1972).

Continuing our voyage through the record, we find that Brower's Exception No. 29 occurred during the redirect examination of the witness Brady. He was asked: "Do you know whether either of these defendants took any medication at any time prior to the time you saw them for the previous hour or two?" Objection overruled. Answer: "I do not know, no sir." It is most apparent that the answer—"I don't know"—was in no way prejudicial.

Brower's Exception No. 31 was taken during defense counsel's cross-examination of State's witness Charles Watkins, a private investigator employed by the Moore County Sheriff's Department. The witness was asked: "When you saw him at Southern Pines, Mr. Watkins, did you notice anything in particular about him, was there anything unusual about him?" Answer: "I don't recall anything unusual." Question: "Did he appear to be normal to you?" Objection sustained. Exception No. 31. Defendant Brower argues that exclusion of the answer to the last question was error.

[18, 19] Even a lay witness who has observed another, or conversed with him, or had dealings with him, and who has had a reasonable opportunity based thereon to form an opinion satisfactory to himself as to the mental condition of such person, may give his opinion in evidence upon the issue of mental capacity. *Moore v. Insurance Co.*, 266 N.C. 440, 146 S.E. 2d 492 (1966); 1 Stansbury, North Carolina Evidence § 127 (Brandis rev. 1973). Here, however, the witness was not asked to state his opinion as to defendant's mental condition. There is no showing that the witness had a reasonable opportunity to observe defendant and be able to form such an opinion. Mr. Brady had already stated he did not recall anything unusual. Moreover, the record is silent as to what the witness would have testified had he been allowed to answer. The ruling therefore may not be relied upon as prejudicial error. *State v. Robinson, supra.*

We find no merit in the twenty-eighth, twenty-ninth and thirty-first exceptions, and any assignments of error based thereon are overruled.

[20] Defendant Brower next contends under this assignment that the trial court erred in admitting two photographs, State's Exhibits 2 and 3, without limiting instructions to the jury. The record reveals, however, that the court did in fact properly instruct the jury that State's Exhibit 3 should be considered for

illustrative purposes only. *See* 1 Stansbury, North Carolina Evidence § 34 (Brandis rev. 1973). Apparently State's Exhibit 2 was admitted into evidence without such limiting instruction. Even so, no such instruction was requested and, in the absence of such request, failure to give a limiting instruction is not error. *State v. Williams,* 272 N.C. 273, 158 S.E. 2d 85 (1967); *State v. McKissick,* 271 N.C. 500, 157 S.E. 2d 112 (1967); *State v. Cade,* 215 N.C. 393, 2 S.E. 2d 7 (1939). It follows that no prejudicial error has been shown.

[21] Defendant Brower next argues under this assignment that the trial court erred in failing to instruct the jury that evidence of his prior convictions pertained only to his credibility, not to his guilt or innocence. In his brief, defendant fails to relate this argument to any specific exception in the record as required by Rule 10, Rules of Appellate Procedure, supra. In any event, the law is well settled that when a defendant in a criminal case elects to testify, he is subject to cross-examination for purposes of impeachment concerning his prior criminal conduct. *See State v. Foster,* 284 N.C. 259, 200 S.E. 2d 782 (1973); *State v. Williams, supra.* Although the court apparently failed to instruct the jury that evidence of prior convictions was admitted only for purposes of impeachment, the record contains no indication that any such limiting instruction was requested. Absent a timely request, failure to give the appropriate limiting instruction is not error. *State v. Williams, supra; State v. Cade, supra.* Even so, we note that the court in its final charge to the jury did, in fact, correctly limit the restricted purpose for which this evidence was admitted. In no view of the matter, therefore, has error been shown.

[22] Defendant Brower next argues under this assignment that the trial court erred in permitting the State over objection to question him concerning codefendant Johnson's out-of-court statement so as to suggest that Brower's silence was somehow incriminating. We find nothing in the record to support this contention. The record shows that defendant Brower was interrogated by *counsel for defendant Johnson* as follows:

"Q. What made you decide to make a statement, then, Mr. Brower?

OBJECTION OVERRULED.

Q. Did you know Mr. Johnson had made a statement, Mr. Brower?

A. I didn't know for sure.

EXCEPTION No. 43"

The record contains several references to the fact that defendant Brower had not made a statement, and these had been admitted previously without objection. One such reference appears in Brower's own testimony on direct examination. We perceive no basis for Brower's apparent argument that the State prejudicially compromised his right to remain silent by inferring culpability from his failure to make a statement contradicting his codefendant Johnson's statement which tended to incriminate Brower. *State v. Castor,* 285 N.C. 286, 204 S.E. 2d 848 (1974), and *State v. Virgil,* 263 N.C. 73, 138 S.E. 2d 777 (1964), cited by defendant Brower in support of his contention, are factually distinguishable. We find no merit in this argument.

Defendant Johnson, following the same general format of Brower's brief, combines into one assignment his seventh, twenty-second, twenty-third, thirty-first, thirty-fifth, thirty-seventh, thirty-ninth and fortieth assignments of error and then attempts to discuss them under five subsections. His first two contentions generally track the points raised and the arguments made in Brower's brief. They have been considered and further discussion of them is unnecessary.

[23] Defendant Johnson's third argument under this assignment relates to those portions of defendant Brower's direct testimony to which Johnson's thirty-sixth and thirty-eighth exceptions were taken. This testimony reveals that while defendants were engaged in a conversation at Sam Stanback's home in Montgomery County, Stanback came into the room with a pistol and stated that he bought it from Mr. Hall for sixty dollars. Later, Brower testified that this same pistol was the one used by Johnson during the robbery. Defendant Johnson contends this testimony should have been excluded as hearsay. The contention is without merit. Brower's testimony was based upon his own observations and thus was not objectionable as hearsay. *See* 1 Stansbury, North Carolina Evidence § 138 (Brandis rev. 1973). Moreover, Johnson interposed no objection or motion to strike regarding Brower's unresponsive revelation that Stanback said he bought the pistol from Mr. Hall, which was the only portion of the challenged testimony that conceivably falls under the proscription of the hearsay rule. Since Johnson thoroughly cross-examined Brower after his direct testimony, he was accorded his constitutional right of confrontation. *See*

State v. Wright, supra. This testimony concerning the identity of the pistol was competent to identify the perpetrators of the crime, as well as to show a design or plan, *see State v. Fox,* 277 N.C. 1, 175 S.E. 2d 561 (1970), and did not constitute inadmissible hearsay evidence. This contention is overruled.

[24] By his fourth argument under this assignment, defendant Johnson contends the trial court erroneously allowed the State over objection to cross-examine him regarding his prior criminal convictions without limiting instructions to the jury at the time the testimony was admitted. He also contends the State was permitted to ask leading and irrelevant questions and to badger him on cross-examination. With regard to the first contention, the record in fact reveals that defendant was never subjected to cross-examination regarding prior criminal convictions. He was asked if he was familiar with robbery. No objection was interposed to this question, and the defendant replied, "No, sir." No limiting instruction was requested. Under these circumstances, there was no prejudicial error. This is true with regard to the second contention as well. These contentions have no merit.

[25] Defendant Johnson's final contention under this assignment is that the trial court erred in permitting Mrs. Hall to make an in-court identification of defendant Johnson as the robber who initially brandished the pistol and announced the holdup. Johnson argues that this identification was tainted by an impermissibly suggestive lineup. The record reveals, however, that after a voir dire hearing, the trial judge made findings of fact and concluded that the lineup procedure was not impermissibly suggestive or conducive to misidentification. The court further concluded that Mrs. Hall's in-court identification of Johnson was of independent origin, based on her observations of him during the commission of the crime. Since these findings on voir dire are supported by competent evidence, they are conclusive on this appeal. *State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Harris,* 279 N.C. 307, 182 S.E. 2d 364 (1971). There was no error in the admission of Mrs. Hall's in-court identification of defendant Johnson.

We have examined the record with the care commensurate with the seriousness of the crime committed and the severity of the sentences imposed. Defendants have been convicted of first degree murder in a fair trial free from prejudicial error. The convictions must therefore be upheld.

[26] The record shows that the jury in each case returned a verdict of "guilty of the felony of murder in the first degree." The jury was polled and each juror stated that his verdict was guilty of the felony of murder in the first degree and that he still assented thereto.

Notwithstanding the verdicts, each judgment contains the following erroneous recital:

> "Thereupon at the July 21, 1975, term of Superior Court for the County of Montgomery a jury was duly summoned, selected, sworn and empanelled, which jury after hearing the evidence, arguments of counsel and the charge of the Court, returned for their verdict that the defendant, [naming him], *shall suffer the penalty of death by asphyxiation.*" (Emphasis added.)

To the end that the judgments may be corrected to speak the truth, this case is remanded to the Superior Court of Montgomery County with directions to proceed as follows:

1. The presiding judge of the Superior Court of Montgomery County will cause to be served on the defendants Charles Alvin Brower and James Cannon Johnson, and on their attorneys of record, notice to appear during a session of said superior court at a designated time, not less than ten days from the date of the order, at which time, in open court, the defendants being present in person and being represented by their attorneys, the presiding judge, based on the verdicts of guilty of the felony of murder in the first degree returned by the jury at the trial at the 21 July 1975 Session of Montgomery Superior Court, will correct the judgments heretofore pronounced so that each judgment correctly reflects the verdict rendered by the jury and the death sentence imposed by the court.

2. The presiding judge of the Superior Court of Montgomery County will issue a writ of habeas corpus to the official having custody of defendants Charles Alvin Brower and James Cannon Johnson to produce them in open court at the time and for the purpose of being present when the judgments are corrected.

No error in the trial.

Remanded for correction of judgments.

STATE OF NORTH CAROLINA v. EDWARD MARTIN McKENNA

No. 22

(Filed 14 May 1976)

1. **Constitutional Law § 31— failure to serve arrest warrant on defendant — requirements of due process satisfied**

The usual and better practice is to serve defendant promptly with an arrest warrant, but such service is not a constitutional requirement of due process; rather, due process is satisfied if defendant is adequately notified of the charge against him, is permitted to confront his accusers and witnesses with other testimony, has assistance of counsel, and is afforded adequate time to prepare and present his defense. Defendant in this case, who was never served with an arrest warrant, was afforded all of these safeguards.

2. **Jury § 7— juror accepted by State and tendered to defendant — subsequent challenge by State — discretionary matter for trial court**

Nothing in G.S. 9-21(b) prohibits the trial court, in the exercise of its discretion before the jury is empaneled, from allowing the State to challenge *peremptorily or for cause* a prospective juror previously accepted by the State and tendered to defendant.

3. **Jury § 7— juror passed by State and tendered to defendant — subsequent peremptory challenge by State — discretionary matter for trial court**

That portion of *State v. Fuller*, 114 N.C. 885, which holds that the trial judge may not, in the exercise of his discretionary and supervisory powers to insure an impartial jury, permit the district attorney to challenge peremptorily a prospective juror after the juror has been passed by the State and tendered to the defendant is overruled.

4. **Jury § 7— jurors chosen but not empaneled — expression of opinion by juror — peremptory challenge proper**

Defendant was not prejudiced where, after twelve jurors had been accepted by both the State and the defendant, one juror stated to another, "I hope they acquit him," and the court thereafter allowed the State to exercise one of its remaining peremptory challenges to excuse the juror who had made the statement.

5. **Homicide § 20— photographs of victim and crime scene — admissibility for illustration**

The trial court in a first degree murder prosecution did not err in allowing into evidence two photographs portraying the condition and location of the victim's body at the scene of the killing for the purpose of illustrating the testimony of a witness.

6. **Homicide § 20; Criminal Law § 84— search of defendant's home — alleged weapon found — admissibility**

The trial court in a first degree murder prosecution properly allowed into evidence the alleged murder weapon which was seized

during a search of defendant's home, since the evidence on *voir dire* tended to show that the officers who searched defendant's home had probable cause to believe that it contained firearms in violation of federal and state laws and thus subject to seizure under a lawful search warrant, the search warrants obtained by those officers were not based upon information secured by another police officer when he went into defendant's home purportedly at defendant's invitation, as both warrants were issued prior to that officer's entry, and the trial court concluded that the weapon was lawfully seized and was not the fruit of any official illegality.

7. Homicide § 21— first degree murder — sufficiency of evidence

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that defendant and a companion broke into the victim's home and ransacked it, defendant shot the victim with a pistol which he found in the home, the pistol was subsequently found in defendant's home, and defendant had stated to a neighbor that he had killed a cop in Raleigh.

8. Criminal Law § 86— testifying defendant — cross-examination for impeachment

A defendant who elects to testify in his own behalf surrenders his privilege against self-incrimination and knows he is subject to impeachment by questions relating to specific acts of criminal and degrading conduct, and such cross-examination for impeachment purposes is not limited to conviction of crimes but encompasses any act of the witness which tends to impeach his character.

9. Criminal Law § 86— prior criminal misconduct — cross-examination of defendant — arrest warrants held by district attorney in jury's view

The trial court did not err in permitting the district attorney to cross-examine defendant concerning unrelated criminal conduct and to hold arrest warrants in his hand in view of the jury while doing so, since the jury did not know what the papers were, and holding them up during cross-examination had little, if any, impact on the jury.

10. Criminal Law § 102— jury argument that witnesses were liars — impropriety not prejudicial

When improper argument is made to the jury, it is the duty of opposing counsel to make timely objection so the judge may correct the transgression by instructing the jury, but such rule does not apply in a capital case if the argument is so grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt. The district attorney's argument in this first degree murder case that the defendant was a liar, though improper, was not so prejudicial to defendant as to require a new trial.

11. Criminal Law § 73; Constitutional Law § 31— affidavit supporting search warrant — admission proper

In a first degree murder prosecution the introduction of affidavits upon which search warrants were obtained was not prejudicial error, since the affidavits were received into evidence without objection, both affiants took the witness stand and submitted themselves to cross-

examination, and defendant himself testified to some of the matters contained in the affidavits.

12. Criminal Law § 127— arrest of judgment

Judgment may be arrested in a criminal prosecution when, and only when, some fatal error or defect appears on the face of the record proper.

13. Criminal Law § 132— motion to set aside verdict

Motions to set aside the verdict and for a new trial are addressed to the sound discretion of the trial court and, absent abuse of discretion, refusal to grant them is not reviewable.

14. Criminal Law § 128— mistrial in capital cases

In capital cases the court may order a mistrial without the consent of the accused only in cases of necessity to attain the ends of justice and must find the facts and place them in the record to the end that the court's action may be reviewed on appeal.

DEFENDANT appeals from judgment of *Clark, J.*, 7 July 1975 Regular Criminal Session, WAKE Superior Court.

Defendant, represented by court-appointed counsel, was tried upon a bill of indictment, proper in form, charging him with the first degree murder of William Blaney Holland, Jr., on 10 November 1973 in Wake County.

The State's evidence tends to show that William B. Holland, Jr., was a member of the Raleigh Police Department. When he failed to report for duty at 4 p.m. on 10 November 1973, Officer Arrington went to Mr. Holland's home at approximately 6 p.m. to check on him. He knocked on the door but received no answer. About that time Mrs. Holland and her young daughter arrived. They had spent the night of November 9 with Mrs. Holland's parents. She unlocked the door and they found the dead body of Officer Holland in one of the bedrooms. He had been shot.

The den door leading to the outside was open and broken glass from the door itself was on the floor. Subsequent investigation showed that a .38 caliber handgun, normally kept in a dresser drawer in the back bedroom, was missing. The gun was a private weapon owned by Mr. Holland in addition to his service revolver. There was a pool of blood on the carpet and numerous bullet holes in the walls. A pillowcase full of items was found on a double bed in the rear bedroom. The pillowcase contained, among other things, a container of chemical mace which had been issued to Officer Holland, a military police nightstick, an electric clock that had stopped at 1:59, a movie camera and

a movie projector. It was determined that all of these items belonged to Mr. Holland. Various dresser drawers were standing open, and there was much evidence that the house had been ransacked.

Four bullets were recovered and offered in evidence at the trial. State's Exhibit 21 was the bullet Dr. Kaasa removed from the head of William B. Holland, Jr.

James Charles Pittman testified as a witness for the State. He said he was seventeen years of age on 10 November 1973. On Friday evening, 9 November 1973, he saw defendant McKenna at a gas station in Bladenboro and, at defendant's request, drove him to Raleigh. Defendant told him where to go, and they drove to a new housing project. They walked down a road to a house with a light burning in the yard, went under the carport and rang the doorbell four or five times, but received no answer. They walked to the rear of the house, defendant knocked the window glass out of the back door, and they went inside. Pittman said he saw defendant "pulling out things and putting them in a pillowcase." The time was about 1:30 a.m. on the morning of November 10. After they had been in the house a short time, Pittman heard a gun go off and jumped into a closet. Defendant "had a .38 stuck in his belt and then he started shooting with it. He shot the gun twice I believe. The .38 must have come from the bedroom because I didn't see him with it prior to going in. He had it when he came out of the bedroom."

Shortly after the shots were fired, defendant went to the closet where Pittman was hiding and they both ran out of the house. As they passed the door to bedroom number one, Pittman "saw the shadows of two feet. They were right close to the doorway of the bedroom. I could not see any of the rest of the body attached to those feet. The feet were not moving in any way. We ran out of the back door of the house."

Pittman said they reentered his car and drove toward Bladenboro. Upon arrival they went to defendant's home and defendant told his wife they had a shooting. The following day defendant told Pittman that he "better not ever say anything about what happened. He said he'd kill me if I told what happened. I believed him and I didn't say anything about it until April 20th of this year. On April 20th I made a statement to Mr. Benson and Mr. Gaskins. That's John Gaskins with the

SBI and Freddie Benson with the Wake County Sheriff's Department. And I also took them out and showed them that house that I testified about in connection with State's Exhibit 22 there. . . . State's Exhibit 22, a photograph, is an accurate illustration of the home and subdivision I testified we went to and also of the home that I identified to the officers." He said State's Exhibit 23, which is a pistol and holster, looked like the gun defendant used in the shooting.

The witness Pittman further testified that he had a plea bargaining arrangement with the State whereby he had agreed to testify truthfully in this case and the State had agreed to permit him to plead guilty to accessory after the fact to murder and receive a ten-year active prison sentence.

When the State sought to offer in evidence the .38 caliber pistol marked State's Exhibit 23, defendant objected, moved to suppress, and requested a voir dire.

Kenneth D. Brady, a treasury agent with the Bureau of Alcohol, Tobacco and Firearms, testified on voir dire that he went to defendant's home on 26 March 1975, accompanied by defendant who was then in custody charged with violation of the United States Gun Control Act of 1968. Mr. Brady had both an arrest warrant and a search warrant which authorized a search of defendant's premises for evidence of violation of the Federal Gun Control Act. He was also accompanied by SBI Agent Marshal Evans who had a state search warrant. Both search warrants were read to defendant McKenna when the agents arrived at his home. The officers then entered defendant's home and, pursuant to the search warrants, searched for and seized every firearm and all ammunition on the premises. Among the items seized was State's Exhibit No. 23, which was found in the top drawer of the dresser next to the bed in the master bedroom of defendant's home. None of the agents, state or federal, who participated in this search and seizure had ever searched defendant's home prior to the execution of these search warrants, although, on some prior occasion, SBI Agent Wesley Terry had told Kenneth D. Brady that he had been to defendant's residence and had seen a number of weapons there. Agent Brady testified that Agent Terry did not inform him of the location of State's Exhibit 23 and that he had no prior knowledge that the weapon was in the dresser drawer. Agent Brady also stated that he had no knowledge that any of the items

seized from defendant's home were connected with any murder case.

Marshal Evans, Special Agent with the SBI, testified on voir dire that he was present with Agent Brady during the search of defendant's home; that he had a search warrant (State's Exhibit 25) which was issued upon an affidavit to which he had sworn; that he read the warrant to defendant prior to entering defendant's home and prior to the time Agent Brady entered the home. Agent Evans said he was not present when Brady found the .38 pistol marked State's Exhibit 23, and that insofar as he knew, neither he nor anyone else had previously informed Agent Brady of the location of the weapon. He also stated that he had no idea whether Agent Terry was or had been in the house prior to the time the search warrant was executed.

The State also introduced on voir dire Exhibits 24 and 25, the search warrants executed by Agents Brady and Evans, and the sworn affidavits used to obtain them. Exhibit 24 indicates that the affiant swore to the affidavit, and the warrant was issued, on 25 March 1975. Exhibit 25 indicates that the affiant swore to the affidavit, and the warrant was issued, at 8:30 a.m. on 26 March 1975.

Defendant called Agent Wesley P. Terry and he testified on voir dire that he was an investigator with the Bladen County Sheriff's Department. On 26 March 1975 he went to defendant's home and entered the house by invitation from defendant. He said defendant told him on the telephone at approximately 10 p.m. on 25 March 1975 to meet him at his house; that when he arrived defendant was not there but a next door neighbor named Nelson Fipps advised him that defendant "had left word with him to tell me if he was not home when I arrived to go in and wait." Accordingly, Mr. Terry entered defendant's home, where he found a crying baby. Once inside, he went to a rear bedroom in the dwelling and looked in a top dresser drawer, immediately adjacent to the bed, for a certain firearm which he had previously seen in the trailer. "It was not my purpose, when I went in the house at that time on March 26, to seize anything, and I did not, in fact, seize anything. Nor did I inform on that day when I came out any of the evidence involved, either State or Federal agents, as to the exact location of any items in the house. I had previously given them information about firearms, a briefing that morning. . . . The only reason

I was checking to see if that weapon was in the dresser beside the bed, was so I could warn my fellow officers outside. I recorded the serial number as a matter of course when I examined the weapon."

Nelson B. Fipps testified on voir dire that he lived next door to defendant and recalled seeing Agent Wesley Terry on March 26. He said defendant's wife came to his house and told him to tell Wesley Terry "to stay there" and that's what he told him. "Terry came over and I told him that Judy had said to wait there. I did not tell him to go inside and wait. I didn't say anything about inside. I just said Judy and Ed said wait over there. . . . I never gave him permission to go inside the McKenna house. I told him he could go in and get the young'un because I wasn't going to get him. I did not tell him that the McKennas had told him to go inside the house."

Defendant testified on voir dire that when he talked to Wesley Terry on March 25 he did not give him permission to enter his home. He said he agreed to meet Terry who wanted defendant to go to South Carolina with him. On March 26 he left home on a mission concerning the title to his truck and asked Wanda Fipps if she would tell Wesley to wait. "I did not say wait in the house, but just to wait until I got back. I thought I'd only be gone a few minutes."

Defendant further testified that Agent Brady did not read a search warrant before entering the house but only said he had one. Nor did Agent Marshal Evans read a search warrant.

The court made findings of fact substantially in accord with the voir dire testimony of Agent Brady, Agent Evans, and Officer Wesley P. Terry. Based on those findings the court concluded, among other things, that Agents Brady and Evans had probable cause to believe that defendant's premises contained firearms in violation of federal and state laws and thus subject to seizure under a lawful search warrant; that the search warrants were not based upon information obtained by Officer Terry upon his entry into the defendant's premises on March 26, 1975, but both warrants were issued prior to such entry; that the weapon identified as State's Exhibit 23 was lawfully seized by Agent Brady and said weapon is not the fruit of any official illegality. Defendant's objection and motion to suppress was thereupon denied.

The jury returned to the courtroom and the weapon was admitted into evidence. The witnesses Brady, Evans, Terry and Nelson B. Fipps returned to the witness stand and each testified before the jury to substantially the same facts he had stated on the voir dire. The witness Fipps further testified that sometime in October, November or December of 1974, defendant told him that he had killed a cop in Raleigh and that Charles Pittman was with him. "He told me he shot the cop right between the eyes with a .38. He said Dooley [Charles Pittman] was in the closet, said shooting at him with a .22 and he ran out of bullets and he said Dooley wouldn't shoot it, so he got to the closet where Dooley was and he got the gun. He didn't say how he got it or where he got it. He said he saw an opening—he was standing by door facing and he shot him right between the eyes."

Dr. Laurin J. Kaasa, a specialist in pathology, performed an autopsy on the body of William B. Holland, Jr., on 10 November 1973 and removed a lead bullet which was lodged behind the right ear just beneath the skin. The bullet had penetrated the skull. Dr. Kaasa testified that Mr. Holland died as a result of hemorrhage and laceration of the brain caused by the bullet.

Clarence Walter Wooten testified that he was employed at Hill's, Inc., a sporting goods store in Raleigh. On 9 April 1971 he sold William B. Holland, Jr., a Colt Detective Special, 2-inch barrel, .38 special, serial number B-10651. The same serial number is on the gun marked State's Exhibit 23 which was taken from defendant's home by Agent Brady. Mr. Wooten said his firm was required to keep records of all firearms sales and produced his business records showing the sale to William B. Holland, Jr., and the date it was purchased. These records were offered in evidence as State's Exhibits 27 and 28.

SBI Agent Johnny Gaskins testified that he interviewed James Charles Pittman on 20 April 1975 with reference to Officer Holland's murder. Pittman first denied any knowledge of the murder and was placed in jail. A few hours later he sent for Agent Gaskins and Wake County Deputy F. L. Benson. These officers advised Pittman of his constitutional rights following which Pittman stated that he had in fact been involved in this particular murder. He then made a statement to these officers which was substantially in accord with his testimony at trial. The officers drove through the subdivision where Officer Holland's home is located and Pittman pointed out the

house that he and defendant had entered. He said McKenna had shot at least twice and he then heard somebody fall. The shooting occurred, according to Pittman, between 1 and 2 a.m.

Defendant testified in his own behalf and offered other witnesses as well.

Carol Hardin testified that she was secretary and bookkeeper for Cole Advertising and kept the payroll records; that defendant was also employed there and the records show that defendant worked on Friday, 9 November 1973 from 7:55 until 3:25 and on Saturday, 10 November 1973, from 10:00 until 5:20. She said a gas ticket indicated that defendant got gas and signed the ticket on 9 November. On recross examination she said: "There is nothing to show by the clock or this gas ticket or anything else that Mr. McKenna was at work between 3:25 Friday, the 9th, and 5:20 p.m. Saturday, the 10th."

Sheila Skipper testified that she attended a dance at the Red Barn in Chadbourn on Friday night, November 9, and saw defendant at the dance with his wife. She said she and her husband and defendant and his wife left the dance together between 11 p.m. and midnight, drove to defendant's home where they cooked and ate, after which she spent the night there. On cross-examination she said she didn't know whether it could have been November 16 or November 23. "It was the first weekend after Halloween. I reckon that would have been the second and third of November."

Frank Gore, a defense witness, testified that James Charles Pittman tried to sell him a pistol sometime in the summer of 1974.

Carson Skipper testified he saw a .38 pistol in a holster on the television set in McKenna's home and tried to buy it, but was told by defendant that the pistol belonged to Pittman, who had pawned it to him for $30.00.

Ronald C. McKeithan, defendant's neighbor, testified that in August 1974 he had a conversation with defendant concerning the purchase of a .38 caliber pistol and that defendant stated he had obtained one from James Charles Pittman.

Defendant testified as a witness in his own behalf. He stated that he was thirty years old and that his criminal record included the following: (1) At age sixteen, he was convicted in juvenile court in Michigan for running away from home,

stealing a car and breaking into a house. (2) He broke into a house at Carolina Beach, North Carolina, and stole some cigarettes. (3) He was convicted of stealing a Cadillac at Carolina Beach and was sentenced to three years in prison in May 1962 for that offense. (4) He escaped in October of 1962, stole a car in Virginia and went to Pennsylvania, where he was convicted of breaking into a house and sentenced to six years in prison. (5) After being paroled and sent back to North Carolina eighteen months later, he escaped from a prison camp in Asheboro, was captured and sent to a prison camp at Clinton, where he again escaped. He broke into a house in Bladenboro and stole a man's pants, wallet, car keys and car. He ran out of gas in Ohio, broke into another house there, stole another car and went to Michigan. He was not tried for any of these offenses. (6) In Michigan he was convicted of breaking and entering and car theft, for which he was sentenced to respective prison terms of five to ten years and two and one-half to five years.

Defendant further testified that he met James Charles Pittman in jail in Elizabethtown in 1971. He said he knew Pittman fairly well in November 1973 and bought "this gun" from him, agreeing that if he ever sold it he would let Pittman have it back. He testified he did not recall any dealings with Pittman on or about 9 November 1973; that he was not with Pittman and never went to Raleigh with him on that date. He denied that he ever entered the home of Officer Holland, said he had never been there, and swore he did not shoot him. He denied he ever told Nelson Fipps that he had shot and killed a policeman in Raleigh. He swore that SBI Agents Gaskins and Evans told him they were going to gas him and his wife and called him all kinds of names but that he made no statement concerning Mr. Holland's murder because he knew nothing about it. He admitted that on and before 26 March 1975 he was engaged in selling weapons unlawfully on a regular basis in North Carolina.

Following arguments of counsel and the charge of the court, the jury convicted defendant of murder in the first degree and he was sentenced to death. He appealed to this Court assigning errors discussed in the opinion.

William B. Marshall, Jr., attorney for defendant appellant.

Rufus L. Edmisten, Attorney General; Edwin M. Speas, Jr., Special Deputy Attorney General; and William H. Guy, Associate Attorney, for the State of North Carolina.

HUSKINS, Justice.

[1] Prior to arraignment defendant moved to dismiss the murder charge on the ground that, prior to trial, he had not been served with an arrest warrant, indictment, or other criminal process informing him of the particulars of the charge against him. After a voir dire hearing, the trial judge made findings of fact and concluded as a matter of law that defendant had shown no prejudicial denial of his constitutional rights. Denial of the motion to dismiss constitutes defendant's first assignment of error.

Defendant contends he was denied due process in that he was not adequately informed of the charge against him and thus was prejudiced in the preparation of his defense. For the reasons which follow, this contention is without merit.

Although defendant was never served with the warrant, the record indicates that a valid warrant was issued on 20 April 1975, a true bill was returned on 28 April 1975 charging defendant with murder, and defendant's own affidavit indicates he was given a copy of the murder indictment soon thereafter. Paragraph 8 of his affidavit reads: "That he was not informed of the Grand Jury proceedings nor given a copy of the murder indictment against him until over a week after the Grand Jury sat." Moreover, a capias *instanter* was served on defendant on 15 May 1975 informing him that he was under indictment for murder. Defendant was advised of the details of the charge by the officer who served the capias and also by his attorneys. He was arraigned and placed on trial on 7 July 1975. The record shows he had counsel at all times after 7 May 1975 and that no motion was ever made for a bill of particulars or for additional time within which to prepare his defense. These facts strongly suggest that defendant was sufficiently apprised of the charges against him and had adequate time to prepare his defense.

The usual practice, and the better practice in our view, is to serve defendant promptly with the arrest warrant. This would have informed him of the charges against him. Such service, however, is not a constitutional requirement of due process. Due process is satisfied if the defendant is adequately notified of the charge against him, is permitted to confront his accusers and witnesses with other testimony, has assistance of counsel, and is afforded adequate time to prepare and present

his defense. *See State v. Vick,* 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Cradle,* 281 N.C. 198, 188 S.E. 2d 296, *cert. denied* 409 U.S. 1047, 34 L.Ed. 2d 499, 93 S.Ct. 537 (1972); *State v. Phillip,* 261 N.C. 263, 134 S.E. 2d 386 (1964); *State v. Lane,* 258 N.C. 349, 128 S.E. 2d 389 (1962); *State v. Barnes,* 253 N.C. 711, 117 S.E. 2d 849 (1961); *State v. Gibson,* 229 N.C. 497, 50 S.E. 2d 520 (1948). The record in this case indicates that defendant was afforded all of these safeguards. No prejudice has been shown by failure to serve the warrant. If defendant needed additional information concerning the charge against him, a bill of particulars, as authorized by former G.S. 15-143 (now G.S. 15A-925), would have provided it. *See State v. Cameron,* 283 N.C. 191, 195 S.E. 2d 481 (1973). This assignment is overruled.

Defendant's second assignment is not discussed in his brief and is therefore deemed abandoned. Rule 28, Rules of Appellate Procedure.

[4] After twelve jurors had been accepted by both the State and the defendant, but before the jury had been empaneled, it was brought to the attention of the presiding judge that Juror No. 7, Mrs. Ella Johnson, had stated to Juror No. 8, Mrs. Virginia Reynolds, "I hope they acquit him," in violation of the court's earlier instructions that the jurors should not discuss the case among themselves until they had heard all the evidence, the argument of counsel, the instructions of the court, and had retired to the jury room for the purpose of deliberating upon their verdict. The district attorney thereupon moved "that the court in its discretion permit the State to exercise one of its remaining peremptory challenges." The court, over objection, allowed the motion "in its discretion and in the interest of justice." Mrs. Johnson was then excused peremptorily by the State. An additional juror was questioned and passed by both the State and the defendant and the jury was empaneled. This ruling constitutes defendant's third assignment of error.

[2] G.S. 9-21(b) provides in pertinent part that "[t]he State's challenge, peremptorily or for cause, must be made before the juror is tendered to the defendant." We have held, however, contrary to defendant's contention, that the statute does not deprive the trial judge of his power to closely regulate and supervise the selection of the jury to the end that both the defendant and the State may receive a fair trial before an impartial jury. *State v. Harris,* 283 N.C. 46, 194 S.E. 2d 796,

cert. denied 414 U.S. 850, 38 L.Ed. 2d 99, 94 S.Ct. 143 (1973). This view has been sustained in numerous cases, including *State v. Waddell,* 289 N.C. 19, 220 S.E. 2d 293 (1975); *State v. Wetmore,* 287 N.C. 344, 215 S.E. 2d 51 (1975); and *State v. Westbrook,* 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated,* 408 U.S. 939, 33 L.Ed. 2d 761, 92 S.Ct. 2873 (1972). We are persuaded anew that our holding on this point in *State v. Harris, supra,* is sound. Nothing in G.S. 9-21(b) prohibits the trial court, in the exercise of its discretion before the jury is empaneled, from allowing the State to challenge *peremptorily or for cause* a prospective juror previously accepted by the State and tendered to the defendant. "[I]t is the duty of the trial judge to see that a competent, fair and impartial jury is empaneled, and to that end the judge may, in his discretion, excuse a prospective juror even without challenge from either party. Decisions as to a juror's competency at the time of selection and his continued competency to serve are matters resting in the trial judge's sound discretion and are not subject to review unless accompanied by some imputed error of law." *State v. Waddell, supra.*

We are not inadvertent to the decision of this Court in *State v. Fuller,* 114 N.C. 885, 19 S.E. 797 (1894). In that case defendant was charged with murder. A prospective juror was passed by the State and the defendant, but before he was sworn the juror asked to be excused because of a long friendship with the defendant who was also related to him by marriage. The trial judge ruled there was no ground for challenge for cause but permitted the State to challenge the juror peremptorily. This Court, holding this to be error, stated:

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

[3] In *State v. Harris, supra,* we distinguished *Fuller* on the ground that the challenge in *Fuller* was peremptory whereas in *Harris* the juror was challenged for cause. Justice Branch, however, writing for the Court in *Harris,* said:

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

Following this intimation in *Harris*, we held in *State v. Wetmore, supra*, that the trial court did not abuse its discretion in allowing the district attorney to reexamine two prospective jurors after both had been passed by the State and the defendant *and excuse one for cause and the other peremptorily.* Thus we no longer regard as authoritative that portion of *Fuller* which holds that the trial judge may not, in the exercise of his discretionary and supervisory powers to insure an impartial jury, permit the district attorney to challenge peremptorily a prospective juror after the juror has been passed by the State and tendered to the defendant. *State v. Fuller, supra*, insofar as it is inconsistent with the views expressed in this opinion, is overruled.

[4] Defendant suffered no prejudice when the State was permitted to challenge Mrs. Johnson peremptorily. He is not entitled to a jury of his choice and has no vested right to any particular juror. So long as the jurors who are actually empaneled are competent and qualified to serve, defendant may not complain; and this is particularly true where, as here, defendant fails to exhaust his peremptory challenges. *See State v. Bernard*, 288 N.C. 321, 218 S.E. 2d 327 (1975). This assignment of error is overruled.

[5] Two photographs, State's Exhibits 2 and 5, portraying the condition and location of the victim's body at the scene of the killing, were admitted into evidence over objection. Defendant contends that the scenes depicted are basically identical to those shown by other photographs and exhibits offered by the State. He argues that the limited probative value for illustrative purposes of State's Exhibits 2 and 5 was far outweighed by their inflammatory and prejudicial effect upon the jury. Admission of these photographs constitutes the basis for defendant's fourth assignment of error.

Photographs of the scene of a homicide are competent in this jurisdiction for the purpose of illustrating the testimony

of a witness. *State v. Atkinson*, 278 N.C. 168, 179 S.E. 2d 410, *death sentence vacated* 403 U.S. 948, 29 L.Ed. 2d 861, 91 S.Ct. 2292 (1971); *State v. Gardner*, 228 N.C. 567, 46 S.E. 2d 824 (1948); 1 Stansbury's North Carolina Evidence § 34 (Brandis rev. 1973). It is proper in the prosecution of a homicide to admit sufficiently authenticated photographs used by a State's witness to illustrate his testimony relating to the position and appearance of the body of the deceased even though the scenes portrayed are repulsive and unpleasant. If a photograph is relevant and material the fact it is gory or gruesome, and thus may tend to arouse prejudice, will not alone render it inadmissible. *See State v. Patterson*, 288 N.C. 553, 220 S.E. 2d 600 (1975); *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975); *State v. Duncan*, 282 N.C. 412, 193 S.E. 2d 65 (1972); *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970).

State's Exhibits 2 and 5 were properly authenticated by Detective Arrington who testified that they accurately depicted and portrayed the condition and location of the torso and full body of the deceased as he observed it on arrival at the scene of the killing. These photographs were therefore competent to illustrate the testimony of Detective Arrington. Whether one or both should have been admitted was in the discretion of the court. *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969). We hold that the use of these two photographs was not excessive, unnecessarily duplicative, or inflammatory. Prejudicial error with respect to this assignment is not shown, and it is accordingly overruled.

[6] Defendant moved to suppress State's Exhibit 23, the alleged murder weapon, contending it was the fruit of an illegal search and seizure in violation of the Fourth and Fourteenth Amendments to the Federal Constitution. At the voir dire hearing triggered by that motion, the State and defendant produced evidence heretofore narrated in the factual statement of this case. The trial judge made findings of fact substantially in accord with the voir dire testimony of the State's witnesses and, based on those findings, concluded as a matter of law that Agents Brady and Evans had probable cause to believe that defendant's home contained firearms in violation of federal and state laws and thus subject to seizure under a lawful search warrant. The court further concluded that the search warrants obtained by Agents Brady and Evans were not based upon information secured by Agent Terry when he entered defendant's

premises on 26 March 1975, both warrants having been issued prior to such entry. The trial court concluded that the weapon identified as State's Exhibit 23 was lawfully seized by Agent Brady and was not the fruit of any official illegality. The motion to suppress was therefore denied and State's Exhibit 23 was received in evidence over defendant's objection. The ruling of the trial court in this respect constitutes defendant's fifth assignment of error.

The Fourth Amendment does not prohibit all searches and seizures but only those which are unreasonable. *Elkins v. United States,* 364 U.S. 206, 4 L.Ed. 2d 1669, 80 S.Ct. 1437 (1960); *State v. Smith,* 289 N.C. 143, 221 S.E. 2d 247 (1976), and cases therein cited. Whether a search or seizure is unreasonable must be determined upon the facts of each individual case. *State v. Reams,* 277 N.C. 391, 178 S.E. 2d 65 (1970), *cert. denied* 404 U.S. 840, 30 L.Ed. 2d 74, 92 S.Ct. 133 (1971).

In the instant case, the findings of the trial judge that the search warrants under which Agents Brady and Evans acted were issued prior to Agent Terry's entry and were not based upon any information obtained by Agent Terry are fully supported by competent evidence presented on voir dire. These findings, therefore, are conclusive on appeal and this Court cannot properly set aside or modify them. *See State v. Curry,* 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Thomas,* 284 N.C. 212, 200 S.E. 2d 3 (1973); *State v. Thacker,* 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Pike,* 273 N.C. 102, 159 S.E. 2d 334 (1968); *State v. Gray,* 268 N.C. 69, 150 S.E. 2d 1 (1966), *cert. denied* 386 U.S. 911, 17 L.Ed. 2d 784, 87 S.Ct. 860 (1967). Accordingly, the admission into evidence of State's Exhibit 23 was proper and not violative of defendant's Fourth Amendment rights. This assignment is overruled.

[7] Defendant's sixth assignment of error is based on denial of his motion for nonsuit. A nonsuit motion requires the trial court 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. If, when so considered, 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). The credibility and weight of the evidence, and its sufficiency to remove any reasonable doubt of guilt, are matters for the jury. *State v. Jenerette,* 281 N.C. 81,

187 S.E. 2d 735 (1972); *State v. Primes*, 275 N.C. 61, 165 S.E. 2d 225 (1969). Discrepancies and contradictions in the evidence are, for the purposes of this motion, to be resolved in favor of the State. *State v. Vestal*, 278 N.C. 561, 180 S.E. 2d 755 (1971). When the evidence here is so considered, it is sufficient to carry the case to the jury. Defendant's sixth assignment of error is overruled.

On direct examination defendant disclosed a long criminal record involving numerous housebreakings and larcenies in this and other states. For some of the offenses, he had served time in prison; for others, he had never been tried. On cross-examination the district attorney, for purposes of impeachment, asked defendant whether he had stolen particular items of property at specific addresses on nine previous occasions. While propounding the questions concerning these unrelated offenses, the district attorney, "in plain view of the jury, began holding up several criminal warrants and as he would hold one in his hand he would ask Mr. McKenna if he had broken into a house in a town specified in the warrant and stolen the amount of items specified in the warrant." Defendant's objection was overruled and defendant answered each question, denying that he committed any of the crimes mentioned. Defendant contends the court erred in permitting the district attorney to cross-examine him concerning unrelated criminal conduct and to hold the arrest warrants in his hand in view of the jury while doing so. This constitutes defendant's seventh assignment of error.

[8] A defendant who elects to testify in his own behalf surrenders his privilege against self-incrimination and knows he is subject to impeachment by questions relating to specific acts of criminal and degrading conduct. Such cross-examination for impeachment purposes is not limited to conviction of crimes but encompasses any act of the witness which tends to impeach his character. *State v. Sims*, 213 N.C. 590, 197 S.E. 176 (1938); *State v. Colson*, 194 N.C. 206, 139 S.E. 230 (1927). More recent cases applying this rule include *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); and *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971).

Here, defendant concedes the rule to be as stated but requests the Court to reexamine and repudiate it. We declined a similar request in *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973), saying: "The rule is necessary to enable the State

to sift the witness and impeach, if it can, the credibility of a defendant's self-serving testimony." We therefore adhere to both the rule and the reason for it.

[9] Defendant further contends, however, that even if the cross-examination concerning the commission of other named criminal offenses was proper, the trial court nevertheless erred in allowing the district attorney to display the warrants in front of the jury while propounding the questions. He argues that the prosecutor was thus permitted, in effect, to cross-examine defendant as to whether he had been indicted or accused of other criminal offenses, thus doing indirectly what he could not do directly.

It would be highly improper for the prosecutor to display to the jury outstanding arrest warrants in which defendant is charged with the commission of criminal offenses unrelated to the case on trial. Such conduct would be a clear violation of *State v. Williams, supra.* Here, however, defendant concedes in his brief that "the jury was not aware that the documents were only arrest warrants and not the defendant's criminal record." Nevertheless, argues defendant, "the jury may well have mistaken the warrants held up by the district attorney for records of the defendant's criminal convictions and concluded that the defendant had not fully disclosed his prior convictions in his testimony on direct examination and was, in fact, compounding and enlarging his lies on cross-examination."

Defendant's argument is mere speculation. Just as easily the jury could have thought the papers were notes prepared by the district attorney or, not knowing what they were, could have given them no thought at all. Moreover, in light of the numerous crimes which, by his own admission, defendant had committed over the years, we think that merely "holding up" some papers, when considered in the context of the total evidence, had minimal, if any, impact on the jury and was insufficient to constitute prejudicial error. *See* 3 Strong's N. C. Index 2d, Criminal Law §§ 169, 170 (1967), and cases cited therein. Defendant's seventh assignment is therefore overruled.

[10] Defendant contends the court erred by allowing the district attorney in his closing argument to state that defendant had lied and to argue, by negative implication, matters not in evidence. This constitutes defendant's eighth assignment of error.

The record discloses that defense counsel in his opening argument vigorously attacked the credibility of the State's witness James Charles Pittman. After pointing out several alleged inconsistencies in Pittman's testimony, counsel said: "That to me is an absolute—that proves that Mr. Pittman has told at least one absolute lie on the stand." At another point, referring to Pittman's plea-bargaining whereby he agreed to testify for the State in exchange for a ten-year prison sentence, counsel said: "I say to you, ladies and gentlemen of the jury, that's one hell of a deal."

In his closing argument the district attorney said: "Pittman has already made his bed. He's going to lie in it for ten years whichever way the case comes out. The only person whose fate hinges on this case, and he is the most interested party, and that is the defendant right over there, Ed McKenna. And that is why you're supposed to scrutinize his clearly tainted, lying testimony." At another point in his argument the district attorney said: "Who has the most interest, Pittman or McKenna? He has, McKenna has every reason to lie."

The record discloses that defendant on cross-examination stated that State's witnesses, Terry, Gaskins, Fipps, Brady, and others, had lied and only the defendant himself had testified truthfully. Commenting upon that aspect of the evidence, the district attorney said: "Everybody lied but McKenna. He hasn't committed numerous burglaries. He didn't have a hundred and eighty-two thousand dollars worth of stolen property in his home at the time he was arrested." The district attorney then explained to the jury that defendant's criminal record, if any, was competent only for the purpose of impeaching his credibility and that the State was bound by his answers. Even so, the district attorney argued that the jury "should be able to tell that Ed McKenna over here is not only a habitual felon but an accomplished and accustomed liar."

The record reveals that no objections were interposed at trial to the argument on either side. Ordinarily, an objection and exception to argument comes too late after verdict. When improper argument is made to the jury it is the duty of opposing counsel to make timely objection so the judge may correct the transgression by instructing the jury. *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35 (1948). The general rule requiring objection before verdict does not apply in a capital case if the argument is so

grossly improper that removal of its prejudicial effect, after a curative instruction, remains in doubt. *See State v. Britt,* 288 N.C. 699, 220 S.E. 2d 283 (1975) ; *State v. Miller,* 288 N.C. 582, 220 S.E. 2d 326 (1975) ; *State v. White, supra; State v. Williams,* 276 N.C. 703, 174 S.E. 2d 503 (1970), *death sentence vacated* 403 U.S. 948, 29 L.Ed. 2d 860, 91 S.Ct. 2290 (1971). Here, the improper argument of the district attorney is not of such magnitude. A curative instruction from the judge, had he been afforded an opportunity to give it by timely objection, would have removed any prejudice possibly engendered by the argument. The evidence of defendant's guilt is highly convincing and there is no reasonable basis upon which to conclude that a different result would likely have ensued had the challenged argument been entirely omitted.

It is improper for the district attorney, and defense counsel as well, to assert in his argument that a witness is lying. "He can argue to the jury that they should not believe a witness, but he should not call him a liar." *State v. Miller,* 271 N.C. 646, 157 S.E. 2d 335 (1967). Ordinarily, the argument of counsel is left largely to the control and discretion of the presiding judge and wide latitude is allowed in the argument of hotly contested cases. *State v. Britt, supra; 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). Language consistent with the facts in evidence may be used to present each side of the case. *State v. Britt, supra; State v. Monk,* 286 N.C. 509, 212 S.E. 2d 125 (1975). These rules, however, do not license counsel to use unbridled language which exceeds the bounds of propriety or disturbs the orderly processes of the court. We do not approve the language used by the district attorney and by defense counsel. Even so, in light of the facts and circumstances disclosed by the record, we do not think its use constitutes prejudicial error requiring a new trial. Failure of defense counsel to object when the district attorney's argument was made is some indication that, at the time, he thought his own remarks had triggered the argument or else thought his client was suffering no harm. Defendant's eighth assignment of error is overruled.

[11] The Federal search warrant (State's Exhibit 24) and the State search warrant (State's Exhibit 25) were admitted into evidence *without objection.* Federal Agent Brady testified that he swore to the affidavit upon which the Federal warrant was issued and, having taken the stand, he was subject to cross-

examination. SBI Agent Evans testified that he swore to the affidavit upon which the State search warrant was issued and, having taken the stand, he was subject to cross-examination. Defendant now argues on appeal that the affidavits are hearsay and contain prejudicial allegations concerning the presence of stolen property at defendant's home. Defendant assigns as error the admission of these affidavits, citing *State v. Spillars,* 280 N.C. 341, 185 S.E. 2d 881 (1972), and *State v. Jackson,* 287 N.C. 470, 215 S.E. 2d 123 (1975). This requires a brief examination of the cited cases.

In *Spillars* an affidavit used to obtain a search warrant was introduced into evidence. The affiant did not take the stand. The statements and allegations contained in the affidavit were hearsay and indicated defendant's complicity in another crime. Held: Admission of the affidavit was error because admission of hearsay statements deprived defendant of his right of confrontation and cross-examination and permitted the State to strengthen its case by the use of incompetent evidence.

In *Jackson* the State offered and the court received in evidence, over objection, the complaint and warrant issued thereon for defendant's arrest. Held: The trial court committed prejudicial error in the admission of the complaint executed by a police officer who did not testify at trial because the State was thereby permitted to strengthen its case with incompetent hearsay evidence by a person who was not subject to cross-examination.

The principles enunciated in *Spillars* and *Jackson* are sound and we reaffirm them. These cases, however, are clearly distinguishable from the instant case. Here, (1) the affidavits supporting the issuance of the search warrants were received into evidence *without objection* and (2) both affiants took the witness stand and submitted themselves to cross-examination. These witnesses testified on direct and cross-examination to substantially the same matters contained in the affidavits, including the presence of stolen firearms and other stolen property in defendant's home. Thus the hearsay statements in the affidavits were merely corroborative, and the affiants' availability for cross-examination permitted the defendant to confront the witnesses against him and to cross-examine them. Furthermore, defendant himself testified to some of the matters contained in the affidavits. In light of these facts, we hold that introduction of the affidavits upon which the search war-

rants were obtained was not prejudicial error. This assignment is overruled.

Defendant's final assignment of error is grounded on denial of his motions in arrest of judgment, for a mistrial, for a new trial and to set aside the verdict.

[12] A motion in arrest of judgment is based upon the insufficiency of the indictment or some other fatal defect appearing on the face of the record. *State v. Armstrong,* 287 N.C. 60, 212 S.E. 2d 894 (1975); *State v. McCollum,* 216 N.C. 737, 6 S.E. 2d 503 (1940). Judgment may be arrested in a criminal prosecution when, and only when, some fatal error or defect appears on the face of the record proper. *State v. Kirby,* 276 N.C. 123, 171 S.E. 2d 416 (1970); *State v. Higgins,* 266 N.C. 589, 146 S.E. 2d 681 (1966). The face of the record in this case reveals no fatal defect; consequently, denial of the motion in arrest of judgment was proper.

[13] Motions to set aside the verdict and for a new trial are addressed to the sound discretion of the trial court and, absent abuse of discretion, refusal to grant them is not reviewable. *State v. McNeill,* 280 N.C. 159, 185 S.E. 2d 156 (1971); *State v. Reddick,* 222 N.C. 520, 23 S.E. 2d 909 (1943). These motions were properly denied.

[14] Defendant's motion for a mistrial was made after verdict and therefore came too late. In a capital case the court may order a mistrial without the consent of the accused only in cases of necessity to attain the ends of justice. *State v. Moore,* 276 N.C. 142, 171 S.E. 2d 453 (1970); *State v. Harris,* 223 N.C. 697, 28 S.E. 2d 232 (1943); *State v. Cain,* 175 N.C. 825, 95 S.E. 930 (1918); *State v. Tyson,* 138 N.C. 627, 50 S.E. 456 (1905). In capital cases the court must find the facts and place them in the record to the end that the court's action may be reviewed on appeal. *State v. Boykin,* 255 N.C. 432, 121 S.E. 2d 863 (1961); *State v. Crocker,* 239 N.C. 446, 80 S.E. 2d 243 (1954). Defendant's brief contains no citation of authority but merely states the contention that error was committed in overruling the motion. The motion was a mere formality, tardily made, and was properly denied.

A careful examination of all defendant's assignments of error discloses no reason in law to disturb the verdict and judgment. In the trial below we find

No error.

J. T. TAYLOR, JR., PETITIONER v. R. G. JOHNSTON AND WIFE, MARGARET K. JOHNSTON; WILLIAM P. MAYO AND WIFE, ANNA BALL MAYO; ROSA HENRIES PRICE, WIDOW; NOAH W. GASKILL AND WIFE, HATTIE I. GASKILL LAND, WIDOW; JOHNNY GASKILL AND WIFE, VELVA GASKILL; VERA GASKILL RICE AND HUSBAND, ROOSEVELT RICE; CHARLOTTE GASKILL HOBBS, WIDOW; MARY GASKILL KITTINGER AND HUSBAND, A. R. KITTINGER; ANNIE L. GASKILL MOORE AND HUSBAND, HUBERT L. MOORE; EVA GASKILL CLEMMONS AND HUSBAND, LEONARD TERRY CLEMMONS; POLLY M. WILLIAMSON, WIDOW; LUTHER GASKILL AND WIFE, LUCY GASKILL; EDDIE GASKILL AND WIFE, EVA GASKILL; MARCUS GASKILL AND WIFE, LINA GASKILL; CHARITY DOWTY AND HUSBAND, TOLLIE DOWTY; EVELYN SPAIN AND HUSBAND, ROYCE SPAIN; THELMA HARRIS, WIDOW; ALVITA HOPKINS, WIDOW; MINNIE MAYO AND HUSBAND, GRANT MAYO; BLANCHE GOODWIN LUPTON AND HUSBAND, MANNING LUPTON; FURNEY GOODWIN AND WIFE, ANNIE GOODWIN; VIOLET GOODWIN IRELAND, WIDOW; EVA GOODWIN RIGGS AND HUSBAND, SETH RIGGS; ELMO GOODWIN AND WIFE, HELEN GOODWIN; MAGGIE GOODWIN DANIELS AND HUSBAND, OSCAR DANIELS; MARION GOODWIN AND WIFE, FRANCES GOODWIN; BERNICE ALCOCK LATHAM, WIDOW; WEYERHAUSER COMPANY; GENTRY POTTER WILLIAMS AND HUSBAND, MANLEY WILLIAMS; ORIEN C. POTTER AND WIFE, WAYNE RAYE POTTER; VERNARD B. HOLLOWELL, TRUSTEE; THURMAN M. POTTER AND WIFE, EMMA V. POTTER; J. DENARD CARAWAN AND WIFE, ELMA CARAWAN; H. M. CARPENTER AND WIFE, MARY S. CARPENTER; R. H. MORRISON, JR., AND WIFE, GLADYS S. MORRISON; THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; BRUCE B. CAMERON AND WIFE, LOUISE W. CAMERON; MARIE J. LEARY, EXECUTRIX OF THE WILL OF SYLVESTER J. LEARY, DECEASED; FIRST-CITIZENS BANK & TRUST COMPANY, TRUSTEE FOR BRUCE B. CAMERON III; ERVIN L. SADLER AND WIFE, RENA SADLER; EFFIE J. SADLER, WIDOW; WATEMAN SADLER; CARL F. ALCOCK AND WIFE, BIRMA L. ALCOCK; WILLIAM B. RODMAN, JR.; CAMMIE R. ROBINSON, WIDOW; HANNAH R. CURTIS AND HUSBAND, GEORGE R. CURTIS; OLZIE C. RODMAN, WIDOW; JOHN C. RODMAN AND WIFE, ELIZABETH M. RODMAN; OLZIE C. RODMAN II, UNMARRIED; ARCHIE C. RODMAN AND WIFE, MEREDITH M. RODMAN; OWEN G. RODMAN AND WIFE, ELIZABETH W. RODMAN; CLARK RODMAN AND WIFE, MAVIS L. RODMAN; CAMILLUS H. RODMAN AND WIFE, HELEN M. RODMAN; W. BLOUNT RODMAN AND WIFE, MARTHA O. RODMAN; W. C. RODMAN AND WIFE, EFFIE T. RODMAN; OWEN H. GUION, JR., AND WIFE, ELIZABETH H. GUION; LIDA R. GUION, UNMARRIED; JULIA GUION MITCHELL AND HUSBAND, JOHN W. MITCHELL; THEODORA R. CHERRY AND HUSBAND, RICHARD F. CHERRY; CHARLOTTE R. ANDREW AND HUSBAND, J. H. B. ANDREW; NATHANIEL F. RODMAN, JR., TRUSTEE FOR THE

ESTATE OF N. F. RODMAN, DECEASED; AND ELIZABETH K. GUION, WIDOW

No. 26

(Filed 14 May 1976)

1. **Partition § 5— effect of decree of partition — common law**

Under the common law, a decree in partition did not transfer or change legal title to any of the property, but the partition could be effected only by an exchange of deeds between the parties pursuant to the court's decree.

2. **Partition §§ 5, 12— 1835 decree of partition — ineffectiveness to pass title**

An 1835 decree confirming a report of division of an intestate's lands which ordered the intestate's heirs to execute to each other deeds for their respective shares did not pass legal title and could not constitute a link in petitioner's chain of title absent evidence of compliance by the parties or of an order of attachment by the court to enforce its decree; nor did the subsequent enactment of G.S. 1-227 remedy this break in petitioner's chain of title where the court did not declare in its decree that the effect of the decree was to transfer title to the property as directed by the court.

3. **Ejectment § 10; Trespass to Try Title § 4— showing of ownership of some interest in land**

In any action to try title where it is denied that petitioner owns any interest in the land, petitioner's action cannot be dismissed if his evidence is sufficient to warrant a finding that he owns some interest in the land entitling him to the present right of possession, and petitioner is not required to establish the exact interest claimed in his pleading.

4. **Execution § 13; Trespass to Try Title § 3— sheriff's deed — admission without objection**

Where a sheriff's deed was admitted without objection, it should have been considered for whatever probative value it contained.

5. **Evidence § 30— ancient documents**

A hearsay exception in favor of recitals in ancient deeds is recognized in North Carolina.

6. **Evidence § 30— ancient documents**

An ancient document is one which bears a date of thirty years or more before the date it is offered into evidence and requires no further authentication when produced from proper and natural custody free from suspicious circumstances.

7. **Evidence § 30— ancient document — muniment of title — evidence of possession**

It is not necessary to fortify an ancient document with evidence of possession or occupation in order to offer it as a muniment of title.

8. **Evidence § 30; Deeds § 4; Execution § 13— sheriff's deed — recitals of live execution — ancient document rule**

Where a 121-year-old sheriff's deed was produced from proper custody without any intimation of fraud or invalidity, the general rule requiring proof of the underlying documents of the judgment and execution sale must yield to the ancient document rule; therefore, recitals in the sheriff's deed were *prima facie* evidence that the sale was made pursuant to a live execution in the sheriff's hands.

9. **Descent and Distribution § 1— presumption of intestacy**

Trial court's finding that petitioner's evidence failed to establish whether his predecessor died testate or intestate does not comport with the rule in this jurisdiction that there is a presumption that a decedent dies intestate.

10. **Ejectment § 10; Trespass to Try Title § 4— proof of chain of title from State to petitioner by mesne conveyances**

When a party proves a chain of title from the State to himself by *mesne* conveyances, he has made out a *prima facie* title to the interest proven in the lands described in the petition.

11. **Adverse Possession §§ 1, 25— signs indicating wildlife management area — no adverse possession**

The posting of signs by the Wildlife Resources Commission indicating that an area is a wildlife management area was insufficient to constitute adverse possession of the area by the Commission.

12. **Ejectment § 7; Trespass to Try Title § 2— Marketable Title Act — applicability — nonpossessory interests**

The Real Property Marketable Title Act did not extinguish respondent's rights to the land in controversy where respondent was in actual and open possession of the land when this action under the Torrens Act was instituted and still retains such possession. G.S. 47B-1.

13. **State § 2— presumption of title in State — effect of Marketable Title Act**

The Real Property Marketable Title Act does not affect the statute creating the presumption in suits for land to which the State or a State agency is a party that title is in the State or State agency. G.S. 146-79.

ON 15 July 1969, petitioner J. T. Taylor, Jr., instituted a proceeding pursuant to Chapter 43 of the General Statutes of North Carolina to have certain lands located in Pamlico County registered under the Torrens system. He alleged fee simple ownership in 4,500 acres of land described by metes and bounds. He made all known persons who might have any vested or contingent claims in the land parties to the action. The North Carolina Wildlife Resources Commission (Commission) was one of the parties named as having an adverse interest in the

land. After receiving notice pursuant to G.S. 43-10, the Commission filed an answer asserting ownership in that portion of the lands described in the petition which lies north of Mouse Harbor Canal. The petition, answer and exhibits were submitted to Sherman T. Rock, Title Examiner, who heard evidence from both the petitioner and the respondent.

Petitioner relied upon a chain of *mesne* conveyances to a grant from the State to vest title in him. Respondent relied upon a deed from the State of North Carolina and the North Carolina State Board of Education to the North Carolina Board of Conservation and Development dated 5 May 1945 and recorded in Pamlico County Public Registry which purported to convey that portion of the land described in the petition lying north of Mouse Harbor Canal. Respondent also relied upon the provisions of G.S. 143-248 to vest title to the lands described in said deed in it, and contended that it thereby acquired at least color of title to the land.

The Commission offered additional evidence tending to show that the lands north of Mouse Harbor Canal were posted with signs reading "North Carolina Wildlife Management Area" and "North Carolina Wildlife Management Area Boundary Line." Respondent contended that this evidence was sufficient to vest title to the lands in controversy by adverse possession under color of title. The examiner of title found that petitioner had proven an unbroken chain of title through *mesne* conveyances from a grant from the State into petitioner and that respondent had produced no evidence to support its claim of color of title or to support its claim of twenty years adverse possession. He concluded that petitioner was the owner in fee simple of that tract of land described in the petition except for about twenty acres lying west of Drum Creek Ditch which was omitted from the litigation by an oral stipulation of the parties.

Respondent, Wildlife Commission, filed exceptions to the crucial findings of fact and conclusions of law and the cause was then submitted to Judge L. Bradford Tillery for decision.

Petitioner, in support of his claim of ownership, relied upon and offered into evidence before Judge Tillery the following documents:

1. A grant (No. 602), dated 22 December 1798, from the State of North Carolina to John Gray Blount recorded in Book 99, page 234, Beaufort County Registry.

2. A document, dated 4 March 1835, authorizing five named commissioners to allot in severalty the lands, including Grant No. 602, held by John Gray Blount upon his death intestate. This document directed the commissioners to return their report before the Beaufort Court of Equity. At the Fall Term 1835 Session of the Beaufort Court of Equity, the Clerk entered the following notation at the end of the commissioners' report of division:

> At Fall Term A.D. 1835 Before the Honorable John A. Donnell Judge presiding the foregoing report of division was returned and confirmed and the cause is retained for further proceedings.
>
> * * *
>
> It appearing to the Court that the defendants are now all of full age. It is ordered by the Court that all parties in the case made stand firm and that the parties execute to each other deeds for their respective shares. . . .

This document was recorded in February 1888 at the Clerk's office in Beaufort County.

3. A deed dated 18 February 1848 from the Sheriff of Beaufort County to William B. Rodman and recorded in the Beaufort County Registry. This deed purportedly conveyed the lands described in Grant No. 602.

4. A quitclaim deed from William B. Rodman, Jr., et al, to petitioner dated 29 December 1967, recorded at the Pamlico County Registry, conveying all of the grantors' interest in the land described in the grant (No. 602) to John Gray Blount.

J. T. Taylor, Jr., also offered a map and parol evidence identifying and locating the land purportedly described in the above documents. Petitioner further offered testimony to the effect that the grantors in the quitclaim deed from William B. Rodman and others to J. T. Taylor, recorded in Book 148, page 536, Pamlico County Registry, were all the heirs of William B. Rodman, the grantee in the sheriff's deed recorded in Book 24, page 331, Pamlico County Public Registry.

Respondent offered evidence of a deed from the State of North Carolina and the North Carolina Board of Education to the Department of Conservation and Development, dated 5 May 1945 and recorded in Book 121, page 121, Pamlico County Public Registry and relied upon G.S. 143-248 as evidence of

transfer of the lands in controversy to it. The Commission offered parol testimony tending to show that beginning in 1956 or 1957, respondent posted signs around the perimeter of the area which read: "Wildlife Game Management Area," and at other times subsequent to 1956 signs were erected which read: "Wildlife Management Area Boundary Line. North Carolina Wildlife Resources Commission." In 1963, pursuant to an agreement with the Pamlico County Health Department, respondent began constructing impoundments upon the land for mosquito-control purposes. Other improvements were thereafter constructed which included twelve miles of dikes, pumping stations, pumps, motor equipment, sheds and several utility buildings. Respondent's employees went on the property regularly for maintenance purposes and students spent considerable time there during the summer months.

In rebuttal, petitioner offered several witnesses who said that they hunted the questioned area during various periods from 1956 to the date of trial and had not observed the signs allegedly posted by the Commission.

Judge Tillery's extensive findings of fact included the following:

PETITIONER'S CLAIM:

3. The lands described in Grant No. 602 were allotted to Thomas H. Blount, the son of John Gray Blount, by instrument recorded in the Office of the Clerk of Superior Court of Beaufort County. Although said instrument bears the designation "Will of John Gray Blount" testimony establishes that the said John Gray Blount died intestate at an undetermined date. The instrument recorded in the Office of the Clerk of Superior Court of Beaufort County is not a will but rather a report of division of the lands of John Gray Blount which was filed by Commissioners appointed by the Superior Court of Beaufort County to divide his lands among his surviving heirs. Said report of Commissioners was confirmed by the court at the Fall Term 1835. The order entered by the Court directed the heirs of John Gray Blount who were parties to that proceeding to execute to each other deeds for the respective shares allotted to them. No evidence was introduced showing that the parties to that proceeding executed to each other deeds as required by said order.

4. In 1848 the lands described in Grant No. 602 were sold by the Sheriff of Beaufort County to William B. Rodman in order to satisfy a judgment entered against Thomas H. Blount. This deed specifically excepted from the conveyance all portions of the lands described in Grant 602 that had been previously sold by John Gray Blount or Thomas H. Blount. No evidence was introduced by petitioner establishing whether or not John Gray Blount or Thomas H. Blount had previously conveyed out any portion of said lands and, therefore, the exact lands conveyed by said deed, if any, has not been established.

5. By quitclaim deed recorded in Book 48, page 536, Pamlico County Registry, the heirs of William B. Rodman conveyed to John T. Taylor, petitioner herein, "all the interest of the parties of the first part to that tract of land granted to John Gray Blount in 1794, being Patent No. 602, originally containing 1,920 acres, and known as the Porpoise Marshes."

Although the evidence establishes that the grantors in this deed were all of the heirs of William B. Rodman who would have taken per stirpes at his death if he died intestate, the evidence fails to establish by direct testimony or otherwise whether the said William B. Rodman died testate or intestate and also fails to show that he was seized of said lands at the time of his death.

RESPONDENT'S CLAIM:

1. That respondent's claim of record title is based upon a deed from the State of North Carolina and the North Carolina Board of Education to the Department of Convervation (sic) and Development, dated 5, 1945, and recorded in Book 121, page 121, Pamlico County Registry, on February 13, 1957.

2. That the lands described in said deed were transferred to the North Carolina Wildlife Resources Commission by virtue of GS 143-248 in 1947.

* * *

7. The action of the Commission in posting those lands north of Mouse Harbor Canal as Wildlife lands and in continuously maintaining same as Wildlife management area since the mid-1950's was such as to place the whole

world on notice that the Commission was claiming title to said area. Such exercise of control over said area together with the posting of same as wildlife lands, in the absence of a cooperative agreement with the purported true owner, is clearly inconsistent with and adverse to a claim of private ownership of the area. No such cooperative agreement was entered into with regard to the area in question.

Judge Tillery thereupon concluded and decreed:

1. That petitioner has failed to show good and sufficient record title in fee simple to that portion of the real property described in the petition which lies north of the Mouse Harbor Canal; and that the exceptions of the respondent Wildlife Resources Commission are well taken and should be allowed.

2. That even if petitioner had established record title to that area lying north of the Mouse Harbor Canal, fee simple title to same had vested in the respondent Wildlife Resources Commission prior to the filing of this action by virtue of its adverse possession of the area.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the North Carolina Wildlife Resources Commission is the owner in fee simple of that portion of the lands described in the petition filed herein which lies north of the Mouse Harbor Canal.

2. That the petition filed herein be and the same is hereby dismissed insofar as it pertains to any portion of the lands described therein which lies north of Mouse Harbor Canal.

3. That petitioner pay the costs of this action.

Petitioner appealed and the North Carolina Court of Appeals affirmed, holding that: (1) the report of the division of the lands of John Gray Blount did not vest legal title in Thomas Blount, (2) petitioner failed to prove the existence of a judgment and live execution in the hands of the sheriff and, therefore, it could not rely on the sheriff's deed to William B. Rodman as a link in his chain of title.

We allowed certiorari on 11 December 1975 pursuant to G.S. 7A-31.

Henderson, Baxter & Davidson, by David S. Henderson, and Taylor and Marquardt, by Nelson W. Taylor III, for petitioner appellant.

Attorney General Edmisten, by Assistant Attorney General Roy A. Giles, Jr., for respondent appellees.

BRANCH, Justice.

Petitioner proceeds under Chapter 43 of the General Statutes which is generally referred to as "the Torrens Law." Pursuant to the provisions of Chapter 43, anyone in peaceable possession of land in this State who claims an estate of inheritance therein may prosecute a special proceeding against all the world to establish his title thereto, to determine all adverse claims and to have the title registered. G.S. 43-6. When the Commission filed its answer, the allegations of the petition were controverted as to the lands lying north of Mouse Harbor Canal and the provisions of G.S. 43-11 were activated. *Paper Co. v. Cedar Works,* 239 N.C. 627, 80 S.E. 2d 665. The pertinent portions of G.S. 43-11 provide:

> (a) Referred to Examiner.—Upon the return day of the summons the petition shall be set down for hearing upon the pleadings and exhibits filed. If any person claiming an interest in the land described in the petition or any lien thereon, shall file an answer, the petition and answer, together with all exhibits filed, shall be referred to the examiner of titles, who shall proceed, after notice to the petitioner and the persons who have filed answer or answered, to hear the cause upon such parol or documentary evidence as may be offered or called for and taken by him, and in addition thereto make such independent examination of the title as may be necessary. Upon his request the clerk shall issue a commission under seal of the court for taking such testimony as shall be beyond the jurisdiction of such examiner.
>
> (b) Examiner's Report.—The examiner shall, within thirty days after such hearing, unless for good cause the time shall be extended, file with the clerk a report of his conclusions of law and fact, setting forth the state of such title, any liens or encumbrances thereon, by whom held, amount due thereon, together with an abstract of title to the lands and any other information in regard thereto affecting its validity.

(c) Exceptions to Report.—Any of the parties to the proceeding may, within twenty days after such report is filed, file exceptions, either to the conclusions of law or fact. Whereupon the clerk shall transmit the record to the judge of the superior court for his determination thereof; such judge may on his own motion certify any issue of fact arising upon any such exceptions to the superior court of the county in which the proceeding is pending, for a trial of such issue by jury, and he shall so certify such issue of fact for trial by jury upon the demand of any party to the proceeding. If, upon consideration of such record, or the record and verdict of issues to be certified and tried by jury, the title be found in the petitioner, the judge shall enter a decree to that effect, ascertaining all limitations, liens, etc., declaring the land entitled to registration accordingly, and the same, together with the record, shall be docketed by the clerk of the court as in other cases, and a copy of the decree certified to the register of deeds of the county for registration as hereinafter provided. Any of the parties may appeal from such judgment to the Supreme Court, as in other special proceedings.

Any decree entered by the examiner must be "approved by the Judge of the Superior Court, who shall review the whole proceeding and have power to require any reformation of the process, pleadings, decrees or entries." G.S. 43-12.

In *Paper Co. v. Cedar Works, supra,* Justice Ervin, speaking for the Court, concisely stated the law and rules governing contested hearings in a Torrens proceeding. We quote from that case:

> On a hearing before an examiner in a contested proceeding to register a land title under the Torrens Law, the same rules for proving title apply as in actions of ejectment and other actions involving the establishment of land titles. *Perry v. Morgan,* 219 N.C. 377, 14 S.E. 2d 46; *Thomasson v. Coleman,* 176 Ga. 375, 167 S.E. 879; *Glos v. Cessna,* 207 Ill. 69, 69 N.E. 634; 76 C.J.S., Registration of Land Titles, sections 18, 19.
>
> These rules for proving title to land are presently relevant:
>
> 1. The general rule is, that the burden is on the plaintiff, in the trial of an action of ejectment or other action

involving the establishment of a land title, to prove a title good against the world, or a title good against the defendant by estoppel. *Shelley v. Grainger,* 204 N.C. 488, 168 S.E. 736; *Rumbough v. Sackett,* 141 N.C. 495, 54 S.E. 421; *Campbell v. Everhart,* 139 N.C. 503, 52 S.E. 201; *Mobley v. Griffin,* 104 N.C. 112, 10 S.E. 142.

2. The plaintiff in an action of ejectment or other action involving the establishment of a land title may safely rest his case upon showing such facts and evidences of title as would establish his right to the relief sought by him if no further testimony were offered. *Power Company v. Taylor,* 196 N.C. 55, 144 S.E. 523; *Singleton v. Roebuck,* 178 N.C. 201, 100 S.E. 313; *Moore v. McClain,* 141 N.C. 473, 54 S.E. 382; *Mobley v. Griffin, supra.* "This *prima facie* showing of title may be made by either of several methods." *Mobley v. Griffin, supra.* See also, in this connection: *Conwell v. Mann,* 100 N.C. 234, 6 S.E. 782.

3. The several methods of showing *prima facie* title to land in actions of ejectment and other actions involving the establishment of land titles are enumerated in the famous case of *Mobley v. Griffin, supra.*

4. This is one of the enumerated methods: The plaintiff proves a *prima facie* title to land by tracing his title back to the State as the sovereign of the soil. *McDonald v. McCrummen,* 235 N.C. 550, 70 S.E. 2d 703; *Moore v. Miller,* 179 N.C. 396, 102 S.E. 627; *Caudle v. Long,* 132 N.C. 675, 44 S.E. 368; *Prevatt v. Harrelson,* 132 N.C. 250, 43 S.E. 800; *Mobley v. Griffin, supra; Graybeal v. Davis,* 95 N.C. 508. The plaintiff satisfies the requirements of this method of proving a *prima facie* title when his evidence shows a grant from the State covering the land described in his complaint and *mesne* conveyances of that land to himself. *Power Company v. Taylor, supra; Buchanan v. Hedden,* 169 N.C. 222, 85 N.C. 417; *Land Co. v. Cloyd,* 165 N.C. 595, 81 S.E. 752; *Deaver v. Jones,* 119 N.C. 598, 26 S.E. 156.

5. The plaintiff in an action of ejectment or other action involving the establishment of a land title need not prove a title alleged by him if it is judicially admitted by the defendant. *Collins v. Swanson,* 121 N.C. 67, 28 S.E. 65; 28 C.J.S., Ejectment, section 81.

6. Where it appears from the showing of a *prima facie* title by the plaintiff or the judicial admission of the defendant that the land in dispute in an action of ejectment or other action involving the establishment of a land title is within the external boundaries of the plaintiff's deed and that the defendant claims it under an exception in such deed, the burden is on the defendant to bring himself within such exception by proper proof. *Boyd v. Lumber Co.*, 185 N.C. 559, 117 S.E. 714; *Bright v. Lumber Co.*, 184 N.C. 614, 113 S.E. 506; *Southgate v. Elfenbein*, 184 N.C. 129, 113 S.E. 594; *Lumber Co. v. Cedar Company*, 142 N.C. 411, 55 S.E. 304; *Batts v. Batts*, 128 N.C. 21, 38 S.E. 132; *Wyman v. Taylor*, 124 N.C. 426, 32 S.E. 740; *Bernhardt v. Brown*, 122 N.C. 587, 29 S.E. 884; 65 Am. S. R. 725; *Basnight v. Smith*, 112 N.C. 229, 16 S.E. 902; *Steel and Iron Co. v. Edwards*, 110 N.C. 353, 14 S.E. 861; *Midgett v. Wharton*, 102 N.C. 14, 8 S.E. 778; *King v. Wells*, 94 N.C. 344; *Gudger v. Hensley*, 82 N.C. 481; *McCormick v. Monroe*, 46 N.C. 13. To do this, the defendant must present evidence sufficient to identify the *locus in quo* and locate it upon the surface of the earth inside the exception. *McBrayer v. Blanton*, 147 N.C. 320, 72 S.E. 1070; *Steel and Iron Co. v. Edwards, supra.*

If there be a hiatus or break in petitioner's chain of title, there can be no benefit from earlier conveyances. *State v. Brooks*, 279 N.C. 45, 181 S.E. 2d 553; *Sledge v. Miller*, 249 N.C. 447, 106 S.E. 2d 868; *Norman v. Williams*, 241 N.C. 732, 86 S.E. 2d 593; *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 2d 142.

The Court of Appeals held that petitioner's chain of title was first severed by the document purporting to be the will of John Gray Blount. The record shows this document to actually be the report of commissioners appointed by the Beaufort Court of Equity to divide the lands of John Gray Blount, deceased. The commissioners returned their report to the Fall Term Session of the Beaufort Court of Equity and by their report allotted to Thomas H. Blount that portion of the lands of John Gray Blount known as the "Pamlico and Porpose (sic) Marshes," being Grant 602. In its decree of confirmation the court ordered that the parties "execute to each other deeds for their respective shares."

Petitioner introduced no evidence tending to show compliance by the parties or that the court ever entered any order of attachment to enforce it decree.

In Volume 68, C.J.S. Partition, § 164, page 274, it is stated:

> In equitable proceedings for partition, since an order or decree confirming the report of commissioners appointed to make partition does not of itself, in absence of statute, vest legal title . . . the execution of conveyances is necessary therefore except where, by force of statute, the necessity of a conveyance is obviated. . . . In a proceeding at law, however, no conveyance is necessary unless required by statute, inasmuch as the parties are seized of their shares and the partition only adjust their rights.

See also 59 Am. Jur. 2d, Partition, § 88, at 845.

The United States Supreme Court considered a proceeding in equity to divide real estate in the case of *Gay v. Parpart,* 106 U.S. 679, 27 L.Ed. 256, 1 S.Ct. 456. There the Court, *inter alia,* stated:

> It was another principle of the chancery jurisdiction in partition, that a decree itself did not transfer or convey title even after the allotment of the respective shares of each of the parties to the proceeding, but that the legal title remained as it was before.
>
> In this respect, a decree in chancery was unlike the writ of partition at the common law, which in such cases operated on the title only by way of estoppel. In the chancery proceeding, however, this difficulty was remedied by a decree that the parties should make the necessary conveyances to each other, which, if they refused, they could be compelled to do by attachment, imprisonment and other powers of the court over them in person.

[1] Under the common law, a decree in partition did not transfer or change legal title to any of the property. The partition could be effected only by exchange of deeds between the parties pursuant to the court's decree. 59 Am. Jur. 2d Partition, § 88; *Gay v. Parpart, supra.*

In *Proctor v. Ferebee,* 36 N.C. 143, this Court considered a decree allotting land and there stated:

> We must remark that the defendant is mistaken as to the ground of the recovery at law. The Court expressly

declined questioning the operation of the decree on the interest of Mrs. Ferebee merely on the ground that she was not a party to the suit. It was so declined because, if she had been a party, the decree could not have affected her legal title, for the reason that a decree in equity does not profess and *cannot per se divest a title at law, but only obliges a person who has the title and who is mentioned in the decree to convey as therein directed.* . . . [Emphasis ours.]

Petitioner, relying on *Bank v. Leverette,* 187 N.C. 743, 123 S.E. 68, first contends that the powers of a court of law and a court of equity are equal with respect to judgments and decrees affecting title to realty. We disagree. In *Leverette,* this Court held that once the possessory rights of a cotenant were defined by judgment or decree, a writ of possession or a writ of assistance would issue to put them into possession of the portion that was rightfully theirs. We find no intimation in *Leverette* that a decree from a court of equity ordering the cotenants to exchange deeds had the same effect as a judgment at law finally determining the respective rights of the parties.

Petitioner further argues that even if legal title did not vest in Thomas H. Blount upon the confirmation of the commissioners' report, the enactment of G.S. 1-227, 1-228 as reported in Session Laws of 1850 remedied this break in the chain of title. (Session Laws 1850, c. 107, s. 2, 4.) The Court of Appeals, holding that the date of confirmation rather than the date of recording determined the applicable law, noted that the decree was confirmed prior to the enactment of G.S. 1-227. Also the Court of Appeals decided that G.S. 1-227 does not have retroactive effect. We need not explore the reasoning of the Court of Appeals since it is apparent that by their very terms the statutes are not here applicable. At the time of its enactment in 1850, G.S. 1-227 provided:

§ 1-227. *When passes legal title.*—In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled. . . . [T]he court, after declaring the right and ordering the conveyance, has power . . . *to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the con-*

veyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed. . . . [Emphasis added.]

In *Morris v. White*, 96 N.C. 91, 2 S.E. 254, this Court held that there must be strict conformity to the provisions of G.S. 1-227 in order for a decree to operate as a conveyance. The Court held that the mere fact that the court below intended for the decree to transfer title was immaterial unless the court declared that the decree "shall be regarded as a deed of conveyance."

[2] Here, the court did not declare in the order then made or in any order made in the progress of the cause that the effect of its order was to transfer title to the subject property as directed by the court. Neither does the record show any conveyance made pursuant to the decree of the Beaufort Court of Equity. Thus the legal title to the property in controversy never vested in Thomas Blount pursuant to the 1835 proceeding. The subsequent conveyances by the sheriff's deed to William B. Rodman and the heirs of William B. Rodman to petitioner could not convey an estate of greater dignity than was vested in Thomas Blount upon the death of John Gray Blount.

[3] In an action to try title where it is denied that petitioners own any interest in the land, petitioners' action cannot be dismissed if their evidence is sufficient to warrant a finding that they own some interest in the land entitling them to the present right of possession and petitioners are not required to establish the exact interest claimed in their pleadings. *Skipper v. Yow*, 249 N.C. 49, 105 S.E. 2d 205.

This record discloses that John Gray Blount died intestate and that Thomas Blount, by the laws of intestate succession, was entitled to a one-fifth undivided interest in the lands of John Gray Blount. Thus, if petitioner proves a chain of title from Thomas Blount into himself according to any one of the recognized methods of proving title, he would be entitled to a one-fifth undivided interest in the lands in controversy.

The appellee contends, however, that the sheriff's deed to William B. Rodman also created a break in petitioner's chain of title since the petitioner failed to establish the existence of the judgment upon which the execution was purportedly issued or to establish that, except by evidence of the recitals

contained in the sheriff's deed, there was a live execution in the hands of the sheriff. The sheriff's deed recited entry of judgment against Thomas Blount and that execution was thereupon issued to the Sheriff of Beaufort County to sell the lands described as Grant 602 to satisfy said judgment. It further recited due advertisement of the land and sale to William B. Rodman as the last and highest bidder at the sheriff's sale.

Our Court has considered the effect of recitals of fact in various types of deeds.

In *Sledge v. Miller, supra,* plaintiff sought to establish title by a connected chain of title from the State. One of the links in his chain of title was a deed from Grady and others as receivers of Beaufort County Lumber Company. Holding that this deed constituted a fatal break in the chain of title, this Court, speaking through Justice Rodman, stated:

> The deed from State Board of Education to Hammer Lumber Company and the deed from Hammer Lumber Company to Beaufort County Lumber Company sufficed to show, *prima facie,* title to the lands there described in the Beaufort County Lumber Company, but plaintiff failed to establish that he acquired title to the properties owned by Beaufort County Lumber Company. For that purpose he offered a deed from Grady and others, receivers of Beaufort County Lumber Company. The record does not show what recitals, if any, appear in this deed. It may be presumed, however, that the persons named as receivers in the deed claimed judicial authority to convey, and that the deed contained recitals to that effect, but the recitals, if they appear in the deed, were not, as against these defendants, sufficient to establish that fact. The burden rested on plaintiff to show that the persons named as receivers were in fact receivers and had authority to convey. This should have been established by offering the judgment roll in the action appointing receivers. [Citations omitted.]

We have also held that in a tax foreclosure action, the failure to introduce the intermediate decree and final judgment created a hiatus in the title when the parties relied on the commissioners' deed as a link in the chain of title. *Kelly v. Kelly,* 241 N.C. 146, 84 S.E. 2d 809.

The plaintiff in *Board of Education v. Gallop,* 227 N.C. 599, 44 S.E. 2d 44, relied on a sheriff's deed as a link in his

chain of title. Defendant contended the deed was invalid because it was not supported by a live execution. Plaintiff introduced an undated purported execution which contained no notation by the sheriff as to when it was received or served. Neither was entry of return on the judgment docket shown. The sheriff's deed, however, recited that it was executed pursuant to a live execution. This Court held that such recital was secondary evidence and therefore inadmissible into evidence until plaintiff proved loss or destruction of the original.

In *Walston v. Applewhite & Co.*, 237 N.C. 419, 75 S.E. 2d 138, Justice Denny, later Chief Justice, speaking for the Court, reaffirmed the rule stated in *Board of Education v. Gallop, supra,* with the following language:

> It is the rule with us that the recitals in a deed executed by a sheriff pursuant to an execution sale, are *prima facie* correct, but they are secondary evidence only and before being admitted for that purpose the loss or destruction of the original record or records involved in the controversy, must be clearly proven. *Bd. of Education v. Gallop,* 227 N.C. 599, 44 S.E. 2d 44; *Thompson v. Lumber Co.,* 168 N.C. 226, 84 S.E. 289; *Person v. Roberts,* 159 N.C. 168, 74 S.E. 322; *Isley v. Boon,* 109 N.C. 555, 13 S.E. 795. Cf. *Powell v. Turpin,* 224 N.C. 67, 29 S.E. 2d 26, and *Jones v. Percy, ante,* 239.

[4] The Sheriff's deed to William B. Rodman was *admitted without objection,* and should therefore have been considered for whatever probative value it contained. *Reeves v. Hill,* 272 N.C. 352, 158 S.E. 2d 529; *Freeman v. City of Charlotte,* 273 N.C. 113, 159 S.E. 2d 327.

[5] Although not strongly argued by the parties to this proceeding, we deem it necessary to consider the effect of the ancient document rule upon the recitals contained in the sheriff's deed. A hearsay exception in favor of recitals in ancient deeds is expressly recognized in North Carolina. *Skipper v. Yow, supra; Sears v. Braswell,* 197 N.C. 515, 149 S.E. 846; 1 Stansbury's North Carolina Evidence § 152 at 509 (Brandis Rev., 1973). If the recitals are competent evidence in the case *sub judice,* the sheriff's deed is a valid link in plaintiff's chain of title.

[6, 7] An ancient document is one which bears a date of thirty years or more before the date it is offered into evidence. Such

document requires no further authentication when produced from proper and natural custody free from suspicious circumstances, indicative of fraud or invalidity. *Spears v. Randolph,* 241 N.C. 659, 86 S.E. 2d 263; 2 Stansbury's North Carolina Evidence § 196 at 121 (Brandis Rev. 1973). In this connection, we note that it is no longer necessary to fortify an ancient document with evidence of possession or occupation in order to successfully offer it as a muniment of title. *Nicholson v. Lumber Co.,* 156 N.C. 59, 72 S.E. 86.

In *Harding v. Cheek,* 48 N.C. 135, the plaintiff relied on a sheriff's deed executed in 1775 which recited the existence of executions upon which the sale was founded. The action was instituted in 1855. Defendant contended that there was no proof of the existence of a judgment or that the sheriff levied upon and sold the land. The Court, without mentioning that the recital was a part of an ancient deed, held that the recitals in the deed were *prima facie* evidence of the facts set forth. However, this Court, in the case of *Rollins v. Henry,* 78 N.C. 342, interestingly enough, in an opinion by Justice Rodman, clarified the holding in *Harding v. Cheek,* with this language:

> The rule which seems to be established, and which is supported by reason, appears to be this: The return to an execution is ordinarily the best evidence of a levy and sale under it. But when the execution has not been returned to the clerk's office, and it, with any return on it, has been destroyed or lost, and it is proved otherwise than the recital that there was a judgment and execution, the recital in a sheriff's deed is *prima facie* evidence of the levy and sale, they being official acts of the sheriff, even although the sale was not a recent one. This rule is intended to be applicable only to cases like the present, and does not touch cases like *Hardin v. Cheek, where the deed was an ancient one, but there was no proof of a judgment and execution.* . . . [Emphasis ours.]

In *Sledge v. Elliott,* 116 N.C. 712, 21 S.E. 797, administrators were licensed to sell certain lands in the year 1865. Plaintiff, seeking a recovery of a portion of these lands, relied on a deed authorized by this court order. The North Carolina Supreme Court affirmed the judgment for the plaintiff and, *inter alia,* stated:

> . . . After the expiration of thirty years, the recital in the deed, that the sale was made in pursuance of a decree

> of the court entered in this cause, must be presumed to be true, notwithstanding the fact that the record is not full. . . . After it had remained unimpeached for nearly 30 years, the burden of overcoming a presumption of fairness and regularity in the original record rests upon any one who seeks to disturb a title founded on it.

For other cases recognizing the efficacy of recitals in ancient documents to prove muniment of title see *Skipper v. Yow, supra; Sears v. Braswell,* 197 N.C. 515, 149 S.E. 846; and *Thompson v. Buchanan,* 195 N.C. 155, 141 S.E. 580.

[8] At the time of the institution of this action, the document or public record was 121 years old and was produced from proper custody without any intimation of fraud or invalidity. Under these circumstances, we are of the opinion that the general rule requiring proof of underlying documents must yield to the ancient document rule. We hold that the recitals in the sheriff's deed were *prima facie* evidence that the sale was made pursuant to a live execution in the sheriff's hands.

[9, 10] We are cognizant of the trial judge's finding that petitioner's evidence failed to establish whether William B. Rodman died testate or intestate. This finding does not comport with the well-established rule in this jurisdiction that there is a presumption that a decedent dies intestate. *Chisholm v. Hall,* 255 N.C. 374, 121 S.E. 2d 726; see 2 Stansbury's North Carolina Evidence § 250 (Brandis Rev. 1973). Here respondent offered no evidence to rebut this presumption. Neither is the finding that petitioner failed to show that William B. Rodman was seized of the lands at his death compatible with our rule that when a party proves a chain of title from the State into himself by *mesne* conveyances, he has made out a *prima facie* title to the interest proven in the lands described in the petition. *Paper Co. v. Taylor,* 196 N.C. 55, 144 S.E. 523; *Paper Co. v. Cedar Works, supra; Skipper v. Yow, supra.*

We now consider respondent's contention that the land in controversy vested in it by virtue of seven years adverse possession under color of title.

Assuming, *arguendo,* that the Commission has proved color of title it is, nevertheless, our opinion that the respondent has failed to show adverse possession for seven years.

In *Locklear v. Savage,* 159 N.C. 236, 74 S.E. 347, Justice Walker succinctly defined adverse possession as follows:

> What is adverse possession within the meaning of the law has been well settled by our decisions. It consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated *as to show that they are done in the character of owner,* in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. . . . [Emphasis ours.]

[11] The only evidence of adverse possession offered by respondent prior to the year 1963 consisted of signs placed on the property beginning about the year 1956 which read: "Wildlife Game Management Area." During a subsequent period there were signs which read: "North Carolina Wildlife Resources Commission Wildlife Management Area Boundary." The case of *Berry v. Cedar Works,* 184 N.C. 187, 113 S.E. 772, is very persuasive authority in support of petitioner's contention that the posting of signs indicating the area to be a wildlife management area was not sufficient to constitute adverse possession. In that case this Court, in an opinion by Justice Adams, stated:

> The Court declined the prayer for instruction that keeping the land continuously and conspicuously posted for seven years was such adverse possession as would ripen the defendant's title, no one else being in the actual occupation. Admitting as a general proposition that the posting of land does not constitute sufficient adverse possession, the defendant contends that the *locus* is swamp land, uninhabitable, unfit for cultivation, and not susceptible of such actual possession as is usually available. It may be observed that the prayer contains no suggestion of the number of the notices or the places at which they were posted.
>
> It is very generally held that the prevention of a trespass, whether by a written notice or by the employment

of agents for the purpose, is not such actual possession as is necessary to mature title to real property. The act of posting land is not equivalent to the *possessio pedis*, and as against the owner is nothing more than notice of a claim. To hold that title to land may be defeated, when the owner has only constructive possession, by the claimant's posting of notices which may never come to the owners' knowledge, would amount to a ruling sanctioned neither by reason nor by established precedent. *Lynde v. William*, 68 Mo., 360; *Lumber Co. v. Hughes*, 38 S.R. (Miss.), 769; *Cedar Works v. Stringfellow*, 236 Fed., 264.

Here there was nothing on the signs posted which indicated a claim of ownership by respondent. One who observed the signs placed on the contested area could well assume that the Wildlife Commission was conducting studies or experiments thereon, or that it was leasing the property, or as the respondent admits, that the area was not posted but was for public use. The signs, unlike those in *Berry v. Cedar Works, supra*, did not suggest that one who came upon the property was a trespasser. We, therefore, hold that the posting of the signs by respondent for the required period of time is not such possession as would mature title in it.

This proceeding was instituted on 15 July 1969, thus whether the improvements by the respondent consisting of dikes, impoundments, pumping stations, sheds and other structures were of such adverse nature as would mature title in respondent is not relevant to this contention since the improvements were not commenced seven years before action was instituted by petitioner.

Petitioner argues that the Real Property Marketable Title Act cures any technical defects in his record of title so as to vest a fee simple title in him as sole owner of the lands in controversy. We do not agree. G.S. 47B-1, in part, provides:

> § 47B-1. *Declaration of policy and statement of purpose.*—It is hereby declared as a matter of public policy by the General Assembly of the State of North Carolina that:
>
> * * *
>
> (2) Nonpossessory interests in real property, obsolete restrictions and technical defects in titles which have been placed on the real property records at

remote times in the past often constitute unreasonable restraints on the alienation and marketability of real property.

* * *

It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

G.S. 47B-3 provides that such marketable record does not affect or extinguish the following rights:

(3) Rights, estates, interests, claims or charges of any person who is in present, actual and open possession of the real property so long as such person is in such possession.

In Am. Jur. 2d, Adverse Possession § 14, it is stated:

. . . Thus, in determining what will amount to actual possession of land, considerable importance must be attached to its nature, character, and locality, and to the uses to which it can be applied, or to which the claimant may choose to apply it. The possession is not required to be more full than the character of the land admits. . . . The possession of marsh land contemplated by law is that which is commensurate with its nature, chief value, and by the extent of operations conducted thereon which the character of the soil and its surroundings may reasonably permit. . . .

In June 1963, the Commission began construction of impoundments on the land *sub judice*. Twelve miles of dikes were constructed which created four water-control impoundments and the Commission also erected pumping stations, equipment sheds and other structures on the land. Respondent had employees who regularly maintained the improvements.

[12, 13] In our opinion, this record discloses that the Commission was in actual and open possession of the lands in controversy prior to the time that this action was instituted and that said respondent still retains such possession. Under these circumstances, the Marketable Title Act does not extinguish respond-

ent's rights in the land in controversy. Neither does the act affect the provisions of G.S. 146-79 which, in part, provides:

> In all controversies and suits for any land to which the State or any State agency or its assigns shall be a party, the title to such lands shall be taken and deemed to be in the State or the State agency or its assigns until the other party shall show that he has a good and valid title to such lands in himself.

In *State v. Brooks*, 279 N.C. 45, 181 S.E. 2d 553, this Court considered the effect of G.S. 146-79. In an opinion by Chief Justice Bobbitt, this Court declared that the presumption vested title in the State and noted: "If G.S. 146-79 were interpreted otherwise, title to the subject land would be in limbo. Presumably this statutory provision was enacted to avoid such an undesirable and chaotic result."

We hold that: (1) the North Carolina Wildlife Resources Commission is the owner in fee simple of a four-fifths undivided interest in that portion of Grant No. 602 described in the petition which lies north of Mouse Harbor Canal; (2) subject to record stipulations and conveyances heretofore made by him, the petitioner, J. T. Taylor, Jr., is the owner of a one-fifth undivided interest in that portion of Grant No. 602 described in the petition which lies north of Mouse Harbor Canal.

This cause is remanded to the North Carolina Court of Appeals with direction that it remand the cause to the Superior Court of Pamlico County with order that judgment be entered in accord with this opinion.

Reversed in part and remanded.

STATE OF NORTH CAROLINA v. BEN FRANK SCOTT AND EULA MAE JACOBS

No. 61

(Filed 14 May 1976)

1. Criminal Law § 9; Homicide § 21 —presence at scene and friendship with perpetrator — insufficient evidence of aiding and abetting

The State's evidence was insufficient to be submitted to the jury on the issue of the male defendant's guilt of aiding and abetting the

femme defendant in the murder of her husband where it tended to show only that the male defendant was a friend of the actual perpetrator, he was present at the time and place the crime was committed, and he provided post-crime assistance to the actual perpetrator, and there was no evidence of acts of assistance by the male defendant during commission of the crime and no direct evidence of the crime scene itself which would permit an inference that the male defendant had knowledge that his presence would be regarded by the perpetrator as encouragement.

2. **Criminal Law § 116— defendant's failure to offer evidence — incomplete instruction**

The trial court committed prejudicial error in instructing the jury that defendant elected, as he had the right to do, not to offer evidence without further instructing the jury that defendant's failure to testify should not be considered as a circumstance against him.

Justice HUSKINS dissenting.

Justice COPELAND concurs in that portion of the dissent relating to the charge of the court.

STATE'S appeal pursuant to General Statute 7A-30(2) and defendant Scott's petition for discretionary review under General Statute 7A-31(c)(3) of the decision of the Court of Appeals, reported at 26 N.C. App. 145, 215 S.E. 2d 409 (1975), (Parker, J., dissenting) awarding a new trial to each defendant. This case was docketed and argued as No. 41 at the Fall Term 1975.

Defendants were separately indicted for the first degree murder on June 19, 1974, of Wallace Jacobs, husband of the femme defendant. After a joint trial upon the indictments the jury found each defendant guilty of murder in the second degree. Each was sentenced to 25-30 years imprisonment. The facts are fully set out in the opinion.

Rufus L. Edmisten, Attorney General, by James E. Magner, Jr., Assistant Attorney General, for the State.

I. M. Biggs, for defendant Ben Frank Scott.

Musselwhite, Musselwhite & McIntyre, by Fred L. Musselwhite, for defendant Eula Mae Jacobs.

EXUM, Justice.

Our decision upon defendant Scott's petition for further discretionary review is to reverse the Court of Appeals insofar as it affirmed the denial of this defendant's motion for nonsuit.

Upon the State's appeal we affirm the Court of Appeals' award of a new trial to defendant Jacobs.

The evidence for the State, neither defendant having offered evidence, may be summarized as follows:

Eula Mae Jacobs and Wallace Jacobs apparently did not have a peaceful marriage. On occasion he had beaten her. A week before the killing she had taken out a warrant against him. Many times in the past she had expressed an intent to kill him. She owned a .22 caliber pistol which she had practiced firing and also had recently purchased a box of .22 caliber bullets. On June 16, 1974, her practice firing was accompanied by a statement of intent to kill her husband. Most of this evidence was admitted only against defendant Eula Mae Jacobs but its repetition is necessary to understand the case against Ben Scott.

The evidence adduced by the State against Ben Scott may be summarized as follows:

Before his marriage to Andella Scott and before his imprisonment on other charges Ben Scott was a frequent visitor in the home of Wallace and Eula Mae Jacobs. Andella Scott was Eula Mae's niece. Ben Scott had been separated from his wife Andella for several months while he was in prison but on work release. During this period Ben Scott stated, with reference to no one in particular, that "if he discovered his wife was having an affair with another man, that he would take the lives of both of them." Andella Scott visited often at the home of Wallace and Eula Mae Jacobs, usually when Eula Mae was present. As Eula Mae did not drive, Wallace Jacobs would usually bring Andella Scott to the Jacobs home and return her. There was testimony that Eula Mae might have tried to get Andella Scott to return to Ben. Before going to prison Ben Scott had once forbidden his wife to visit at the Jacobs home. While on work release, however, he would sometimes visit the Jacobs.

In early June, 1974, Ben Scott was released from prison and began visiting the Jacobs home regularly. One witness testified, "After the 1st day of June, I saw [his car] over there almost daily. He would sometimes get there about 9:00-10:00 o'clock and he would stay over in the evening. I know that Wallace Jacobs was at work while this was going on."

One week before the killing Andella Scott went to the Jacobs home while Ben was there. He unsuccessfully attempted a reconciliation, became angry and left.

On June 17, 1974, Ben Scott drove Eula Mae Jacobs to the home of Anderson Locklear in Cumberland Mills. Eula Mae fired her .22 caliber pistol three or four times after getting out of the car. Apparently Wallace Jacobs had just beaten Eula Mae again. Ben Scott stayed just long enough for Anderson Locklear to get Eula Mae's beer cooler out of Scott's car. Locklear noticed two "long guns" in the back seat of the car. Scott left.

On June 18, 1974, at 2:00 p.m. Dorothy Locklear, a close neighbor of the Jacobs, saw Ben Scott's car at the Jacobs residence. Dorothy Locklear was taking clothes off the line and Eula Mae Jacobs was hanging out clothes. Dorothy Locklear testified, "After she got through hanging hers out, Ben Frank Scott and Eula Mae Jacobs went running and playing and fell down in the grass at the back of the house. They grabbed each other and fell down on the grass." Ben Scott's car stayed there all afternoon. All that day from 9:00 or 9:30 a.m. until 4:30 p.m. Lefty Cummings, Eula Mae Jacobs' son who worked a night shift, was sleeping in the Jacobs house. When Lefty woke up at 4:30 p.m. Wallace and Eula Mae were both there. Wallace usually got off work at 4:30 p.m. Lefty went back to bed at 6:00 p.m. after supper. In his pajama drawer he noticed his mother's .22 caliber pistol. Later during the night Ben Scott came into Lefty's bedroom, woke him up and told him that his mother said for him to get up and get ready for work. Lefty left at 11:10 p.m., leaving Ben Scott sitting in a chair, Eula Mae Jacobs lying on a sofa, and Wallace Jacobs sitting in a rocking chair.

At 12:00 midnight Dorothy Locklear, the neighbor, heard five shots but did not get out of bed or look out the window.

At 12:35 a.m. on June 19, 1974, Eula Mae Jacobs and Ben Scott arrived at the Anderson Locklear home in Cumberland Mills. (Driving time by the most direct route from the Jacobs home to Anderson Locklear's is 35-40 minutes at the speed limit.) Ben Scott said, "Give me them things you got." Eula Mae handed him six or seven cartridges from her pocketbook. Ben Scott said "What about my gas?" Eula Mae gave him two dollar bills and some change. Eula Mae told Scott to take a message to her son Lefty not to go home after work but to

go to his Aunt Ida's and to give Lefty the phone number of of Mr. and Mrs. Rich, the next door neighbors of the Anderson Locklears where the Locklears received telephone calls. Scott left.

At about 2:00 or 2:15 a.m. Ben Scott appeared at the textile plant where Lefty Cummings was working and gave him Eula Mae Jacobs' message. (Driving time from the Anderson Locklear home to the plant where Lefty worked was approximately 45 minutes.)

At 2:45 a.m. a night operator for Southern Bell in Laurinburg received a telephone call from a pay telephone in Lumberton. (Driving time from the plant where Lefty worked to Lumberton is 40-45 minutes.) A male voice told her to ring the Sheriff's office and tell him to go to an address in Pembroke where they would probably find a dead man. The operator could not remember the address. The caller would not stay on the line while the operator rung the Sheriff.

At 3:09 a.m. Ben Scott was seen in a pay telephone booth in Lumberton with the receiver at his ear. At 3:10 a.m. the dispatcher at the Robeson County Sheriff's Department received a telephone call from an unidentified male. The caller said, "I got something I want to tell you. Listen to what I got to tell you. I'm only going to say it one time . . . . Go to Wallace Jacobs' residence in the Pembroke area, there's been a break-in at that house and you will find the lights out in the house and the doors locked. There will be a screen torn out in one of the back windows and there is someone hurt." The dispatcher asked him how he knew. The caller said, "Never mind. Just take my word." When the dispatcher asked who was calling the caller hung up.

At 3:30 a.m. Sheriff's Deputies Honeycutt and Locklear arrived at the Jacobs residence. One window screen, bent from the inside out, was found on the grass. The window was raised. They entered the house and found Wallace Jacobs nude and dead from two gunshot wounds of undetermined caliber. At 4:15 a.m. Deputy Sheriff Stone arrived. Several bullet holes were found in the house and one spent .22 caliber bullet. A box of .22 caliber bullets was found in what was apparently Eula Mae's bedroom. Although an air rifle was lying on the deceased's arm and there was a box of pellets in the deceased's left hand there was no blood on the rifle or pellet box. The deceased's left palm was bloody.

At 6:00 a.m. Lefty Cummings returned from work. The .22 caliber pistol was no longer in his drawer.

Between 11:00 and 11:30 a.m. that morning of June 19, 1974, Ben Scott came to the Anderson Locklear home. Annie Jane Locklear asked if he knew Wallace Jacobs was dead. He said "No" and "the last time he seed him was setting in the chair with his feet on the hassock." Annie persisted, "Who killed him?" Ben Scott said, "I don't know." Annie asked about his wife, and Ben Scott said "Andella would call Aunt Eula and make an appointment to go over and Wallace would pick her up and Wallace would take her home; that they were too close."

Around noon on June 19 Ben Scott and Eula Mae Jacobs were both in the Anderson Locklear home. While asking Eula Mae about her husband's death, Annie Jane Locklear mentioned lawyers. Ben Scott then said to Eula Mae Jacobs, "Come on, I will carry you to the lawyer's office." He helped her to the car and they left.

Ben Scott was arrested on June 20. While in custody he was visited by Eula Mae Jacobs' daughter, Connie Cummings. She asked him whether he killed Wallace. He said, "No, I didn't." She then inquired whether he had been at Wallace Jacobs' house at 2:00 a.m. on June 19. After first denying it he said, "Oh, yes, I did go over there, too."

Two gloves were found in Scott's car the day of his arrest. There were no fingerprints on the window screen of Jacobs' house. Scott's explanation for the gloves was that he worked in a chicken plant. The gloves had no blood or foreign substance on them.

I

In our opinion the evidence is insuffcient to withstand defendant Scott's motion for nonsuit. The rules for determining the sufficiency of evidence when such a motion is lodged were recently restated in *State v. Hankerson*, 288 N.C. 632, 636, 220 S.E. 2d 575, 580 (1975): "[W]e consider all of the evidence actually admitted . . . in the light most favorable to the State, resolve any contradictions and discrepancies therein in the State's favor, and give the State the benefit of all reasonable inferences from the evidence."

Viewing the evidence in this light the jury could reasonably infer that Eula Mae Jacobs intended to kill her husband, made preparations to do so, harbored both longstanding and fresh grievances against him, and, so motivated, actually shot him to death. As to defendant Scott the evidence is far less convincing. For instance it leaves to speculation and conjecture whether Scott had any motive for killing Wallace Jacobs. He might, of course, have been jealous because of the "too close" relationship between Wallace Jacobs and his estranged wife, Andella Scott, or he might have desired Eula Mae Jacobs. There was, however, no direct testimony that he was either jealous or desirous and no circumstantial evidence from which either motive could be reasonably inferred. The two supposed motives are, in a real sense, mutually exclusive and, in view of the ages (from the warrants it appears that Scott was 26 and Eula Mae was 45) and relationships of the parties, somewhat improbable.

There is direct testimony that Scott was present with Wallace and Eula Mae Jacobs at their home 40 minutes before shots were heard and that 35 minutes later he was observed to arrive by automobile with Eula Mae Jacobs at a place some 35 minutes driving time away from the scene of the crime. The evidence supports, therefore, a reasonable inference that Scott was present at the time and place of the crime.

As was stated in *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 681-682 (1967):

> "The question for the Court is whether, when all of the evidence is so considered, there is substantial evidence to support a finding both that an offense charged in the bill of indictment . . . has been committed and that the defendant committed it. *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 [1960]. If, when the evidence is so considered, it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for nonsuit should be allowed. *State v. Guffey*, 252 N.C. 60, 112 S.E. 2d 734 [1960]. This is true even though the suspicion so aroused by the evidence is strong. *State v. Chavis*, 270 N.C. 306, 154 S.E. 2d 340 [1967].
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> * * *
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> "These controlling principles of law are more easily stated than applied to the evidence in a particular case. Of

necessity, the application must be made to the evidence introduced in each case, as a whole, and adjudications in prior cases are rarely controlling as the evidence differs from case to case."

[1] The case against defendants Scott and Jacobs rests on the theory that one defendant did the shooting and the other was an aider and abettor. The State does not seriously contend that Scott was the actual perpetrator. Indeed the State's evidence was that Scott, when asked by Connie Cummings if he killed Wallace Jacobs said, "No, I didn't." The State is bound by that statement unless other evidence casts doubt on its veracity or throws "a different light on the circumstances of the homicide." *State v. Hankerson, supra.* While there was evidence which cast doubt on Scott's denials of his being present at and having knowledge of the crime, no evidence impinges upon his denial that he killed Wallace Jacobs. The case could not have been submitted to the jury on the theory that he did. Whether there was sufficient evidence to submit the case on the theory that Scott was an aider and abettor of Eula Mae Jacobs is a more difficult question. We hold, however, that the evidence was insufficient on this theory also.

The applicable rules of law were fully set forth in *State v. Rankin,* 284 N.C. 219, 222-223, 200 S.E. 2d 182, 184-185 (1973) in an opinion by Associate Justice Lake:

> "'[W]hen two or more persons aid and abet each other in the commission of a crime, all being present, all are principals and equally guilty.' [Citations omitted.] To be sufficient to sustain a conviction, it is not necessary that the evidence for the State show the defendant struck the blow, seized or carried away the property or spoke any word at the time and place of the offense. [Citations omitted.]
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> "The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make him guilty of the offense. [Citations omitted.] . . . [The elements of this theory are that] defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of

intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator. *'When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement.'* Wharton, Criminal Law, 12th Ed., § 246." (Further citations omitted.) (Emphasis added.)

The State strenuously contends that *Rankin* stands for the proposition that presence alone at the scene of a crime coupled with the fact of friendship with the actual perpetrator is enough to permit a jury to find the friend guilty on the theory of aiding and abetting. This is not the law and the decision in *Rankin* does not rest upon such a principle. *Rankin* dealt with a prosecution for larceny from the person. Appellant was convicted at trial on the theory of aiding and abetting. The State's evidence was that the victim was walking through an alley when one Crawford snatched her purse. Turning, she saw three persons, Crawford, appellant Rankin, and Speed. Crawford emptied her purse, took the money and told the victim, "You better not come this way." The other two never spoke. The three men ran out of the alley, slowed down as they reached the street and proceeded "as if nothing had happened" to a store where they made a purchase. When the police arrived the three ran from them. This Court held there was sufficient evidence to permit the jury to find that appellant Rankin was "present at the scene of the offense for the purpose of aiding Crawford and that Crawford was aware of such purpose." *Id.* at 224, 200 S.E. 2d at 185. The immediate flight of appellant Rankin with Crawford and Speed was seen as a circumstance to be considered by the jury though not sufficient in itself to withstand the motion for nonsuit.

It is clear that in *Rankin* the Court thought the evidence permitted a reasonable inference that appellant's presence at the scene was "for the purpose of aiding" the actual perpetrator, Crawford. The actions of Crawford and his cohorts after the crime, when added to the facts of their very presence together in an alleyway and their juxtaposition at the time of the offense were sufficient to permit a jury to infer an intent to aid on the part of Rankin and some communication of that intent to Crawford.

The distinction between *Rankin* and the case at bar is this: in *Rankin* there was direct evidence of appellant's presence at the scene, the nature of the scene, how the parties were situated at the scene with relation to each other, plus their common effort immediately after the crime to escape detection. In the case before us this kind of evidence is totally lacking. That defendant Scott was even present at the scene is a fact which must be inferred, if at all, from other circumstances. The scene is not delineated by any direct evidence as it was in *Rankin.* Scott's actions after the crime are, moreover, unlike *Rankin, not* an effort to conceal the crime but, rather, an effort to provide post-crime assistance to the actual perpetrator, Eula Mae Jacobs. *Cf. State v. Hargett,* 255 N.C. 412, 121 S.E. 2d 589 (1961).

The case against Scott then comes to this: he was a friend of the actual perpetrator and was present at the time and place the crime was committed. The rule stated in *Rankin* that "when the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as an encouragement" does not mean that mere presence plus friendship is sufficient evidence for a jury to convict upon an aiding and abetting theory. The rule by its terms requires that the friendly bystander *have knowledge* that his presence will be regarded by the perpetrator as encouragement. *State v. Banks,* 242 N.C. 304, 87 S.E. 2d 558 (1955). When the scene of the crime is described by direct evidence as it was in *Rankin* such knowledge of the bystander may well be inferred from this description. Where, however, as here, presence is proved only by inference and there is no direct evidence of the crime scene itself it would be unreasonable to infer also such knowledge of the bystander from the mere fact of his presence.

This Court has consistently held that a friendly relationship between a bystander and the actual perpetrator of a crime is not enough standing alone to make the bystander an aider and abettor. In *State v. Banks, supra,* we held it error for the trial judge to charge the jury that "mere presence . . . is enough to make one an aider or abettor where both or all of the defendants are friends." In *State v. Ham,* 238 N.C. 94, 98, 76 S.E. 2d 346 (1953) we said, "Yet we find no decision of this Court in which it is held that evidence tending to show that a bystander was a friend of the perpetrator and the perpetrator was aware of his presence, and nothing more, is sufficient to

support a conviction [as an aider and abettor]." *Accord, State v. Hargett, supra.*

In other aiding and abetting cases where the friendliness of the bystander was a circumstance and the case was permitted to go to the jury there was evidence of more than mere presence. There was in each case evidence of acts of assistance during commission of the crime. *State v. Holland,* 234 N.C. 354, 67 S.E. 2d 272 (1951); *State v. Williams,* 225 N.C. 182, 33 S.E. 2d 880 (1945); *State v. Cloninger,* 149 N.C. 567, 63 S.E. 154 (1908); *State v. Jarrell,* 141 N.C. 722, 53 S.E. 127 (1906).

State v. Ham, supra, is persuasive authority for nonsuiting the case against defendant Scott. *Ham* was a prosecution against five defendants for murder which occurred when two groups of women engaged in a general brawl. Two of the defendants, Jean Teaster and Leonard Teaster, were husband and wife. The State's evidence was that while Jean Teaster had actively participated in the brawl, Leonard simply stood by, watched the affair, and drove the automobile for the femme defendants. In holding that Leonard Teaster's motion for nonsuit should have been allowed this Court said, *State v. Ham, supra* at 98, 76 S.E. 2d at 349:

> "The defendant Jean Teaster was aware of the presence of her husband, and we may assume that in all probability this defendant would have intervened had it appeared to him that his wife was getting the worst of the encounter. But this is a pure surmise based on our knowledge of human nature and not an inference of fact supported by evidence.
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> * * *
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> The cases cited and relied on by the State are factually distinguishable. In those and like cases *there was evidence of some fact or circumstance tending to establish the defendant's actual participation in the commission of the crime charged.*" (Emphasis added.)

For the reasons stated, we hold that defendant Scott's motion for nonsuit should have been allowed. The decision of the Court of Appeals affirming the denial of this motion must, therefore, be reversed.

II

[2] Neither defendant called any witnesses or testified in his or her own behalf. After defendants rested the trial judge said:

> "All right, members of the jury, the State has rested. The Defendant Scott as he has the right to do, has elected not to offer evidence. The Defendant Jacobs, as she has a right to do, has elected not to offer any evidence. So the next order of the trial is the arguments of counsel."

In his charge to the jury the trial judge, after summarizing the evidence for the State, said:

> "The defendant Scott elected, as he had the right to do, not to offer evidence. The defendant Jacobs elected, as she had the right to do, not to offer evidence."

The Court of Appeals awarded a new trial because this instruction was practically identical to the one given in *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974) and found wanting. The State in its brief and Judge Parker in his dissent urge us to reconsider the decision in *Baxter* and hold the instruction, if error, to be harmless beyond a reasonable doubt.

In *Baxter,* the trial judge instructed the jury, "The defendants, Robert Baxter and Alveta Baxter, did not offer any evidence as they have the right to do." This Court pointed out that the statement was ambiguous. It could mean either that the defendant "had the right not to offer any evidence and did not do so; or . . . he had the right to offer evidence and did not do so." The Court held, however, that whichever interpretation was adopted the instruction was prejudicially erroneous in that it was an incomplete statement of the law and did not make "clear to the jury that the defendant has the right to offer or to refrain from offering evidence as he sees fit *and that his failure to testify should not be considered by the jury as basis for any inference adverse to him.*" *State v. Baxter, supra* at 738-739, 208 S.E. 2d at 698. (Emphasis added.)

The statement here does not suffer from the same ambiguity as the statement in *Baxter.* Reasonably interpreted it seems clear that the right referred to by the trial judge in both instances was the right *not* to offer evidence. The trial judge, as in *Baxter,* did not, however, advise the jury that defendant's failure to testify should not create any inference adverse to him. We said in *Baxter* that, absent a request, it is generally better for

the trial judge not to remind the jury of a defendant's failure to testify, a circumstance which is already quite obvious to it. *Baxter* then made it clear that if he does undertake to do so, he must also advise the jury that defendant's failure to testify must not be considered as a circumstance against him. This instruction is essential to insure, insofar as possible, that defendant's exercise of a fundamental right shall not be used by the jury to his prejudice. Failure to give it is, under the circumstances here, prejudicial error.

We note, in fairness to the trial judge here, that *Baxter* was filed on October 10, 1974, just four days before this trial commenced, and had not at the time of trial been generally circulated.

The decision of the Court of Appeals awarding a new trial to the defendant Jacobs is affirmed.

On defendant Scott's petition, REVERSED.

On State's appeal, AFFIRMED.

Justice HUSKINS dissenting.

The majority hold that the evidence in this case was insufficient to support a finding by a jury that defendant Scott aided and abetted defendant Jacobs in murdering her husband and that defendant Scott's motion for nonsuit therefore should have been granted. The majority also hold that the trial judge committed prejudicial error in failing to instruct the jury that defendants' decision not to testify or offer other evidence "should not be considered by the jury as basis for any inference adverse to [them]." *State v. Baxter,* 285 N.C. 735, 208 S.E. 2d 696 (1974). Consequently, defendant Scott's conviction is reversed outright and defendant Jacobs is awarded a new trial. For the reasons which follow, I dissent as to both defendants and vote to uphold their convictions.

The evidence against defendant Scott is accurately stated in the majority opinion. Suffice it to say that, in my opinion, when this evidence is considered in the light most favorable to the State, when any contradictions and discrepancies are resolved in favor of the State, and when the State is given the benefit of all reasonable inferences arising from this evidence, *see State v. Hankerson,* 288 N.C. 632, 220 S.E. 2d 575 (1975), there is evidence from which a jury could reasonably conclude that

defendant Jacobs shot her husband to death and that defendant Scott aided and abetted her in that act. *See State v. Rankin,* 284 N.C. 219, 200 S.E. 2d 182 (1973).

Defendants offered no evidence. After they rested, the trial judge on his own motion instructed the jury, in part, that "[t]he defendant Scott as he has the right to do, has elected not to offer evidence. The defendant Jacobs, as she has a right to do, has elected not to offer any evidence." The majority, relying on *State v. Baxter, supra,* hold that the trial judge, having given this instruction, committed reversible error in failing to further instruct the jury that defendants' decision not to offer evidence could not be "considered as a circumstance against them." Although this omission was a technical violation of the rule announced in *Baxter,* examination of the instruction given in the present case convinces me that this oversight on the part of the trial judge was harmless beyond a reasonable doubt.

In *Baxter,* the trial judge instructed the jury that "[t]he defendants, [naming them], did not offer any evidence as they have the right to do." The majority in *Baxter* concluded that this statement was ambiguous in that it could mean either that defendant "had the right not to offer any evidence and did not do so; or . . . he had the right to offer evidence and did not do so." In the instant case, however, as the majority concede, "[t]he statement . . . does not suffer from the same ambiguity as the statement in *Baxter.* Reasonably interpreted it seems clear that the right referred to by the trial judge in both instances was the right *not* to offer evidence." For these very reasons, I do not believe that there is a reasonable possibility that the omission complained of might have contributed to the convictions. *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed. 2d 171, 84 S.Ct. 229 (1963). In all events, when considered in the context in which it was used the incomplete statement had no prejudicial effect on the result of the trial and was therefore harmless. *See State v. Perry,* 231 N.C. 467, 57 S.E. 2d 774 (1950), and my dissent in *State v. Baxter, supra,* at 739.

For the reasons stated above, I dissent from the majority opinion and vote to reverse the Court of Appeals and uphold the conviction of both defendants.

Justice COPELAND concurs in that portion of the dissent relating to the charge of the court.

DISPOSITION OF PETITIONS FOR CERTIORARI TO THE COURT OF APPEALS

ANDREWS ASSOCIATES v. SODIBAR SYSTEMS

No. 127 PC.

Case below: 28 N.C. App. 663.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

DUKE UNIVERSITY v. CHESTNUT

No. 114 PC.

Case below: 28 N.C. App. 568.

Petition for discretionary review under G.S. 7A-31 dismissed.

SKINNER v. SKINNER

No. 80 PC.

Case below: 28 N.C. App. 412.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

STATE v. BARKER

No. 93.

Case below: 28 N.C. App. 729.

Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 15 April 1976.

STATE v. EVANS AND ATKINSON

No. 102 PC.

Case below: 28 N.C. App. 729.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 3 May 1976.

STATE v. GRESHAM

No. 104 PC.

Case below: 28 N.C. App. 730.

Petition for discretionary review under G.S. 7A-31 allowed 3 May 1976.

STATE v. HUGHES

No. 22.

Case below: 29 N.C. App. 183.

Motion of Attorney General to dismiss appeal for failure to comply with rules allowed 3 May 1976.

STATE v. HUNTER

No. 99 PC.

Case below: 27 N.C. App. 534.

Petition for writ of certiorari to North Carolina Court of Appeals denied 15 April 1976.

STATE v. McGEE

No. 110 PC.

Case below: 28 N.C. App. 729.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

STATE v. PARKS

No. 107 PC.

Case below: 28 N.C. App. 703.

Petition for discretionary review under G.S. 7A-31 allowed 3 May 1976.

STATE v. REIVES

No. 117 PC.

Case below: 29 N.C. App. 11.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

STATE v. SHORES

No. 90 PC.

Case below: 28 N.C. App. 323.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

STATE v. WILLIAMS

No. 116 PC.

Case below: 29 N.C. App. 24.

Petition for discretionary review under G.S. 7A-31 denied 3 May 1976.

APPENDIXES

ADDITIONS TO
RULES OF APPELLATE PROCEDURE

AMENDMENT TO REVIEW OF
JUDICIAL STANDARDS COMMISSION
RECOMMENDATIONS

AMENDMENTS TO
CODE OF JUDICIAL CONDUCT

AMENDMENTS TO
RULES GOVERNING ADMISSION TO
THE PRACTICE OF LAW

ADDITION TO THE RULES OF APPELLATE PROCEDURE

There shall be added to Rule 30 of the Rules of Appellate Procedure subparagraph "(f)," which shall read as follows:

(f) *Pre-argument review; decision of appeal without oral argument.*

(1) The Chief Judge of the Court of Appeals may from time to time designate a panel to review any pending case, after all briefs are filed but before argument, for decision under this rule.

(2) If all of the judges of the panel to which a pending appeal has been referred conclude that oral argument will not be of assistance to the Court, the case may be disposed of on record and briefs. Counsel will be notified not to appear for oral argument.

This addition to Rule 30 was adopted by the Supreme Court in conference on May 3, 1976, to become effective immediately upon its adoption. It shall be promulgated by publication in the next succeeding Advance Sheets of both the Supreme Court and the Court of Appeals.

Exum, J.
For the Court

AMENDMENT TO RULES GOVERNING SUPREME COURT REVIEW OF RECOMMENDATIONS OF THE JUDICIAL STANDARDS COMMISSION

By order of the Court in Conference on April 14, 1976, Rule 3 of the rules governing Supreme Court Review of Recommendations of The Judicial Standards Commission is amended by striking the last sentence and substituting in lieu thereof the following sentence:

> "Decision on a recommendation for censure shall be by a written order filed with the Clerk and published in the Advance Sheets and bound volumes of the Supreme Court Reports."

Exum, J.
For the Court

AMENDMENTS TO CANON 7A CODE OF JUDICIAL CONDUCT

Canon 7A of the Code of Judicial Conduct first published in 283 N.C. at 779-80, as amended, 286 N.C. at 729-30, is hereby again amended* so that, as amended, it reads as follows:

A. Political Conduct in General.

(1) A judge or candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization. For example, he may not attend a political convention on any level as a delegate; nor may he preside or serve as an officer at any precinct meeting, convention, or other political convocation. He may attend a precinct meeting, convention or other political convocation provided he does not violate any other canon, particularly 7A(1)(b) or (c).

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office; provided, a judge or candidate for 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.

(c) solicit funds for a political organization or candidate.

(d) make financial contributions to any candidate for political office, except as expressly provided in subsection (b) hereinabove, unless the candidate is a member of the judge's or judicial candidate's family.

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) The foregoing provisions of Canon 7A do not prohibit a judge's spouse or any other adult member of his family from engaging in political activity provided the spouse or other family member acts in accordance with his or her individual convictions, on his or her own initiative, and not as alter ego of the judge himself.

Canon 7A, as thus amended, was adopted by the Supreme Court of North Carolina in Conference on March 16, 1976, and shall become effective upon its publication in Volume 289, No. 3, of the Supreme Court Advance Sheets. Until that time the present Canon 7A shall be and remain in full force and effect.

Exum, J.
For the Court

* the new amendments:

(1) Add the last two sentences in subsection (1)(a).

(2) Delete the words, "who is not at that time a candidate for election to judicial office," in subsection (1)(b) and substitute in lieu thereof the words, "or candidate for judicial office."

(3) Delete the words, "except as authorized in subsection A(2)" in subsection (1)(c).

(4) Add subsection (1)(d) in its entirety.

(5) Delete the words, "only insofar as permitted by law" in section (2).

(6) Add section (4) in its entirety.

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The attached amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly adopted at a regular quarterly meeting of the Council of The North Carolina State Bar.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are hereby amended by rewriting the Rules as appear in 279 N.C. 733-742, 281 N.C. 769, 284 N.C. 765, 285 N.C. 767 and 287 N.C. 783.

NORTH CAROLINA ADMINISTRATIVE CODE

TITLE 21
OCCUPATIONAL LICENSING BOARDS

CHAPTER 30
BOARD OF LAW EXAMINERS

SECTION	.0100	ORGANIZATION
	.0101	ADDRESS
	.0102	PURPOSE
	.0103	MEMBERSHIP
SECTION	.0200	GENERAL PROVISIONS
	.0201	COMPLIANCE NECESSARY
	.0202	DEFINITIONS
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SECTION	.0300	REGISTRATION
	.0301	WHO MUST REGISTER
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SECTION	.0400	APPLICATIONS OF GENERAL APPLICANTS
	.0401	HOW TO APPLY
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	.0404	FEES
	.0405	REFUND OF FEES
	.0406	BAD CHECK POLICY

CHAPTER 30—BOARD OF LAW EXAMINERS

SECTION .0100—ORGANIZATION

.0101 ADDRESS

The offices of the Board of Law Examiners of the State of North Carolina are located in the Law Building at 107 Fayetteville Street, Raleigh, N. C. The mailing address is P. O. Box 25427, Raleigh, N. C. 27611. The offices are open from 9:00 a.m. to 5:00 p.m. Monday through Friday.

History Note: Statutory Authority G.S. 84-24; 150A-60; Effective February 1, 1976.

.0102 PURPOSE

The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0103 MEMBERSHIP

The Board of Law Examiners of the State of North Carolina consists of nine members of the N. C. Bar elected by the Council of the North Carolina State Bar. One member of said board is elected by the board to serve as chairman for such period as the board may determine. The board also employs an executive secretary to enable the board to perform its duties promptly and properly. The executive secretary, in addition to performing the administrative functions of the position, may act as attorney for the board.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

SECTION .0200—GENERAL PROVISIONS

.0201 COMPLIANCE PROVISIONS

No person shall be admitted to the practice of law in North Carolina unless he has complied with these rules and the laws of the state.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0202 DEFINITIONS

(a) The term "Board" as used in this chapter refers to the "Board of Law Examiners of the State of North Carolina."

(b) The term "Secretary" as used in this chapter refers to the "Executive Secretary of the Board of Law Examiners of the State of North Carolina."

(c) Every word importing the masculine gender only shall extend and be applied to females as well as to males.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0203 APPLICANTS

For the purpose of these rules, applicants are classified either as "general applicants" or as "comity applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, a person shall satisfy the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0204 LIST

As soon as possible after the filing deadline for applications, the secretary shall prepare and maintain a list of general applicants for the ensuing examination.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0205 HEARINGS

Every applicant may be required to appear before the board to be examined about any matters pertaining to his or her moral character, educational background or any other matters set out in Section .0500 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

SECTION .0300—REGISTRATION

.0301 WHO MUST REGISTER

Every person seeking admission to practice law in the State of North Carolina as a general applicant shall register, by filing with the secretary at the offices of the board a properly completed registration form prescribed and supplied by the board. The registration form may be obtained by writing or calling the offices of the board.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0302 REGISTRATION FORMS

Each registration form shall be complete in every detail and must be accompanied by such other evidence or documents as may be prescribed by the board. The registration form requires a person to supply information relating to his background, including family, education, employment, whether he has been a party to any disciplinary or legal proceedings, character references and a certification to be completed by the applicant's dean.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0303 FILING DATE

Registrations shall be filed with the secretary at the offices of the board at least eighteen (18) months prior to August 1 of the year in which the applicant expects to take the bar examination.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0304 FEES; LATE REGISTRATION

Each registration by a resident of the State of North Carolina must be accompanied by a fee of $25.00 and each registration by a non-resident shall be accompanied by a fee of $40.00. An additional fee of $50.00 shall be charged all applicants who file a late registration, both resident and non-resident. All said fees shall be payable to the board. No part of a registration fee shall be refunded for any reason whatsoever.

History Note: Statutory Authority G.S. 84-24; 25;
Effective February 1, 1976.

SECTION .0400—APPLICATIONS OF GENERAL APPLICANTS

.0401 HOW TO APPLY

After complying with the registration provisions of Section .0300 of this Chapter, applications for admission to an examination must be made upon forms supplied by the board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by writing or calling the board's offices.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0402 APPLICATION FORM

The application form requires an applicant to supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar. In addition, all applicants must submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a birth certificate. The application must be filed in duplicate. The duplicate may be a photocopy of the original.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0403 FILING DEADLINE; NO WAIVER

Applications must be filed with and received by the secretary at the offices of the board not later than 12:00 noon, Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0404 FEES

Every application by a general applicant who is a resident of the State of North Carolina shall be accompanied by a fee of $130.00. Every application by a general applicant who is not a resident of the State of North Carolina shall be accompanied by a fee of $130.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident. All said fees shall be payable to the board.

History Note: Statutory Authority G.S. 84-24; 25;
Effective February 1, 1976.

.0405 REFUND OF FEES

No part of the fee required by Rule .0404 of this chapter shall be refunded to the applicant unless the applicant shall file with the secretary a written request to withdraw as an applicant, not later than the 15th day of June before the next examination, in which event not more than one-half (½) of the fee may be refunded to the applicant in the discretion of the board; provided, however, no part of any fee paid to the National Conference of Bar Examiners or its successor shall be refunded.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0406 BAD CHECK POLICY

All checks payable to the board for any fees which are not honored upon presentment shall be returned to the applicant who shall, within 10 days following the receipt thereof, pay to the board in cash, cashier's check, certified check or money order any fees payable to the board. Failure of the applicant to pay the fees as required by this section shall result in a denial of his application to take the North Carolina Bar Examination.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .0500—REQUIREMENTS FOR APPLICANTS

.0501 REQUIREMENTS FOR GENERAL APPLICANTS

Before being licensed by the board to practice law in the State of North Carolina, a general applicant shall:

(1) be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(2) have registered as a general applicant in accordance with the provisions of Section .0300 of this Chapter.

(3) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(4) be a citizen of the United States;

(5) be of the age of at least eighteen (18) years;

(6) be and continuously have been a bona fide citizen and resident of the State of North Carolina on and from the 15th day of June of the year in which the applicant applies to take the written bar examination;

(7) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(8) stand and pass a written bar examination as prescribed in Section .0900 of this Chapter.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0502 REQUIREMENTS FOR COMITY APPLICANTS

Any attorney at law immigrating or who has heretofore immigrated to North Carolina from a sister state or from the District of Columbia or a territory of the United States, upon written application may be licensed by the board to practice law in the State of North Carolina, without written examination, in the discretion of the board, provided each such applicant shall:

(1) be a citizen of the United States;

(2) file written application with the secretary, upon such form supplied by the board, not less than six (6) months before the application shall be considered by the board; the application requires:

(a) that an applicant supply information relating to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, mental illness, character references, a statement of the applicant's practice of law, along with a requirement that the applicant be familiar with the Code of Professional Responsibility as promulgated by the North Carolina State Bar;

(b) that all applicants submit four certificates of moral character from individuals who know the applicant, a recent photograph, one set of clear fingerprints and a certification of the court of last resort from the jurisdiction the applicant is applying;

(c) that it must be filed in duplicate and the duplicate may be a photocopy of the original.

(3) Pay to the board with each written application a fee of $400.00 plus such fee as the National Conference of Bar Examiners or its successors may charge from time to time for processing an application of a non-resident, no part of which may be refunded to the applicant whose application is denied;

(4) be and continuously have been a bona fide citizen and resident of the State of North Carolina for a period of at least sixty (60) days immediately prior to the consideration of his application to practice law in the State of North Carolina;

(5) prove to the satisfaction of the board:

(a) that the applicant is licensed to practice law in a state having comity with North Carolina;

(b) that the applicant has been actively and substantially engaged for at least three (3) years out of the last five (5) years immediately preceding the filing of his application with the secretary in:

(i) the practice of law as defined by G.S. 84-2.1, or

(ii) activities which would constitute the practice of law if done for the general public, or

(iii) serving as a judge of a court of record, or

(iv) serving as a full-time teacher in a law school approved by the Council of the North Carolina State Bar, or as full-time member of the faculty of the Institute of Government of the University of North Carolina at Chapel Hill.

Time spent in active military service of the United States, not to exceed three (3) years, may be excluded in computing the five (5) year period referred to in subsection (b) above;

(6) satisfy the board that the state in which the applicant is licensed and from which he seeks comity will admit attor-

neys licensed to practice in the State of North Carolina to the practice of law in such state without written examination;

(7) be in good professional standing in the state from which he seeks comity;

(8) furnish to the board such evidence as may be required to satisfy the board of his good moral character;

(9) applicants must meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

SECTION .0600—MORAL CHARACTER

.0601 BURDEN OF PROOF

Every applicant shall have the burden of proving that he is possessed of good moral character and that he is entitled to the high regard and confidence of the public.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0602 PERMANENT RECORD

All information furnished to the board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the board.

History Note: Statutory Authority G.S. 84-24; Effective February 1, 1976.

.0603 FAILURE TO DISCLOSE

No one shall be licensed to practice law in this state by examination or comity:

(1) who fails to disclose fully to the board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to his professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant, whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0604 BAR CANDIDATE COMMITTEE

Every applicant shall appear before a bar candidate committee appointed by the chairman of the board, in the judicial district in which he resides, or in such other judicial district as the board in its sole discretion may designate to the candidate, to be examined about any matter pertaining to his moral character. The applicant shall give such information to the committee as may be required on such forms as may be provided by the board. A bar candadate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised of the time and place of his appearance before the bar candidate committee.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0605 DENIAL; RE-APPLICATION

No new application or petition for reconsideration of a previous application from an applicant who has been denied permission to take the bar examination by the board on the grounds of failure to prove good moral character shall be considered by the board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the board.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .0700—EDUCATIONAL REQUIREMENTS

.0701 GENERAL EDUCATION

Each applicant to take the examination, prior to beginning the study of law, must have completed, at an accredited college or university an amount of academic work equal to ¾ of the work required for a bachelor's degree at the university of the state in which the college or university is located. With his application he shall file an affidavit from such college or university furnishing all information that the board shall require.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0702 LEGAL EDUCATION

Every general applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law shall file with the secretary a certificate from the president, dean or other proper official of the law school approved by the Council of the North Carolina State Bar, a list of which is available in the office of the secretary, or shall otherwise show to the satisfaction of the board that the applicant has or will receive a law degree within sixty (60) days after the date of the written examination or for all general applicants who apply for admission to practice law in the State of North Carolina in or before the month of January, 1978, but not thereafter, that the applicant has successfully completed the courses required by the Council of the North Carolina State Bar, or will complete such courses within sixty (60) days after the date of the written examination provided in Section .0900 of this chapter being the same courses as those set out in Rule .0903 of this chapter.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .0800—PROTEST

.0801 NATURE OF PROTEST

Any person may protest the application of any applicant to be admitted to the practice of law either by examination or by comity.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0802 FORMAT

A protest shall be made in writing, signed by the person making the protest and bearing his home and business address, and shall be filed with the secretary prior to the date on which the applicant is to be examined.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0803 NOTIFICATION; RIGHT TO WITHDRAW

The secretary shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the secretary a written withdrawal as a candidate for admission to the practice of law at that examination.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0804 HEARING

In case the applicant does not withdraw as a candidate for admission to the practice of law at that examination, the person or persons making the protest and the applicant in question shall appear before the board at a time and place to be designated by the board. In the event time will not permit a hearing on the protest prior to the examination, the applicant may take the written examination; however, if the applicant passes the written examination, no license to practice law shall be issued to him as provided by Rule .1302 of this chapter until final disposition of the protest in favor of the applicant.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0805 WITHHOLDING LICENSE

Nothing herein contained shall prevent the board on its own motion from withholding its license to practice law until it has been fully satisfied as to the moral fitness of the applicant as provided by Section .0600 of this Chapter.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .0900—EXAMINATIONS

.0901 WRITTEN EXAMINATIONS

One written examination shall be held each year for those applying to be admitted to the practice of law in North Carolina as general applicants.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0902 DATES

The examination shall be held in the City of Raleigh between July 1 and August 31 on such dates as the board may set from year to year.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0903 SUBJECT MATTER

The examination shall deal with the following subjects: Business Associations (including agency, corporations, and partnerships), Civil Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Legal Ethics, Real Property, Security Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.0904 PASSING SCORE

The board shall determine what shall constitute the passing of an examination.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .1000—REVIEW OF WRITTEN BAR EXAMINATION

.1001 REVIEW

An unsuccessful applicant to the bar examination may examine the test booklets containing his essay examination along

with the model answers and the essay examination in the board's offices.

History Note: Statutory Authority G.S. 93B-8;
Effective February 1, 1976.

.1002 FEES

The board will furnish an unsuccessful applicant a copy of his essay examination at a cost to be determined by the secretary not to exceed $20.00. No copies of the board's model answers will be made or furnished to any applicant.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1003 MULTISTATE BAR EXAMINATION

There is no provision for review of the Multistate Bar Examination.

History Note: Statutory Authority G.S. 93B-8;
Effective February 1, 1976.

.1004 SCORES

The board will not release to applicants the scores on bar examinations. Only upon written request of an applicant will the board furnish the Multistate Bar Examination score of said applicant to another board of bar examiners or like organization that administers the admission of attorneys into that jurisdiction.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1005 BOARD REPRESENTATIVE

The secretary of the board serves as the representative of the board during this review of the written bar examination by an unsuccessful applicant. The secretary is not authorized to discuss any specific questions and answers on the bar examination.

History Note: Statutory Authority G.S. 93B-8;
Effective February 1, 1976.

SECTION .1100—RULEMAKING PROCEDURES

.1101 PETITIONS

(a) Any person wishing to submit a petition requesting the adoption, amendment or repeal of a rule by the Board of Law Examiners shall address a petition to:

Executive Secretary
Board of Law Examiners
P. O. Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611

(b) Ten (10) copies of the petition must be filed and include the following information:

(1) name(s) and address(es) of petitioner(s);

(2) a draft of the proposed rule;

(3) reason for proposal or change;

(4) effect of existing rule;

(5) any data supporting proposal;

(6) effect of the proposed rule, including cost factors;

(7) names of those most likely to be affected by the proposed rule, with addresses if reasonably known.

(c) Within thirty (30) days of submission of the petition, the board will render a final decision. If the decision is to deny the petition, the secretary will notify the petitioner in writing, stating the reasons therefor. If the decision is to grant the petition, the board, within thirty (30) days of submission, will initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in the rules in this Chapter.

History Note: Statutory Authority G.S. 150A-12; 16; Effective February 1, 1976.

.1102 NOTICE

(a) Upon a determination to hold a rulemaking proceeding, either in response to a petition or otherwise, the board will give at least ten (10) days notice of a public hearing on the proposed rule.

(b) Any person or agency desiring to be placed on the mailing list for the Board of Law Examiners' rulemaking notices may file such request in writing, furnishing their name and mailing address to:

Executive Secretary
Board of Law Examiners
P. O. Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611

(c) Notice of a public hearing on the rulemaking proceedings will be by written notice to all of the law schools in North Carolina and by publication as a display advertisement in at least three (3) newspapers of general circulation in different parts of the state.

(d) Persons desiring information in addition to that provided in a particular rulemaking notice may contact by letter:

Executive Secretary
Post Office Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611
Telephone: 919/828-4886

History Note: Statutory Authority G.S. 15A-12;
Effective February 1, 1976.

.1103 HEARINGS

(a) Unless otherwise stated in a particular rulemaking notice, hearings before the Board of Law Examiners will be held on the 3rd floor of the Law Building located at 107 Fayetteville Street at regular scheduled meetings of the board.

(b) Any person desiring to present oral data, views or arguments on the proposed rule must, at least five days before the hearing, file notice with:

Executive Secretary
Post Office Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611
Telephone: 919/828-4886

Notice may be waived or a failure to give notice may be excused, by the chairman, for good cause shown. Any person permitted

to make an oral presentation is encouraged to submit a written copy of the presentation to the above-named person prior to or at the hearing.

(c) A request to make an oral presentation should contain a brief summary of the individual's views with respect thereto, and a statement of the length of time the individual desires to speak. Presentations may not exceed ten (10) minutes unless, upon request, either before or at the hearing, the board grants an extension of time, for good cause shown.

(d) Upon receipt of a request to make an oral presentation, the secretary will acknowledge receipt of the request and inform the person requesting the presentation of the imposition of any limitations deemed necessary to the end of a full and effective public hearing on the proposed rule.

(e) Any person may file a written submission containing data, comments or arguments, after publication of a rulemaking notice up to and including the day of the hearings. Written submissions, except when otherwise stated in the particular rulemaking notice, should be sent to:

Board of Law Examiners
Post Office Box 25427
107 Fayetteville Street
Raleigh, North Carolina 27611

Such submissions should clearly state the rule(s) or proposed rule(s) to which the comments are addressed.

(f) Upon receipt of such written comments, prompt acknowledgment will be made including a statement that the comments therein will be considered fully by the board.

(g) The presiding officer at the hearing shall have complete control of the proceedings, including: extensions of any time requirements, recognition of speakers, time allotments for presentations, direction of the flow of the discussion and the management of the hearing. The presiding officer, at all times, shall take care that each person participating in the hearing is given a fair opportunity to present views, data and comments.

(h) Any interested person desiring a concise statement of the principal reasons for and against the adoption of a rule by the board and the factors that led to overruling the con-

siderations urged against its adoption, may submit a written request addressed to:

Chairman, Board of Law Examiners
Post Office Box 25427
Raleigh, North Carolina 27611

(i) For purposes of subsection h of this rule, an "interested person" shall be any person whose rights, duties or privileges might be affected by the adoption of the rule in question.

(j) A record of all rulemaking proceedings will be maintained for as long as the rule is in effect following filing with the Attorney General. This record will contain: the original petition, the notice, all written memoranda and information submitted, and a record or summary of oral presentations, if any. It will be maintained in a file at the board's offices.

History Note: Statutory Authority G.S. 150A-12; 16; Effective February 1, 1976.

.1104 DECLARATORY RULINGS

(a) Any person substantially affected by a statute administered or rule promulgated by the Board of Law Examiners may request a declaratory ruling as to either: whether or how the rule applies to a given factual situation or whether a particular board rule is valid.

(b) The board will have the power to make such declaratory rulings. All requests for declaratory rulings shall be written and mailed to:

Executive Secretary
Board of Law Examiners
Post Office Box 25427
Raleigh, North Carolina 27611

(c) All requests for a declaratory ruling must include the following information:

(1) name and address of petitioner;

(2) rule to which petition relates;

(3) concise statement of the manner in which petitioner is aggrieved by the rule or its potential application to him;

(4) a statement of whether an oral hearing is desired, and if so, the reasons for such an oral hearing.

(d) The board may refuse to issue a declaratory ruling whenever for good cause it deems issuance of such ruling undesirable. Petitiioner will be notified in writing, stating reasons for the denial of a declaratory ruling.

(e) Where a declaratory ruling is deemed appropriate, the board will issue the ruling within sixty (60) days of receipt of the petition.

(f) A declaratory ruling procedure may consist of written submission, oral hearing, or such other procedure as may be appropriate in a particular case.

(g) A declaratory ruling will not be issued based on a petition as to whether an individual possesses good moral character. Such a decision is made only after a hearing pursuant to Section .1200 of this Chapter.

History Note: Statutory Authority G.S. 150A-17; Effective February 1, 1976.

SECTION .1200—CONTESTED CASES

.1201 REQUEST FOR HEARING

(a) Any party to a contested case, as defined by G.S. 150A-2(2), who believes his rights, duties or privileges have been adversely affected by rule or action of the board and who has not been notified of the right to a hearing may request a hearing by the board without undue delay.

(b) Before making a request for a hearing, the person aggrieved should first exhaust all efforts to seek a solution to the adverse ruling by informally contacting the secretary of the board.

History Note: Statutory Authority G.S. 150A-11; 23; Effective February 1, 1976.

.1202 NOTICE OF HEARING

(a) Upon receipt of request for a hearing by any party to a contested case, the secretary will promptly acknowledge said request and schedule a hearing by the board.

(b) A hearing by the board will be scheduled by the issuance of a notice of hearing as provided by G.S. 150A-23(b).

History Note: Statutory Authority G.S. 150A-23; Effective February 1, 1976.

.1203 EXAMINATION REVIEW HEARING

(a) Before any person can request a formal hearing in connection with a review of the written portion of his bar examination, he must have reviewed his examination under the procedures set out in Section .1000 of this Chapter.

(b) Petitioner must bear the cost of reproducing his written bar examination for each board member.

History Note: Statutory Authority G.S. 150A-11; Effective February 1, 1976.

.1204 WHO SHALL HEAR CONTESTED CASES

All administrative hearings resulting from actions of the board shall be heard by a majority of the board.

History Note: Statutory Authority G.S. 150A-24; Effective February 1, 1976.

.1205 INTERVENTION

(a) A petition to intervene of right as provided in the N. C. Rules of Civil Procedure, Rule 24, will be granted, if timely, and the petitioner meets the criteria of that rule. If a grant would cause substantial prejudice to the rights of other parties, substantial added expense or compelling serious inconvenience to the party or to the board, the petition to intervene will be deemed untimely.

(b) A petition to intervene permissively as provided in N. C. Rules of Civil Procedure, Rule 24, will be granted, if timely, under paragraph (a) of this rule, when the petitioner meets the criteria of that rule and the board determines that:

(1) there is sufficient legal or factual similarity between the petitioner's intended rights, privileges or duties and those of the parties to the hearing; and

(2) permitting intervention by the petitioner as a party would aid the purpose of a hearing.

(c) A person desiring to intervene in a contested case must file a written petition with the secretary of the board at the address stated in Section .0100 of this Chapter.

(d) Ten (10) copies of the petition must be filed and include the following information:

(1) name and address;

(2) business occupation;

(3) either statutory or non-statutory grounds for intervention;

(4) any claim or defense in respect of which intervention is sought;

(5) full identification of the hearing in which petitioner is seeking to intervene;

(6) summary of the arguments or evidence petitioner seeks to present.

(e) If the board determines to allow intervention, notification of that decision will be issued promptly to all parties and to petitioner.

(f) If the board's decision is to deny intervention, the petitioner will be notified promptly. Such notice will be in writing and state all reasons for the decision and will be issued to the petitioner and to all parties.

History Note: Statutory Authority G.S. 150A-23;
Effective February 1, 1976.

.1206 CONTINUANCES; MOTIONS FOR SUCH

Continuances, adjournments and like dispositions will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuance should be made to the secretary of the board and will be granted or denied by the chairman of the board.

History Note: Statutory Authority G.S. 150A-11;
Effective February 1, 1976.

.1207 SUBPOENAS

(a) The board shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attend-

ance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(b) The secretary of the board is delegated the power to issue subpoenas in the board's name.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1208 DEPOSITIONS AND DISCOVERY

(a) A deposition may be used in lieu of other evidence when taken in compliance with the N. C. Rules of Civil Procedure, G.S. 1A-1. The board may also allow the use of depositions or written interrogatories for the purpose of discovery or for the use as evidence in the hearing or for both purposes pursuant to the N. C. Rules of Civil Procedure.

(b) A party may submit sworn affidavits as evidence to be considered by the board in a contested case. The board will take under consideration sworn affidavits presented to the board by persons desiring to protest an applicant's admission to the North Carolina bar.

History Note: Statutory Authority G.S. 150A-28;
Effective February 1, 1976.

.1209 REOPENING OF A CASE

After a final decision has been reached by the board in any matter, a party may petition the board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The decision made by the board will be in writing and a copy will be sent to the petitioner and made a part of the record of the contested case.

History Note: Statutory Authority G.S. 150A-11;
Effective February 1, 1976.

SECTION .1300—LICENSES

.1301 INTERIM PERMIT FOR COMITY APPLICANTS

No license shall be issued to any comity applicant for admission under Rule .0502 of this Chapter except at the time of

the annual licensing of the general applicants; provided, the board may at any other time, in its discretion, grant an interim permission to such comity applicants to practice law until license shall be issued.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1302 LICENSES FOR GENERAL APPLICANTS

Upon compliance with the rules of the board, and all orders of the board, the secretary, upon order of the board, shall issue a license to practice law in North Carolina to each applicant as may be designated by the board in the form and manner as may be prescribed by the board, and at such times as prescribed by the board.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

SECTION .1400—JUDICIAL REVIEW

.1401 APPEALS

Any person may appeal from an adverse ruling by the Board of Law Examiners. A general applicant may appeal from an adverse ruling or determination by the board as to the applicant's eligibility to take the written examination. After a general applicant has successfully passed the written examination, he may appeal from any adverse ruling or determination withholding his license to practice law. A comity applicant may appeal from an adverse ruling of the Board of Examiners denying his application to the North Carolina Bar by comity for failure to meet any of the requirements of Rule .0502 of this Chapter.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1402 NOTICE OF APPEAL

Notice of appeal shall be given, in writing, within twenty (20) days after notice of such ruling or determination and written exceptions to the ruling or determination filed with the secretary, which exceptions shall state the grounds of objection to such ruling or determination. Failure to file such notice of

appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the board becoming final.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1403 RECORD TO BE FILED

Within sixty days after receipt of the notice of appeal, the Secretary shall prepare, certify, and file with the clerk of the Superior Court of Wake County, at the expense of the appellant, the record of the case, comprising:

(1) the application and supporting documents or papers filed by the applicant with the board;

(2) a complete transcription of the testimony when taken at the hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision.

With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1404 WAKE COUNTY SUPERIOR COURT

Such appeal shall lie to the Superior Court of Wake County and shall be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken except that in cases of alleged omissions or errors in the record. Testimony thereon may be taken by the court. The findings of fact by the board, when supported by competent evidence, shall be conclusive and binding upon the court. The court

may afirm, reverse or remand the case for further proceedings. If the court reverses or remands for further poceedings the decision of the board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

.1405 NORTH CAROLINA SUPREME COURT

Any party to the review proceeding, including the board, may appeal to the Supreme Court from the decision of the superior court. No appeal bond shall be required of the board.

History Note: Statutory Authority G.S. 84-24;
Effective February 1, 1976.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the Board of Law Examiners has amended the Rules Governing Admission to the Practice of Law in the State of North Carolina and completely rewrote them to comply with the Administrative Procedure Act which becomes effective February 1, 1976. These Rules replace the Rules formerly adopted by the Board of Law Examiners and approved by the Council of The North Carolina State Bar and approved by the Supreme Court as shown in the Supreme Court Reports.

Given over my hand and the Seal of The North Carolina State Bar, this the 21st day of January, 1976.

s/ B. E. James, Secretary-Treasurer
The North Carolina State Bar

After examining the foregoing amendments of the Rules and Regulations of The North Carolina State Bar as adopted by the Council of The North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 3rd day of February, 1976.

s/ Susie Sharp
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 3rd day of February, 1976.

s/ Exum, J.
For the Court

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this index, e.g., Appeal and Error § 1, correspond with titles and section numbers in N. C. Index 2d.

TOPICS COVERED IN THIS INDEX

ADVERSE POSSESSION

AGRICULTURE

ANIMALS

APPEAL AND ERROR

ASSAULT AND BATTERY

AUTOMOBILES

AUTOMOBILES — Continued

§ 7. Safety Statutes

It is not a violation of due process to punish a person for certain crimes related to the public welfare or safety even when the person is without knowledge of the facts making the act criminal, and violations of motor vehicle and traffic laws are within the scope of this rule. *Poultry Co. v. Thomas*, 7.

§ 20. Passing at Intersections

An employee of plaintiff who attempted to pass at an intersection in the city limits was guilty of negligence per se without regard to the employee's knowledge of whether he was in the city limits. *Poultry Co. v. Thomas*, 7.

§ 62. Striking Pedestrian

Evidence was sufficient for the jury to find that defendant driver was negligent in striking a pedestrian who entered a roadway to go around an automobile blocking her path. *Clark v. Bodycombe*, 246.

§ 77. Passing Vehicle Traveling in Same Direction

An employee of plaintiff who attempted to pass at an intersection in the city limits was guilty of negligence per se without regard to the employee's knowledge of whether he was in the city limits. *Poultry Co. v. Thomas*, 7.

§ 83. Pedestrian's Contributory Negligence

Plaintiff's evidence did not disclose she was contributorily negligent as a matter of law in walking along the right-hand side of a highway. *Clark v. Bodycombe*, 246.

§ 90. Instructions in Accident Cases

Trial court's jury instructions on contributory negligence and the speed of defendant's vehicle were proper. *Penland v. Green*, 281.

BILL OF DISCOVERY

§ 1. Examination of Adverse Party

Defendant in a criminal case is not entitled to a list of witnesses who are to testify against him. *S. v. Carter*, 35.

BOUNDARIES

§ 10. Sufficiency of Description and Admissibility of Evidence Aliunde

Deed conveying a "tract of Pocosin Land adjoining the lands of the late Henderson Luton & others, containing by estimation, Three Hundred and Nineteen Acres" was patently ambiguous and void. *Overton v. Boyce*, 291.

BURGLARY AND UNLAWFUL BREAKINGS

§ 3. Indictment

An indictment sufficiently charged the crime of burglary where it alleged that defendant broke and entered an occupied dwelling house at 2:00 a.m. "with intent to kidnap" the named occupant. *S. v. Norwood*, 424.

CONSTITUTIONAL LAW — Continued

§ 31. Right of Confrontation and Access to Evidence

Trial court did not refuse to allow defendant to put on evidence. *S. v. Hunt*, 403.

Trial court properly allowed a State's witness to testify concerning a statement made by defendant's companion during the crime. *S. v. Cox*, 414.

There is no merit to defendant's contention that the consolidation of his murder trial with that of a codefendant deprived him of a fair trial by enabling the codefendant to use an otherwise inadmissible out of court statement which inculpated defendant. *S. v. Brower*, 644.

Defendant was not denied due process where an arrest warrant was never served on him. *S. v. McKenna*, 668.

In a first degree murder case, the introduction of affidavits upon which search warrants were obtained was not prejudicial error. *Ibid.*

§ 36. Cruel and Unusual Punishment

The death penalty for first degree murder is not cruel and unusual punishment, *S. v. Waddell*, 19; *S. v. Bush*, 159; *S. v. Alford*, 372; *S. v. Williams*, 439; *S. v. Davis*, 500; *S. v. McCall*, 512; *S. v. Warren*, 551; for first degree rape, *S. v. Dull*, 55.

CONTRACTS

§ 10. Limiting Liability for Negligence

Contract provision limiting a telephone company's liability for errors or omissions in an advertisement in the Yellow Pages of a telephone directory is not unreasonable and contrary to public policy. *Gas House, Inc. v. Southern Bell Telephone Co.*, 175.

§ 32. Actions for Wrongful Interference

Plaintiff's complaint which alleged malicious interference by defendant Ford Motor Co. with plaintiff's employment relationship without justification stated a cause of action. *Smith v. Ford Motor Co.*, 71.

CORPORATIONS

§ 1. Incorporation and Corporate Existence

Where a corporate judgment debtor transferred land subject to the judgment lien to a second corporation, the owner of the judgment lien assigned the judgment and lien to the second corporation, and the second corporation was the mere alter ego of the first, the transfer of the judgment lien to the second corporation had the same effect as a transfer to the first corporation which was the judgment debtor, and the judgment debt and lien were thereby extinguished. *Waff Bros. v. Bank*, 198.

§ 25. Contracts and Notes

Although a corporation may not technically ratify a contract made on its behalf prior to its incorporation, since it could not at that time have authorized such action on its behalf, it may, after it comes into existence, adopt such contract by its corporate action, which adoption may be ex-

CRIMINAL LAW — Continued

§ 34. Evidence of Guilt of Other Offenses

Evidence of defendant's commission of rape was admissible in a prosecution for kidnapping. *S. v. Poole*, 47.

Defendant was not prejudiced by the district attorney's cross-examination of him concerning prior convictions. *S. v. Lester*, 239; *S. v. Alford*, 372.

§ 42. Articles Connected with the Crime

Handcuffs used on a kidnap victim were properly admitted into evidence. *S. v. Norwood*, 424.

§ 43. Photographs

Trial court did not err in admitting photographs of the crime scene though the witness who identified the photographs had been at the scene at night and the photographs had been taken during the day. *S. v. Lester*, 239.

Trial court did not err in failing to give limiting instruction on admissibility of a photograph in the absence of a request for such instruction. *S. v. Brower*, 644.

§ 46. Flight of Defendant as Implied Admission

Trial court in a murder prosecution did not err in admitting evidence of defendant's flight. *S. v. Lester*, 239.

§ 50. Opinion Testimony

Admission of a tag attached to a pistol stating the gun was found at the "murder scene" near the body of deceased, if improper, was not prejudicial error. *S. v. Cousins*, 540.

§ 60. Evidence in Regard to Fingerprints

Fingerprint evidence was sufficient for the jury in a prosecution for felonious breaking and entering of a launderette and larceny pursuant to the breaking and entering. *S. v. Miller*, 1.

§ 63. Evidence as to Sanity of Defendant

Trial court properly excluded testimony as to whether defendant appeared to be normal when the witness saw him in a certain place. *S. v. Brower*, 644.

§ 66. Evidence of Identity by Sight

A lineup was lawful and did not taint a witness's in-court identification of defendant, and the fact that the witness failed to identify defendant at the lineup but identified another person goes to the weight rather than the competency of her in-court identification testimony. *S. v. Waddell*, 19.

Photographic identification was not unlawful and impermissibly suggestive. *Ibid.*

In-court identification of defendants by eyewitnesses to the crime was not tainted by a lineup which took place two weeks after the crime but was based on observations at the crime scene. *S. v. Alford*, 372.

In-court identification of defendants by two witnesses to the crime was based on observation at the crime scene. *S. v. Cox*, 414.

CRIMINAL LAW — Continued

Appellate court cannot conclude that defendant was not advised of his right to counsel at a lineup where defendant failed to object to the identification testimony and no voir dire hearing was held. *S. v. Coffey*, 431.

Pretrial motion to suppress identification testimony will not suffice to challenge admissibility of in-court identification testimony. *S. v. Wilson*, 531.

Pretrial lineup was not impermissibly suggestive and in-court identification was not otherwise tainted by out-of-court identification procedures. *Ibid.*

In-court identification of defendant was properly permitted where the court found that a pretrial lineup procedure was not impermissibly suggestive and that the in-court identification was of independent origin. *S. v. Brower*, 644.

§ 71. Shorthand Statement of Fact

Testimony that the shorter robber went over to the taller robber to "assist him" was competent as a shorthand statement of fact. *S. v. Brower*, 644.

§ 73. Hearsay Testimony

Statement by homicide victim that he felt like he was poisoned was admissible as part of the res gestae. *S. v. Hunt*, 403.

Testimony by one defendant tending to identify the gun used in a robbery-murder was not hearsay and was competent to identify the perpetrators of the crime and show a design or plan. *S. v. Brower*, 644.

In a first degree murder case, the introduction of affidavits upon which search warrants were obtained was not prejudicial error. *S. v. McKenna*, 668.

§ 75. Tests of Voluntariness of Confession and Admissibility

There is no merit in defendant's contention that his in-custody statement was involuntary because of his lack of sleep and food and his heavy use of drugs and alcohol shortly before his interrogation. *S. v. Carter*, 35.

Trial court erred in admission of defendant's in-custody inculpatory statements without an express finding that defendant had knowingly and intelligently waived his right to counsel. *S. v. Biggs*, 522.

§ 76. Determination and Effect of Admissibility of Confession

Defendant was not prejudiced by failure of the court to enter its findings and conclusions on the admissibility of defendant's in-custody statement at the time the voir dire hearing was held where the findings and conclusions were thereafter placed in the record by the court during the trial. *S. v. Carter*, 35.

Evidence was sufficient to support trial court's findings that defendant was not intoxicated at the time he made a confession and that the confession was voluntary. *S. v. Williams*, 439.

§ 77. Admissions and Declarations

Where the State introduced evidence of in-custody statements made by defendant on 6 October, but introduced no evidence of in-custody self-serving statements made by defendant on 7 October, trial court properly

CRIMINAL LAW — Continued

Defendant in a first degree murder prosecution is entitled to a new trial since the court erred in allowing corroborative testimony by a witness which was actually additional and contradictory to the testimony it was intended to corroborate. *S. v. Warren*, 551.

§ 90. Rule That Party is Bound By and May Not Discredit Own Witness

Introduction by the State of an exculpatory statement made by defendant does not preclude the State from showing that the facts concerning the crime were different. *S. v. Carter*, 35.

Trial court erred in allowing the State to impeach its own witness where the district attorney was not surprised by the testimony of the witness. *S. v. Smith*, 143.

§ 91. Time of Trial and Continuance

Defendant was not denied a fair trial because he was put to trial before an order declaring him an outlaw was rescinded. *S. v. Waddell*, 19.

Defendant's motion for continuance on the ground that he did not receive an autopsy report until shortly before the trial and that he was confined in a mental hospital was properly denied. *S. v. Harrill*, 186.

Trial court did not abuse its discretion or deprive defendant of his constitutional right to confrontation in denying defendant's motion for a continuance based upon the absence of a witness who would have given nonessential testimony. *S. v. Brower*, 644.

§ 92. Consolidation and Severance of Counts

Defendant was not prejudiced by consolidation of his murder trial with that of a codefendant although the codefendant testified at the trial and defendant thus lost his right to open and close the jury arguments. *S. v. Taylor*, 223.

Trial court committed prejudicial error in denying defendant Alford's motion for a separate trial. *S. v. Alford*, 372.

Trial court did not err in consolidating two murder charges against defendant for trial. *S. v. Davis*, 500.

There is no merit to defendant's contention that the consolidation of his murder trial with that of a codefendant deprived him of a fair trial by enabling the codefendant to use an otherwise inadmissible out of court statement which inculpated defendant. *S. v. Brower*, 644.

§ 99. Expression of Opinion on Evidence During Trial

Trial court did not express an opinion in admonition to defense counsel to refer to his client as defendant or as Michael Cousins rather than Michael. *S. v. Cousins*, 540.

§ 102. Argument and Conduct of Counsel or District Attorney

Trial court did not err in refusing to permit defendant's counsel to argue to the jury his tender of a plea of guilty to second degree murder which the State refused to accept. *S. v. Harrill*, 186.

Defendant in a homicide case was not prejudiced by the D.A.'s question during jury argument as to where defense counsel got certain information, by his argument that the truth about defendant's guilt slipped out during defense counsel's argument to the jury, or by his remark that defense counsel was deliberately making a misstatement in cross-examining a witness. *S. v. Taylor*, 223.

CRIMINAL LAW — Continued

§ 118. Charge on Contentions of the Parties

Trial court did not err in instructing the jury that defendant, who offered no evidence, contended that the jury ought not to believe the State's witnesses. *S. v. Hunt*, 403.

A judge is not required to state the contentions of the parties. *S. v. Dietz*, 488.

§ 165. Exceptions and Assignments of Error to Argument of District Attorney

Defendant waived objection to argument of the district attorney not supported by evidence by failing to object thereto at the time of the argument. *S. v. Coffey*, 431.

§ 168. Harmless and Prejudicial Error in Instructions

Erroneous instruction on burden of proof is not corrected by subsequent correct instructions. *S. v. Harris*, 275.

§ 173. Invited Error

Defendant was not prejudiced by evidence he had been declared an outlaw where such evidence was initially and repeatedly disclosed by defendant's own counsel. *S. v. Waddell*, 19.

DAMAGES

§ 4. Damages for Injury to Personal Property

In awarding damages for soybeans destroyed by cattle, trial court erred in failing to deduct expenses which would have been required to mature, care for and market the crop. *Whitaker v. Earnhardt*, 260.

§ 13. Competency of Evidence on Issue of Compensatory Damages

Trial court erred in refusing to allow plaintiff's testimony concerning medical treatment she received in Ohio and medical bills she incurred there. *Taylor v. Boger*, 560.

DEEDS

§ 4. Competency of Grantor

Because of the ancient document rule, recitals in a 121-year-old sheriff's deed were prima facie evidence that the sale was made pursuant to a live execution in the sheriff's hands. *Taylor v. Johnston*, 690.

DESCENT AND DISTRIBUTION

§ 1. Nature and Title by Descent in General

There is a presumption that a decedent dies intestate. *Taylor v. Johnston*, 690.

DIVORCE AND ALIMONY

§ 16. Alimony Without Divorce

There is nothing in G.S. 50-16.8 which indicates that an application for alimony or alimony pendente lite must be contained in the pleadings or an amendment thereto. *McCarley v. McCarley*, 109.

DIVORCE AND ALIMONY—Continued

§ 20. Decree of Divorce as Affecting Right to Alimony

Plaintiff, who was the dependent spouse, was entitled to permanent alimony though she initiated an action for divorce on the ground of one year separation since she attempted to take a voluntary dismissal of her action while defendant pursued the action to its completion and obtained the divorce decree. *McCarley v. McCarley,* 109.

EJECTMENT

§ 7. Presumptions and Burden of Proof

The Real Property Marketable Title Act did not extinguish rights of the person in possession of the land. *Taylor v. Johnston,* 690.

EVIDENCE

§ 28. Public Records and Documents

Copies of driver's license records bearing a mechanical reproduction of the signature of the authorized officer of the Department of Motor Vehicles were admissible in evidence. *S. v. Watts,* 445.

§ 30. Ancient Documents

Because of the ancient document rule, recitals in a 121-year-old sheriff's deed were prima facie evidence that the sale was made pursuant to a live execution in the sheriff's hands. *Taylor v. Johnston,* 690.

§ 44. Nonexpert Evidence as to Physical Ability and Health

Trial court erred in refusing to allow plaintiff's testimony concerning medical treatment she received in Ohio and medical bills she incurred there. *Taylor v. Boger,* 560.

§ 50. Medical Testimony

Trial court erred in refusing to allow an orthopedic surgeon to answer a hypothetical question about the causal connection between phlebitis resulting from an accident and the development of varicose veins in plaintiff's leg. *Taylor v. Boger,* 560.

EXECUTION

§ 13. Title and Rights of Purchasers

Because of the ancient document rule, recitals in a 121-year-old sheriff's deed were prima facie evidence that the sale was made pursuant to a live execution in the sheriff's hands. *Taylor v. Johnston,* 690.

HOMICIDE

§ 8. Effect of Drugs Upon Mental Capacity

Trial court in a murder case did not err in failing to instruct the jury as to defendant's purported inability to formulate a specific felonious intent due to drug intoxication. *S. v. Brower,* 644.

§ 14. Presumptions and Burden of Proof

Presumptions of unlawfulness and malice arising from an intentional assault with a deadly weapon proximately resulting in death are constitutional. *S. v. Lester,* 239.

HOMICIDE — Continued

§ 20. Demonstrative Evidence; Photographs and Physical Objects

Trial court properly allowed photographs of the deceased to illustrate testimony of an expert witness. *S. v. Alford*, 372.

Trial court properly allowed into evidence a weapon and cigarette lighter which were found in plain view by the officer. *Ibid.*

In a prosecution for first degree murder by poisoning, a bottle of rat poison purchased by an SBI agent and testimony that the liquid therein contained arsenic were properly admitted. *S. v. Hunt*, 403.

Trial court properly allowed into evidence photographs of deceased though the court gave no limiting instruction. *S. v. Cox*, 414.

Photographs of deceased and clothing worn by deceased were admissible to illustrate testimony of a witness. *S. v. Williams*, 439.

A pistol was sufficiently identified for its admission into evidence and was relevant to contradict defendant's contention that deceased shot at him with a pistol before he fired at deceased. *S. v. Cousins*, 540.

Admission of a tag attached to a pistol stating the gun was found at the "murder scene" near the body of deceased, if improper, was not prejudicial error. *Ibid.*

Trial court properly allowed into evidence the alleged murder weapon which was seized during a search of defendant's home and photographs of the victim at the crime scene. *S. v. McKenna*, 668.

§ 21. Sufficiency of Evidence and Nonsuit

State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder committed during the perpetration of armed robbery. *S. v. Bush*, 159; *S. v. Carter*, 35; *S. v. Waddell*, 19; *S. v. Warren*, 551.

Evidence was sufficient to be submitted to the jury in a first degree murder prosecution where it tended to show that defendant killed deceased with a knife. *S. v. Bush*, 159.

Evidence was sufficient for the jury in a prosecution for murder of a hitchhiker. *S. v. Lester*, 239.

Evidence was sufficient for the jury in a first degree murder prosecution where it tended to show that defendant shot a customer in an auto parts store. *S. v. Alford*, 372.

State's evidence was sufficient for the jury in a prosecution for first degree murder by poisoning. *S. v. Hunt*, 403.

State's evidence sufficiently established premeditation and deliberation to support conviction of first degree murder. *S. v. Biggs*, 522.

State's evidence was sufficient for the jury to find defendant, after premeditation and deliberation, formed a fixed purpose to kill two police officers in a breathalyzer room and thereafter accomplished that purpose. *S. v. Davis*, 500.

State's evidence was sufficient for the jury in a prosecution for first degree murder by shooting the victim from a house trailer some 80 feet away. *S. v. McCall*, 512.

Evidence that defendant broke into the victim's home and shot him with a pistol was sufficient for the jury in first degree murder case. *S. v. McKenna*, 668.

HOMICIDE — Continued

Evidence that defendant was present at the scene and was a friend of the perpetrator was insufficient for the jury on the issue of defendant's guilt of aiding and abetting the perpetrator in the murder of her husband. *S. v. Scott*, 712.

§ 24. Instructions on Presumptions and Burden of Proof

Trial court erred in placing upon defendant the burden of satisfying the jury that decedent's death was the result of an accident. *S. v. Harris*, 275.

Where the jury returned a verdict of first degree murder, defendant is not entitled to a new trial under the Mullaney decision because of the court's instructions placing the burden on defendant to rebut the presumption of malice so as to reduce the charge of second degree murder to manslaughter. *S. v. Taylor*, 223.

Trial court's instructions placing on defendant the burden of proving there was no malice on his part and proving self-defense were not invalidated by Mullaney v. Wilbur, since that decision is not retroactive. *S. v. Lester*, 239.

Trial court's instructions on presumptions of malice and unlawfulness arising upon proof of a killing by the intentional use of a deadly weapon do not contravene the Mullaney decision. *S. v. McCall*, 512.

§ 27. Instructions on Manslaughter

Trial court erred in instructing the jury that in order to convict defendant of voluntary manslaughter it must find that defendant did not act in the heat of passion and did not act upon adequate provocation. *S. v. Cousins*, 540.

§ 28. Instructions on Defenses

In a prosecution for murder of two police officers, evidence of powder burns on defendant's hands was insufficient to require an instruction on self-defense. *S. v. Davis*, 500.

§ 31. Verdict and Sentence

Imposition of the death penalty upon conviction of first degree murder was constitutional. *S. v. Bush*, 159; *S. v. Alford*, 372; *S. v. Williams*, 439; *S. v. Warren*, 551; *S. v. Davis*, 500; *S. v. McCall*, 512.

Where judgment in a first degree murder case erroneously recites that the jury returned for their verdict that defendant "shall suffer the penalty of death by asphyxiation," the case is remanded so that judgment may be corrected to show the verdict of guilty of murder in the first degree rendered by the jury and the death sentence imposed by the court. *S. v. Brower*, 644.

INDICTMENT AND WARRANT

§ 9. Charge of Crime

Indictment for burglary charging that defendant broke and entered "the dwelling house of one Doris Matheny there situate, and then and there actually occupied by one Doris Matheny" describes the location of the dwelling with sufficient clarity. *S. v. Coffey*, 431.

JUDGMENTS — Continued

§ 52. Assignment of Judgment

Where land subject to a judgment lien was conveyed to a corporation and the judgment was thereafter assigned to the corporation, the judgment cannot be deemed to have been merged into the fee simple estate of the corporation. *Waff Bros. v. Bank*, 198.

JURY

§ 1. Right to Trial by Jury

Although the parties made no written demand for a jury trial in the manner prescribed by Rule 38, the purpose of Rule 38 was accomplished by an oral request of all parties for a jury trial and a notation of such request by the clerk in her order transferring the cause to the civil issue docket of superior court. *Shankle v. Shankle*, 473.

§ 2. Special Venire

Trial court did not err in denial of motion for special venire because of newspaper publicity and prominence of victim. *S. v. Harrill*, 186.

Trial court in a murder case did not err in denial of defendant's motion for a special venire from another county on the ground of unfavorable pretrial publicity. *S. v. Brower*, 644.

§ 5. Selection Generally; Personal Disqualification

Trial court did not err in allowing the district attorney to reexamine a prospective juror concerning his beliefs as to capital punishment after the juror had been accepted by the State but before the jury was impaneled. *S. v. Waddell*, 19.

§ 7. Challenges

Defendants failed to make out a prima facie case of systematic exclusion of blacks from the jury. *S. v. Alford*, 372.

Trial court in a first degree murder case properly permitted the district attorney to question prospective jurors concerning their capital punishment beliefs. *S. v. Hunt*, 403.

Defendant was not prejudiced where one juror expressed an opinion after the jurors had been chosen but not empaneled and the court allowed the State to challenge peremptorily the juror. *S. v. McKenna*, 668.

KIDNAPPING

§ 1. Elements of the Offense and Prosecution

Evidence was sufficient for the jury in a prosecution for kidnapping. *S. v. Dull*, 55.

An indictment alleging that defendant "unlawfully, wilfully, did feloniously and forcibly kidnap" a named person was sufficient to charge the crime of kidnapping. *S. v. Norwood*, 424.

LARCENY

§ 4. Warrant and Indictment

There was no fatal variance between an indictment charging larceny of disk boggs "of one Newland Welborn and Hershel Greene" and evidence

MORTGAGES AND DEEDS OF TRUST — Continued

by the mortgage, intention of the parties to the transfer of the indebtedness determines whether the debt is deemed paid and the land is discharged from the lien of the mortgage. *Waff Bros. v. Bank*, 198.

NARCOTICS

§ 1. Elements and Essentials of Statutory Offenses Relating to Narcotics

In a prosecution for sale of marijuana it was not necessary for the State to show that the N. C. Drug Authority has made a finding that marijuana is in fact a controlled substance. *S. v. Dietz*, 488.

§ 3. Competency and Relevancy of Evidence

Any error in allowing the district attorney to ask defendant if anyone else besides the State's witness had ever approached him about buying marijuana was not so prejudicial as to require a new trial. *S. v. Dietz*, 488.

§ 45. Instructions

Trial judge sufficiently charged on delivery by placing the burden on the State to prove defendant "transferred" marijuana. *S. v. Dietz*, 488.

PARENT AND CHILD

§ 7. Duty to Support

A court may enforce by contempt proceedings its order, entered by consent, that child support payments be made beyond the child's majority. *White v. White*, 592.

PARTITION

§ 5. Effect of Decree for Partition

An 1835 decree confirming a division of intestate's lands which ordered intestate's heirs to execute to each other deeds did not pass legal title and could not constitute a link in petitioner's chain of title. *Taylor v. Johnston*, 690.

PROPERTY

§ 4. Criminal Prosecution for Malicious Destruction

Evidence was sufficient for the jury in a prosecution for malicious damage to person and property by means of dynamite. *S. v. Sellers*, 268.

PUBLIC OFFICERS

§ 9. Personal Liability of Public Officers

In an action for breach of contract to recover lost benefits against the State and the officials who acted for the State in the transaction which is the basis for the suit, the State alone will be liable for a breach of contract. *Smith v. State*, 303.

RAPE

§ 5. Sufficiency of Evidence and Nonsuit

Evidence was sufficient to be submitted to the jury in a prosecution for first degree rape where it tended to show that defendant used a knife in accomplishing the crime. *S. v. Dull,* 55.

§ 7. Verdict and Judgment

Imposition of the death penalty upon a conviction of first degree rape was not cruel and unusual punishment. *S. v. Dull,* 55.

ROBBERY

§ 4. Sufficiency of Evidence and Nonsuit

Evidence was sufficient for the jury in a prosecution for armed robbery of employees of an auto parts store. *S. v. Alford,* 372.

RULES OF CIVIL PROCEDURE

§ 26. Deposition in a Pending Action

Trial court did not err in entering an order prohibiting defendant from taking the deposition of an out-of-state expert witness. *Transportation, Inc. v. Strick Corp.,* 587.

§ 38. Jury Trial of Right

Although the parties made no written demand for a jury trial in the manner prescribed by Rule 38, the purpose of Rule 38 was accomplished by an oral request of all parties for a jury trial and a notation of such request by the clerk in her order transferring the cause to the civil issue docket of superior court. *Shankle v. Shankle,* 473.

§ 41. Dismissal of Actions

Plaintiff could not, without defendant's consent, voluntarily dismiss her complaint for an absolute divorce where defendant's answer amounted to a counterclaim seeking an absolute divorce. *McCarley v. McCarley,* 109.

In case of a motion to dismiss, it is the better practice for the trial judge to decline to render judgment until all the evidence is in except in the clearest cases. *Whitaker v. Earnhardt,* 260.

§ 50. Motion for Judgment N.O.V.

A motion for judgment n.o.v. is inappropriate in a case tried by the court without a jury. *Whitaker v. Earnhardt,* 260.

§ 52. Findings by the Court

Failure to except to findings does not necessarily preclude appellate review on the question of whether the evidence supported the findings. *Whitaker v. Earnhardt,* 260.

§ 56. Summary Judgment

When summary judgment may be granted for the party with the burden of proof on the basis of his own affidavits. *Kidd v. Early,* 343.

SEARCHES AND SEIZURES

§ 1. Search Without Warrant

Trial court properly allowed into evidence a revolver in plain view seized without a warrant. *S. v. Smith,* 143.

Trial court properly allowed into evidence a weapon and cigarette lighter which were found in plain view by the officer. *S. v. Alford,* 372.

SIGNATURES

Copies of driver's license records bearing a mechanical reproduction of the signature of the authorized officer of the Department of Motor Vehicles were admissible in evidence. *S. v. Watts,* 445.

STATE

§ 2. State Lands

The Real Property Marketable Title Act does not affect the statute creating the presumption that title is in the State. *Taylor v. Johnston,* 690.

§ 3. Claims Against the State and Recommendatory Jurisdiction of the Supreme Court

There is no original jurisdiction in the Supreme Court over claims against the State. *Smith v. State,* 303.

§ 4. Actions Against the State

In causes of action on a contract arising after 2 March 1976 the doctrine of sovereign immunity will not be a defense to the State, but if a plaintiff is successful in establishing his claim against the State, he cannot obtain execution to enforce the judgment. *Smith v. State,* 303.

In an action for breach of contract to recover lost benefits against the State and the officials who acted for the State in the transaction which is the basis for the suit, the State alone will be liable for a breach of contract. *Ibid.*

TAXATION

§ 31. Sales, Use, and Excise Taxes

Sales of frozen concentrated orange juice are not subject to taxation under the Soft Drink Tax Act. *Food House, Inc. v. Coble,* 123.

TELEPHONE AND TELEGRAPH COMPANIES

§ 4. Liability for Negligence Generally

Contract provision limiting a telephone company's liability for errors or omissions in an advertisement in the Yellow Pages of a telephone directory is not unreasonable and contrary to public policy. *Gas House, Inc. v. Southern Bell Telephone Co.,* 175.

TRESPASS TO TRY TITLE

§ 2. Presumptions and Burden of Proof

The Real Property Marketable Title Act did not extinguish rights of the person in possession of the land. *Taylor v. Johnston,* 690.

TRIAL

§ 3. Motion for Continuance

Respondents were prima facie entitled to a continuance where their retained attorney withdrew from the case on the day of the trial after the trial judge "made strong remarks about the respondents." *Shankle v. Shankle*, 473.

VENDOR AND PURCHASER

§ 1. Requisites and Construction of Options

When an option to purchase real estate neither specifies the method of payment nor provides that the terms are to be fixed by a later agreement, the law implies that the purchase price will be paid in cash. *Kidd v. Early*, 343.

§ 2. Performance or Tender

An optionee did not invalidate his option by making a counter offer during the option period concerning the terms of payment. *Kidd v. Early*, 343.

Tender of the purchase price was not a prerequisite to the exercise of an option to purchase real estate. *Ibid.*

Notice from optionors that they would not carry out the terms of the option made unnecessary tender of payment by the optionees. *Ibid.*

§ 3. Description and Amount of Land

A contract to convey 200 acres of a larger tract described as "the C. F. Early Farm" is saved from patent ambiguity by the further contract provision that the acreage is "to be determined by a new survey furnished by the sellers." *Kidd v. Early*, 343.

§ 5. Specific Performance

There was no genuine issue of fact as to whether plaintiff purchasers were ready, willing and able to perform their part of an option contract, and summary judgment against defendant sellers decreeing specific performance of the option contract was appropriate. *Kidd v. Early*, 343.

VENUE

§ 4. Actions Against Public Officers

Pursuant to G.S. 1-77(2), plaintiff was entitled to bring his action against defendant public officers in Burke County where his cause of action arose, and pursuant to G.S. 1-82 he could bring his action against the State in Burke County, the county of his residence. *Smith v. State*, 303.

WITNESSES

§ 1. Competency of Witness

Trial court did not err in allowing witnesses whose names were not on a list furnished defendant to testify. *S. v. Carter*, 35.

Failure of district attorney to notify defense counsel of an agreement to grant a State's witness concessions for truthful testimony as required by statute did not warrant suppression of the witness's testimony. *S. v. Cousins*, 540.

WORD AND PHRASE INDEX

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