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SUPREME COURT OF NORTH CAROLINA

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OF
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1. Appointed 2 March 1979.
2. Appointed 6 April to succeed Gary A. Sluder who died 3 March 1979.

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PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

GENERAL STATUTES CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

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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 following named persons were duly admitted to the practice of law in the State of North Carolina by comity on the dates indicated:

On February 26, 1979, the following individuals were admitted:

CHARLES MATTHEW BERGER ..... Raleigh, applied from New York
JOSEPH WILLIAM FREEMAN, JR. ..... Elkin, applied from Ohio
MICHAEL B. SOSNA ..... Henderson, applied from New York
LINDA ALT SHEPARD ..... Wilmington, applied from Utah
MICHAEL D. SHEPARD ..... Wilmington, applied from Utah
SIDNEY GUNDERSEN ..... Greensboro, applied from New York
JAMES ERIC SHELDON ..... Chapel Hill, applied from Massachusetts
STEVEN FRANKLIN SIEGEL ..... Pinehurst, applied from Vermont

On March 9, 1979, the following individuals were admitted:

WALLACE A. JENKINS ..... Charlotte, applied from Ohio
WILLIAM AUBREY CORNER ..... Asheville, applied from Michigan

Given under my hand and seal, this the 26th day of March, 1979.

FRED P. PARKER III

Executive Secretary

Board of Law Examiners of
The State of North Carolina

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM 1978

IN THE MATTER OF THE ORDINANCE OF ANNEXATION NO. 1977-4

No. 7

(Filed 28 November 1978)

1. **Municipal Corporations § 2.4— challenge to annexation ordinance—burden of proof**

The party challenging an annexation ordinance has the burden of showing error by competent and substantial evidence.

2. **Municipal Corporations § 2.6— annexation of air base—provision of services if federal government ceased to do so**

In an action to invalidate a city ordinance annexing Seymour Johnson Air Force Base containing 3157 acres and a subdivision containing 59.25 acres, the evidence was sufficient to support the trial court's findings that respondent city could provide police protection, fire protection, garbage collection service and street maintenance for the annexed areas in the event the federal government ceased to provide such services to the air base, and that the city had sufficient monies to do so where the city manager testified that the city could provide police protection for the air base from several sources of revenue, and that the city could also provide fire protection to the air base although it would mean a diminished level of services throughout the city; the city finance officer testified that in his opinion the city could provide all municipal services to the air base should the federal government terminate those services, and that the city was in relatively sound financial condition, having some fifty sources of revenue which it could use for all city purposes; and the record shows that for the first year following annexation the increased cost to the city would be only $2,053 while the increased revenue would be $230,624, and that the city had previously extended major trunk water mains and sewage lines to the boundaries of the air base property.

3. Municipal Corporations § 2.6— annexation—revenues to provide services

In this action to invalidate a city ordinance annexing Seymour Johnson Air Force Base containing 3157 acres and a subdivision containing 59.25 acres, the evidence was sufficient to support the court's finding that respondent city had sufficient revenues to provide all required services in substantially the same manner as such services were provided within the rest of the city prior to annexation where there was clear evidence that the city was able to provide comparable services to the 59.25 acre area; there was evidence that the federal government would continue to render police and fire protection and water, sewer and street maintenance service on the air base that was comparable to that rendered by the city in other parts of the city; and there was evidence that the city was financially able to render services on the air base in the event the federal government should cease doing so.

4. Municipal Corporations § 2.2— annexation—development for urban purposes—population—consideration of military personnel

In determining whether an area to be annexed had a total resident population of two persons per acre and thus was developed for urban purposes within the meaning of G.S. 160A-48, a person was properly counted as a member of the total resident population if such person would have been counted as an inhabitant of the proposed area of annexation under rules governing the last preceding decennial census. Therefore, military personnel living on the air force base in the area to be annexed were properly counted in determining the population estimate required by G.S. 160A-48, since persons living on military bases as members of the armed forces were counted in the 1970 census as residents of the states, counties, and minor civil divisions in which their installations were located.

5. Trial § 6— extent of stipulation—intent and circumstances of parties

In determining the extent of a stipulation, the intent of the parties and their circumstances at the time the stipulation was signed must be examined to ensure that the language of the stipulation will not be construed to effect an admission of a fact which was intended to be controverted.

6. Municipal Corporations § 2.6— annexation of air base—duplication of services not required—contingent budgeting not required

In annexing an area which included an air force base, there was no requirement that the city duplicate services provided on the base by the federal government, and the city was not required to have funds budgeted to provide municipal services to the base in the event that the federal government ceased providing those services.

7. Municipal Corporations § 2— authority to annex federal property

An air force base owned by the federal government was subject to annexation by a city where the annexation did not interfere with federal jurisdiction and was not for the sole purpose of generating revenue.

8. Municipal Corporations § 2— annexation of air base—no local taxation of military personnel—no unconstitutional classes

The annexation of Seymour Johnson Air Force Base by the City of Goldsboro did not create unconstitutional tax classes because Congress has exempted military personnel from local taxation.

In re Annexation Ordinance

APPEAL by petitioner Charles Dail pursuant to G.S. 160A-50(h) from *Canaday, J.*, October 17, 1977 Civil Session, WAYNE Superior Court.

The judgment from which petitioner appeals affirms action of the Board of Aldermen of the City of Goldsboro, North Carolina, annexing certain territory to said city. The amended judgment contains findings of fact, conclusions of law and adjudication set forth in pertintent part as follows:

FINDINGS OF FACT

1. On December 7, 1976, the Board of Aldermen of the City of Goldsboro passed a resolution, Resolution No. 1976-221, stating its intent to consider the annexation of property known as the Seymour Johnson Air Force Base owned by the United States of America which contains 3157 acres and portions of the Emmett Reeves Subdivision containing 59.25 acres, which areas were fully and accurately described in said Resolution. . . .

2. On December 20, 1976, the Board of Aldermen of the City of Goldsboro at a regular meeting heard from opponents to said annexation. At said meeting, a report prepared by the Department of Planning of the City of Goldsboro, in accordance with G.S. 160A-47, in connection with the proposed annexation of the Seymour Johnson Air Force Base area was presented to the Board of Aldermen. . . .

3. The Petitioners and the Respondent stipulated and agreed that, prior to the adoption of the Ordinance of Annexation, the City of Goldsboro, published the notice of public hearing as required by G.S. 160A-49, and no question is raised as to said publication.

4. The Petitioners and the Respondent have stipulated and agreed that, prior to the adoption of the Ordinance of Annexation, the City of Goldsboro prepared the report required by G.S. 160A-47, and said official body duly approved the same as required by G.S. 160A-49(c), and no question is raised as to the procedural steps leading to the adoption of said report.

5. On January 17, 1977, a public hearing, as required by G.S. 160A-49, was held at the regular meeting of the Board of Aldermen of the City of Goldsboro. At said meeting, the Director

of Planning of the City of Goldsboro presented an explanation of the report required by G.S. 160A-47. At said public hearing, all interested persons were given an opportunity to be heard, including residents and property owners of the City, residents and property owners of the area proposed to be annexed, and residents and property owners of the area lying outside of the City and outside of the area proposed to be annexed. The Petitioners, through their attorney, spoke in opposition to said proposed annexation.

6. On February 7, 1977, at a regular meeting of the Board of Aldermen of the City of Goldsboro, the Board of Aldermen of the City of Goldsboro duly adopted an Ordinance of Annexation, Ordinance No. 1977-4, which fully complies with all requirements of G.S. 160A-49(e). That under said Ordinance, the effective date of said annexation was February 7, 1977.

7. The Petitioners and the Respondent have stipulated and agreed that there is no dispute as to the metes and bounds description of the area to be annexed as contained in the map prepared by the City of Goldsboro or in the metes and bounds description as set forth in the Ordinance of Annexation. That the area annexed by the Ordinance of Annexation contains 3216.25 acres, including 59.25 acres which is privately owned and which lies between Seymour Johnson Air Force Base and the boundaries of the City of Goldsboro as they existed prior to February 7, 1977. That 3157 acres of the area annexed embraces Seymour Johnson Air Force Base and is owned by the United States of America.

8. The 3157 acres constituting the area known as Seymour Johnson Air Force Base is a military base owned by the United States of America, and said area adjoined the City of Goldsboro prior to February 7, 1977. Seymour Johnson Air Force Base is the headquarters of the Fourth Combat Support Group—Tactical Air Command and the 68th Bombardment Wing. On February 7, 1977, there were located in the 3157 acre area known as Seymour Johnson Air Force Base 1,000 housing structures and an estimated 8,827 persons who resided within said area. These persons were either military personnel or dependents of military personnel. Military personnel are subject to military orders as prescribed by the United States Air Force.

9. On or about Feburary 7, 1977, there was located within the 59.25 acre tract seven housing structures and an estimated 25 persons.

10. The Petitioner, Charles E. Dail, is a citizen and resident of the City of Goldsboro, and resides within a portion of the area annexed. Said Petitioner resides within the 59.25 acre tract and owns a house and lot at 807 South Randolph Street. He is a person owning property within the meaning of G.S. 160A-50. Since the passage of the Ordinance of Annexation on February 7, 1977, the real and personal property of Charles E. Dail at 807 South Randolph Street, Goldsboro, North Carolina, has been subject to all debts, laws, ordinances and regulations of the City of Goldsboro.

11. In apt time as provided for in G.S. 160A-50 the Petitioners, Charles E. Dail and Hans A. Staps, filed a petition for review and served copies of the same upon the City of Goldsboro by registered mail, return receipt requested.

12. The United States of America, the owner of said 3157 acres, did not petition the Court under G.S. 160A-50 to review this annexation and has not questioned its validity or protested said annexation.

13. The Petitioners, Charles E. Dail and Hans A. Staps, through counsel and in open court, in addition to the written stipulations, stipulate and agree that the City of Goldsboro has followed the statutory procedures within the meaning of G.S. 160A-50(f)(1) and that no objections are raised in this regard.

14. The City of Goldsboro, within the time required by law, transmitted to the Superior Court a transcript of that portion of the City's Minute Book in which the procedure for annexation had been set out and a copy of the report setting forth the plans for extending services to the annexed area as required by G.S. 160A-47. The report of the proceeding so certified was admitted as evidence and duly considered by the Court as a part of the record.

15. The evidence showed plans to provide services to the area annexed within the meaning of the statutory requirements:

(a) The maps of the municipality and the area to be annexed were introduced showing the present and proposed boundaries of the municipality and the present major trunk water mains and sewers interceptors and outfall and extensions thereof. Further,

said maps showed the general land use patterns in the area to be annexed.

(b) The City of Goldsboro extended police protection to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. The City of Goldsboro has concurrent jurisdiction with the United States of America within the 3157 acre tract owned by the United States of America. The City of Goldsboro exercises its criminal jurisdiction over civilian personnel for violation of criminal laws committed within the 3157 acre tract, but it has no jurisdiction over the military personnel located thereon. The City of Goldsboro has employed five (5) additional police officers, and since February 7, 1977, it has provided police protecton to the 59.25 acre tract and the 3157 acre tract. That in the event the United States of America shall cease to provide police protection, the City of Goldsboro would provide said service provided it had the jurisdiction to act accordingly. The City of Goldsboro has sufficient monies to provide and finance said service.

(c) The City of Goldsboro extended fire protection to the area to be annexed and has provided said protection since February 7, 1977, on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. That the United States Government maintains its own fire department on Seymour Johnson Air Force Base, and the City of Goldsboro has a mutual aid agreement with Seymour Johnson Air Force Base. That for military and security reasons, the United States of America has not called upon the City of Goldsboro to provide fire protection in the 3157 acre tract. In the event the United States of America shall cease to provide fire protection on Seymour Johnson Air Force Base, then the City of Goldsboro would provide this service. The City of Goldsboro has sufficient monies to provide and finance said service.

(d) The City of Goldsboro extended garbage collection to the area to be annexed on the date of annexation on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. Since February 7, 1977, garbage collection has been provided in the 59.25 acre tract by the City of Goldsboro. The United States of America has provided its own garbage collection service on

Seymour Johnson Air Force Base and has not requested the City of Goldsboro to provide said service. That in the event the United States of America shall cease to provide said service, then the City of Goldsboro would provide this service. The City of Goldsboro has sufficient monies to provide and finance said service.

(e) The City of Goldsboro is providing street maintenance to the area to be annexed and has provided said service since the date of annexation on substantially the same basis as that provided within the rest of the municipality. In said 59.25 acre tract there are several unpaved streets which the City of Goldsboro has repaired and has maintained on substantially the same basis as it has maintained other streets within the City of Goldsboro. Prior to February 7, 1977, Randolph Street was impassable, and the City of Goldsboro has repaired said street since February 7, 1977. All of the streets in the 3157 acre tract owned by the United States of America are private ways and have not been dedicated as public streets and as such are not maintained by the City of Goldsboro. In the event the United States of America dedicated said streets to public use, then the City of Goldsboro would maintain said streets on the same basis as other streets within the City of Goldsboro. The City of Goldsboro has sufficient monies to provide and finance said service.

(f) On February 7, 1977, there existed a water distribution system in the area to be annexed which provides fire protection on substantially the same basis and in the same manner as that provided within the rest of the municipality prior to annexation.

(g) On February 7, 1977, the City of Goldsboro had located in the area to be annexed major trunk water mains and sewer outfall lines to serve said area on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation. The Petitioner, Charles E. Dail, is not receiving public water or sewer service at the present time since he does not desire either public water or sewer service. The City of Goldsboro can provide the Petitioner, Charles E. Dail, and other residents of the 59.25 acre tract with public water and sewer service in accordance with uniform policies in existence within the City of Goldsboro. The residents of the Seymour Johnson Air Force Base are receiving public water and sewer service at the present time.

(h) The City of Goldsboro has sufficient revenues or plans for financing the extension of all services in the area to be annexed. The City of Goldsboro has sufficient revenues to provide all services required under the annexation laws on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation.

16. The area annexed is located on the eastern edge of Goldsboro and, on February 7, 1977, there were approximately 1,007 housing structures located on Seymour Johnson Air Force Base and within the 59.25 acre area. On February 7, 1977, an estimated 8,852 persons resided in the 3,216.25 acre tract.

(a) Within the said annexed area, 3,157 acres are classified as having a governmental purpose or use, that 8,827 persons resided in said area and over 1,000 housing structures are located on Seymour Johnson Air Force Base. In the 59.25 acre tract, there are seven (7) residential lots comprising 2.44 acres and 29 vacant lots comprising 54.11 acres.

(b) The area annexed was adjacent or contiguous to the City of Goldsboro at the time of annexation within the meaning of G.S. 160A-48 in that the aggregate external boundary of the area to be annexed is 66,343.5 feet of which 10,886 feet (or more than one-eighth) coincided with the City of Goldsboro's boundary prior to annexation. That 15.9 percent of the aggregate external boundary of the area to be annexed coincided with the boundary of the City of Goldsboro at the time of annexation. That no part of the area annexed was included within the boundary of another incorporated municipality.

(c) The area annexed was developed for urban purposes within the meaning of G.S. 160A-48 in that it had a resident population equal to 2.75 persons for each acre of land included within its boundaries. There were 8,852 persons residing on 3216.25 acres.

(d) The northeastern section of the City of Goldsboro and the surrounding area outside of the corporate limits of the City of Goldsboro (but adjacent to the City of Goldsboro and the area to be annexed) have the largest shopping area in eastern North Carolina and a heavily populated area which requires sound urban development and planning.

17. The Petitioner, Charles E. Dail, has not presented any evidence that tends to show that he has in any way suffered any material injury by reason of any failure of the City of Goldsboro to comply with procedure set forth in the statute or any failure to meet the requirements set forth in G.S. 160A-48 as they apply to his property.

18. The Petitioner, Hans A. Staps was not present at the trial and presented no evidence, and as a result failed to show that he has in any way suffered any material injury by reason of any failure of the City of Goldsboro to comply with the procedures set forth in the statute or any failure to meet the requirements set forth in G.S. 160A-48 as they apply to his property.

UPON THE FOREGOING FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. That the area designated by the City of Goldsboro and known as the Seymour Johnson Air Force Base area, containing 3216.25 acres meets all criteria authorizing annexation under Part III, Article 4A, Chapter 160A of the General Statutes of North Carolina.

2. That the Petitioner, Charles E. Dail, through counsel has stipulated and agreed in open court that the City of Goldsboro has followed the Statutory Procedures within the meaning of G.S. 160A-50(f)(1) of the General Statutes.

3. That property owned by the United States of America is subject to annexation under the provision of Part III, Chapter 4A, of Chapter 160A of the General Statutes of North Carolina.

4. That the City of Goldsboro has met the requirements of the provisions of G.S. 160A-47 and G.S. 160A-48.

5. That Part III, Article 4A, of Chapter 160A of the General Statutes of North Carolina, as it applies to the area annexed, does not violate Article 1, Section 1; Article 1, Section 6; Article 1, Section 19; Article 2, Section 1; Article 5, Section 2 of the Constitution of North Carolina, nor the 14th Amendment of the Constitution of the United States.

6. That the Petitioner, Charles E. Dail, as a resident of the 59.25 acre tract, and the Petitioner, Hans A. Staps, have failed to show by sufficient evidence that they have suffered material injury by reason of any failure of the City of Goldsboro to comply with the procedures set forth in the statutes or any failure to meet the requirements set forth in G.S. 160A-48 as they apply to their property.

Upon the foregoing findings of fact, and conclusions of law, it is ORDERED, ADJUDGED AND DECREED that the action of the Board of Aldermen of the City of Goldsboro in the adoption of the Annexation Ordinance No. 1977-4, be affirmed; and that said annexation is fully effective as to the area described in said Ordinance from and after February 7, 1977, the cost of this action shall be taxed against the Petitioners.

Bernard A. Harrell for petitioner appellant.

Smith, Everett & Womble, by W. Harrell Everett, Jr., for respondent appellee.

BRITT, Justice.

[1] Under G.S. 160A-50(f), the person challenging an annexation ordinance must show (1) that the statutory procedure was not followed, or (2) that the provisions of G.S. 160A-47 were not met, or (3) that the provisions of G.S. 160A-48 have not been met. The party challenging the annexation has the burden of showing error. In *In re Annexation Ordinance*, 284 N.C. 442, 452, 202 S.E. 2d 143 (1974), this court, speaking through Huskins, J., said:

> "As a general rule it is presumed that a public official in the performance of his official duties 'acts fairly, impartially, and in good faith and in the exercise of sound judgment or discretion, for the purpose of promoting the public good and protecting the public interest. [Citation omitted.] The presumption of regularity of official acts is rebuttable by affirmative evidence of irregularity or failure to perform duty, but the burden of producing such evidence rests on him who asserts unlawful or irregular conduct. The presumption, however, prevails until it is overcome by . . . evidence to the contrary. . . . Every reasonable intendment will be made in support of the presumption. . . .' *Huntley v. Potter*, 255 N.C.

619, 122 S.E. 2d 681 (1961); *accord, Styers v. Phillips*, 277 N.C. 460, 178 S.E. 2d 583 (1971). Hence the burden is on the petitioner to overcome the presumption by competent and substantial evidence. 6 N.C. Index 2d, Public Officers, § 8 (1968)."

Petitioner concedes that respondent followed the statutory procedures "within the meaning of G.S. 160A-50(f)(1)". That being true, our inquiry is whether petitioner has met his burden of showing by competent and substantial evidence that respondent did not comply with the provisions of G.S. 160A-47 or G.S. 160A-48. We hold that petitioner has not met that burden.

[2] By his assignments of error, 1, 2, 3, and 4, petitioner argues that the trial court erred in finding as facts that respondent city could provide police protection, fire protection, garbage collection service and street maintenance for the annexed areas in the event the federal government ceased to provide said services to the air base, and that respondent had sufficient monies to do so. His primary argument on these assignments is that the findings of fact are not supported by the evidence.

Petitioner does not seriously argue that respondent cannot provide said services to the 59.25 acre tract in which his premises are located. In attacking respondent's ability to provide services to the air base, petitioner relies in large part on the testimony of certain of respondent's department heads which he presented as witnesses.

These include the chief of police who testified that if he were required to provide full police protection to the newly-annexed area, he could not do it "with my present budget and department"; the chief of the fire department who stated that if the air base were to disband its fire department, respondent city could not provide adequate fire protection for the area; and the city manager who stated that the current budget of respondent did not show any funds for providing police protection, fire protection and refuse collection for the newly-annexed area.

Off-setting testimony was provided by the city manager on re-direct examination when he testified that if the federal government ceased providing police protection for the air base, he thought respondent could provide that service from several

sources of revenue; and that the city could also provide fire protection to the air base although it would mean a diminished level of services throughout the city. Further off-setting testimony was provided by the city finance officer who stated that in his opinion the city could provide all municipal services to the air base should the federal government terminate those services; and that the city was in relatively sound financial condition, having some fifty sources of revenue which it could use for all city purposes.

The record further reveals that for the first year following annexation the increased cost to the city would be only $2,053 while the increased revenues to the city—from property taxes, Powell Bill funds, water revenue, public utility franchise taxes, and wine and beer excise taxes—would be $230,624. It was also shown that the city had previously extended major trunk water mains and sewage lines to the boundaries of the air base property.

While there is evidence to support some of petitioner's contentions, there is evidence to support the court's findings of fact. These findings are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed even though there is evidence contra. 1 Strong's N.C. Index 3d, Appeal and Error § 57.2.

Assignments of error 1, 2, 3 and 4 are overruled.

By his fifth and sixth assignments of error, petitioner contends the trial court erred in finding as facts (1) that on 7 February 1977 there existed a water distribution system in the area to be annexed which provided fire protection "on substantially the same basis and in the same manner as that provided within the rest of the municipality prior to annexation", and (2) that the residents of the air base were receiving public water and sewer services at the time of the trial. These assignments have no merit.

There was plenary evidence that the federal government was providing adequate fire protection, water and sewer services on the air base with water provided partly by respondent and partly by deep wells on the base, and with sewer facilities provided by respondent and the federal government. There was also evidence that respondent had a sound plan to provide fire protection to

homes and other structures on the 59.25 acre tract; also water for those on said tract who wanted it. "[T]here is *no* requirement that a municipality duplicate services, in an area to be annexed, which are already available in the area." *Huntley v. Potter*, 255 N.C. 619, 632, 122 S.E. 2d 681 (1961). Furthermore, it would appear from a reading of G.S. 160A-49(h) that a city annexing territory has one year—possibly 15 months—to implement its plan for extending services to an annexed area.

[3] By his seventh assignment of error, petitioner contends the trial court erred in finding that respondent had sufficient revenues or plans for financing the extension of municipal services to the area annexed; and that respondent had "sufficient revenues to provide all services required under the annexation laws on substantially the same basis and in the same manner as such services are provided within the rest of the municipality prior to annexation". This assignment has no merit.

While there was some evidence that would support this contention, there was other evidence contradicting it and the trial court was the trier of the facts. Clearly, the evidence showed that respondent was able to provide comparable services to the 59.25 acre area. We think the evidence was also clear that the federal government was rendering, and would continue to render, police and fire protection and water, sewer and street maintenance service on the air base that were comparable to that rendered by respondent in other parts of the city. This evidence, together with that of the city finance officer that respondent was financially able to render the services on the air base in the event the federal government should cease doing so, was sufficient to support the findings of fact.

[4] In his eighth assignment petitioner asserts error in the court's finding that the area annexed was developed for urban purposes within the meaning of G.S. 160A-48.

G.S. 160A-48(c)(1) reads in pertinent part as follows: "(c) Part or all of the area to be annexed must be developed for urban purposes. An area developed for urban purposes is defined as any area which . . . (1) Has a total resident population equal to at least two persons for each acre of land included within its boundaries. . . ." G.S. 160A-54 provides: " . . . In determining whether the standards set forth in G.S. 160A-48 have been met on appeal

to the superior court under G.S. 160A-50, the reviewing court shall accept the estimates of the municipality: (1) As to population, if the estimate is based on the number of dwelling units in the area multiplied by the average family size in such area, or in the township or townships of which such area is a part, as determined by the last preceding decennial census . . . provided, that the court shall not accept such estimates if the petitioners demonstrate that such estimates are in error in the amount of ten percent (10%) or more." In construing this portion of the annexation statute this Court, speaking through Justice Huskins, has said that ". . . the tests to determine whether an area is developed for urban purposes must be *applied* to the annexation area as a whole." *In re Annexation Ordinance, supra* at 456.

In the present case the City of Goldsboro annexed 3216.25 acres. The parties stipulated prior to trial that "an estimated 8,827 persons resided in the 3,157 acre area known as the Seymour Johnson Air Force Base" and that "an estimated twenty-five persons resided" in the remaining 59.25 acres of the annexed area. At trial petitioner's evidence tended to show that 7930 persons lived on the base and twenty-five persons lived in the remainder of the annexed area. Both the figure stipulated to prior to trial and the figure actually shown by the evidence provide a sufficient estimate of the population of the entire 3216.25 acres to obtain the ratio of two persons per acre of annexed land which G.S. 160A-48 requires.

On appeal, however, petitioner contends that the military personnel stationed on the base should not have been counted in determining the population estimate. He argues that these persons are not subject to taxation by the annexing unit and are not *ipso facto* eligible to vote therein. He insists, therefore, that they are not *bona fide* "residents" of the annexed area. We disagree.

[5] At the outset, we note the stipulation entered into between the parties prior to trial. Ordinarily, such stipulations constitute judicial admissions binding on the parties and dispense with the necessity of proving the stipulated fact. Such stipulations continue in force for the duration of the controversy and preclude the later assertion of a position inconsistent therewith. *Hargus v. Select Foods, Inc.*, 271 N.C. 369, 156 S.E. 2d 737 (1967); *Plumbing Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966). It is

also true, however, that intent of the parties and their circumstances at the time the stipulation was signed must be examined to ensure that the language of the stipulation will not be construed to effect an admission of a fact which was intended to be controverted. *Rickert v. Rickert*, 282 N.C. 373, 193 S.E. 2d 79 (1972). Our examination of the petition in this case reveals that petitioner asserted that the base personnel were not within the meaning of "resident" under G.S. 160A-48. It would be anomalous to find that he conceded this point at trial only to reassert it on appeal when the language of the stipulation is susceptible of being construed as conceding the number of persons on the base and precluding proof of that issue only. We adopt this latter construction of the stipulation and address ourselves to the argument raised by the petitioner.

Acceptance of petitioner's contention with regard to the military personnel on Seymour Johnson Air Force Base would compel us to require that the annexing unit make a finding that a person is *actually* domiciled within the proposed area of annexation before counting that person for the purpose of making the population estimate required by the statute. This would impose an unnecesary administrative burden not contemplated by the statute, and we refuse to impose such a requirement.

> "Precisely speaking, *residence* and *domicile* are not convertible terms. A person may have his residence in one place and his domicile in another. Residence simply indicates a person's actual place of abode, whether permanent or temporary. Domicile denotes one's permanent, established home as distinguished from a temporary, although actual, place of residence. *Hall v. Board of Education*, 280 N.C. 600, 605, 187 S.E. 2d 52 (1972)."

We hold that a person is properly counted as a member of the "total resident population" under G.S. 160A-48 if such person would have been counted as an inhabitant of the proposed area of annexation under rules governing the last preceding decennial census. This method of enumerating population is consistent with the manner in which average family size is determined under G.S. 160A-54. It is also employed in apportioning congressional districts. G.S. 163-201. *See also: Drum v. Seawell*, 249 F. Supp. 877 (M.D.N.C., 1965), *affirmed*, 383 U.S. 831, 16 L.Ed. 2d 298, 86

S.Ct. 1237 (1966), (presence of large numbers of military personnel does not justify underrepresentation of an area).

The military personnel on Seymour Johnson Air Force Base were properly counted in determining the population estimate required by G.S. 160A-48. In accordance with census practice dating back to 1790 persons enumerated in the 1970 census who lived on military bases as members of the armed forces were counted as residents of the states, counties, and minor civil divisions in which their installations were located. U. S. Dept. of Commerce, Bureau of the Census, 1970 Census of Population, Number of Inhabitants, United States Summary, p. IV (1971). We hold that the court did not err in finding that the annexed area was developed for urban purposes within the meaning of G.S. 160A-48(c).

While petitioner recognizes the rule of presumptive regularity of official acts as well as the burden of proof imposed on him thereby, he contends (1) that the annexation is void as being beyond the delegation of legislative authority granted by Part III, Article 4A of Chapter 160A, and (2) that the report or Plan of Annexation in this case is insufficient to raise the *prima facie* rule of regularity. With these two contentions we cannot agree.

[6] Petitioner appears to contend that for the annexation to be legal, respondent, at the time of the trial (October 17, 1977), had to have funds *budgeted* to provide municipal services to the air base in the event the federal government ceased providing those services. We find nothing in applicable statutes to support this contention.

G.S. 160A-47(3) requires the annexing city to file a statement showing *how* it will provide and finance municipal services to the annexed area. As we have already said, there is no requirement that available services be duplicated. *Huntley v. Potter, supra.* This Plan of Annexation is not based upon a doubtful contingency but upon sound estimates of anticipated expenditures and revenue. *Cf.: In Re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961) (city relied on developers and landowners to provide service rather than formulating its own plan). This is sufficient to raise the presumption of regularity.

The action taken by the City of Goldsboro is also within the power delegated to it by the legislature. Municipalities have no

inherent powers; they have only such powers as are delegated to them by legislative enactment. *Koontz v. Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897, *rehearing den.*, 281 N.C. 516, 189 S.E. 2d 35 (1972); *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E. 2d 716 (1967). "A municipal corporation or its corporate authorities have no power to extend its boundaries otherwise than provided by legislative enactment or constitutional provision. Such power may be validly delegated to municipal corporations by the legislature, and when so conferred must be exercised in strict accord with the statute conferring it." *Huntley, supra* at 627.

G.S. 160A, Article 4A, Part III, establishes annexation powers for municipalities larger than 5000 persons. *Prima facie* complete and substantial compliance therewith is a condition precedent to annexation of territory by a municipality. *In Re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971); *In Re Annexation Ordinance*, 255 N.C. 633, 122 S.E. 2d 690 (1961). The record in this case reveals such compliance. The parties stipulate procedural compliance. The character of the annexed area is such as is prescribed by G.S. 160A-48, and Goldsboro's Plan of Annexation complies with G.S. 160A-47.

Because we find that Goldsboro has complied with G.S. 160A-47 and G.S. 160A-48, we need not examine petitioner's ninth assignment of error. By it he contends the court erred in finding as fact and concluding as a matter of law that he had shown no material injury to himself resulting from non-compliance with the annexation statute. Inquiry into the injury suffered by the petitioner is necessary only where it is shown that the annexation statute has not been complied with. *In Re Annexation Ordinance*, 278 N.C. 641, 180 S.E. 2d 851 (1971).

In his tenth and eleventh assignments of error petitioner contends that the court erred in concluding as a matter of law that Seymour Johnson Air Force Base meets all the requirements of G.S. 160A-47 and G.S. 160A-48, in concluding as a matter of law that the base owned by the United States was subject to annexation under the statute, and in entering judgment in accord with these conclusions.

We have already examined G.S. 160A-47 and G.S. 160A-48 and have determined for reasons previously stated that Seymour Johnson Air Force Base is property which complies with the re-

quirements of those statutes. There is no need to repeat that discussion.

[7] Petitioner argues finally that allowing Goldsboro to annex Seymour Johnson Air Force Base violates the express purposes of the annexation statute and allows the imposition of an unconstitutionally unequal tax on citizens of the same class.

Annexation by a city or town is viewed as a political matter to be regulated solely by the state legislature. 2 McQuillin, Municipal Corporations § 7.10, p. 309. While this court has not considered heretofore the question of municipal annexation of federal property, the courts of our sister states which have done so have been nearly unanimous in their approval of such action when it is taken in accordance with the states' statutes. *See, e.g.: Howard v. Commissioners of Louisville*, 344 U.S. 624, 97 L.Ed. 617, 73 S.Ct. 465 (1953); *Flynn v. Stevenson*, 4 Ill. App. 3d 458, 281 N.E. 2d 438 (1972); *Kansas City v. Querry*, 511 S.W. 2d 790 (Mo., 1974); *Wichita Falls v. Bowen*, 143 Tx. 45, 182 S.W. 2d 695 (1944); *Norfolk County v. City of Portsmouth*, 186 Va. 1032, 45 S.E. 2d 136 (1947), *contra*, *United States v. Bellevue*, 334 F. Supp. 881 (D. Neb., 1971), *affirmed*, 474 F. 2d 473, *cert. denied*, 414 U.S. 827, 38 L.Ed. 2d 60, 94 S.Ct. 46 (1973). In *Bellevue*, the only decision we have found overturning an annexation of federal property, the court held that federal property could be annexed under the statute but that the statute did not allow annexation of property solely for purpose of obtaining greater revenue, the avowed purpose of the city in that case.

In the present case the proposed area of annexation possesses every characteristic which the legislature deemed essential for "sound urban development." The City of Goldsboro has meticulously complied with the annexation statutes. We cannot substitute our judgment for that of the legislature on this question and are compelled to hold that Seymour Johnson Air Force Base is subject to annexation under the existing statutes.

Furthermore, we can find no constitutional impediment to this annexation. Absent interference with asserted federal jurisdiction, the "fiction of a state within a state can have no validity to prevent the state from exercising its power over the federal area within its boundaries." *Howard v. Commissioners of Louisville, supra.* The power to annex federal property is general-

ly unrestricted if it is annexed in accord with the state's statutes; such an exercise of the annexation power cannot be approved, however, where it is for the *sole* purpose of generating revenue. *See:* 11 Military Law Review 99 (1961). Federal consent to the annexation is unnecesasry. *Agua Caliente Band, Etc. v. Palm Springs*, 347 F. Supp. 42 (Cal., 1972). This annexation has not been objected to by the federal government and does not interfere with federal jurisdiction.

[8] Nor will this annexation create unconstitutional tax classes. Taxes must be uniformly imposed throughout a taxing jurisdiction. *Dyer v. City of Leaksville*, 275 N.C. 41, 165 S.E. 2d 201 (1969); *Leonard v. Maxwell*, 216 N.C. 89, 3 S.E. 2d 316, appeal dismissed, 308 U.S. 516, 84 L.Ed. 439, 60 S.Ct. 175 (1939). However, the legislature is given the widest latitude in making distinctions which are bases for tax classifications; such classifications will not be disturbed unless they are capricious, arbitrary and unjust. *Rigby v. Clayton*, 274 N.C. 465, 164 S.E. 2d 7 (1968). The petitioner in this case will be taxed in the same manner as every other citizen of Goldsboro. He cannot complain because Congress has exempted military personnel from local taxation. Soldiers and Sailors Civil Relief Act, 50 U.S.C.A. § 574.

For the reasons stated, the judgment appealed from is

Affirmed.

BOARD OF TRANSPORTATION v. DAVID J. MARTIN AND WIFE, MARILYN B. MARTIN; W. G. PARKER, TRUSTEE; L. CARL LILES; DILLARD POWELL, SUBSTITUTE TRUSTEE; THE CAROLINA BANK; C. THOMAS BIGGS, TRUSTEE; HOME SAVINGS & LOAN ASSOCIATION; JOHN K. CULBERTSON, TRUSTEE; NORTH CAROLINA NATIONAL BANK; SOUTHERN NATIONAL BANK OF NORTH CAROLINA; CAROLINA BUILDERS CORPORATION; FIRST CITIZENS BANK & TRUST COMPANY; REYNOLDS METAL COMPANY; COUNTY OF WAKE; TOWN OF CARY; WHITE PACKING COMPANY, INC.; FRIEDRICH REFRIGERATORS, INC.; UNITED STATES OF AMERICA AND ITS AGENCY, DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE; CITY OF RALEIGH; CENTRAL CAROLINA BANK & TRUST COMPANY; EARL J. LATTA, INC.; GUARANTEE STATE BANK, TRUSTEE

No. 24

(Filed 28 November 1978)

1. **Eminent Domain § 5— amount of compensation—parcels owned by individual and corporation—no unity of ownership**

A parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages. Even if such treatment were permitted, there would be no unity of ownership where the corporation is attempting a reorganization under Chapter X of the Federal Bankruptcy Act and the title to the corporation's property is vested in the trustee in bankruptcy.

2. **Eminent Domain § 5— amount of compensation—parcels owned by individual and corporation—no unity of use**

The intended future development of a tract owned by an individual for use in conjunction with an adjacent tract owned by a corporation of which the individual is sole shareholder and used for a commercial shopping center is not adequate to support a finding of unity of use so that the two tracts may be treated as unified for the purpose of determining damages for the condemnation of a portion of the individual's tract.

ON petition for discretionary review, prior to determination by the Court of Appeals, of order entered by *Godwin, J.*, on 22 December 1977 in WAKE Superior Court.

Plaintiff instituted this action to have certain lands belonging to defendant David J. Martin condemned for highway purposes. Plaintiff filed a declaration of taking and deposited with the court $451,780, the estimated amount due defendants as just compensation for the land taken.

Defendants Martin filed answer admitting that plaintiff is entitled to condemn the land taken but denying that the amount deposited with the court is just compensation therefor.

On 8 September 1977 plaintiff filed a motion requesting a hearing pursuant to G.S. 136-108 to determine all issues other than the issue of damages.

On 13 September 1977 defendants Martin filed a motion asking that South Hills Shopping Center, Inc., and its trustee in bankruptcy, J. Larkin Pahl, be made parties to the action.

Following a hearing on the two motions, the trial court made findings of fact summarized, except where quoted, in pertinent part as follows (numbering ours):

"1. This action involves the condemnation by plaintiff of land to be used for an interchange between Interstate 40 and the Raleigh Beltline (U.S. Highways 1 and 64) on the southwestern side of Raleigh near the Cary-Macedonia Road exit from the Beltline. At this point, the Beltline runs approximately east-west, and the proposed I-40 will intersect it at right angles running North-South.

"2. Defendant David Martin held fee simple title to the subject land both on the north and south sides of the Beltline which is described in Exhibit 'B' of the complaint. He continues to hold title to remaining parcels hereinafter described. All motions in this proceeding concern only the land on the north side of the Beltline.

"3. Defendant David Martin's land on the north side of the Beltline consisted of a parcel of approximately 52 acres, of which 28.82 acres has been taken by plaintiff upon the filing of its complaint. To the northeast of this taking approximately 24 acres remain, and to the southwest 8.6 acres remain. Both remaining parcels are contiguous to the taking.

"4. To the southwest of and contiguous to said 8.6 acre parcel is a parcel of land owned by South Hills Shopping Center, Inc. One corner of this parcel is in a line of taking. . . ."

5. A dispute has arisen between plaintiff and defendants Martin as to whether the parcel of land known as South Hills Shopping Center should be included as part of the tract affected

by the taking of this action for the purpose of ascertaining severance damages thereto. Plaintiff contends that said land should not be so included while defendants Martin contend the opposite.

6. The parcel of land known as South Hills Shopping Center is owned by South Hills Shopping Center, Inc.

Included in the court's findings of fact are stipulations by the parties as follows:

"(a) Defendants David J. Martin and Marilyn B. Martin are husband and wife, and have been such during all pertinent dates recited herein.

"(b) South Hills Shopping Center, Inc., was incorporated on March 28, 1968. Defendant David J. Martin is the sole stockholder of said corporation; defendants Martin were the original incorporators, and are and were the only officers of said corporation.

"(c) Both the shopping center parcel and the contiguous Martin parcel were conveyed as a single tract by W. H. Brickhouse and wife to defendant David Martin on February 20, 1961. . . .

"(d) Defendants Martin developed South Hills in stages completing the first building thereon, the service center, in June, 1969; the second building, the mall, in April, 1972; and the third building, the motel, in January, 1973.

"(e) After completing construction of the service center, defendants Martin conveyed it and its lot to South Hills Shopping Center by deed dated August 15, 1969, recorded in Book 1888, Page 465, Wake County Registry; to like effect with the mall and motel. . . .

"(f) Said conveyances to South Hills facilitated obtaining loans for shopping center construction. Corporate loans, carrying a legally higher interest rate than personal loans, were available and made to South Hills Shopping Center, Inc. The loans made to South Hills Shopping Center, Inc., could not have been obtained by defendants Martin individually due to the statutory limitation existing at that time on interest rates for personal loans. When defendants Martin created South Hills Shopping Center, Inc., they did so principally to obtain financing for the shopping center,

but were aware of the other desirable features of incorporation, including limited liability.

"(g) The motel and its lot were sold prior to the taking herein. The motel lot was at the extreme Southwestern end of the South Hills parcel and is no longer a part of the South Hills Shopping Center and is not involved in these proceedings.

"(h) Substantially before the taking herein, defendants Martin planned to expand South Hills by extending the mall to the northeast onto land owned by defendants Martin individually. Preparatory to such expansion, and prior to the date of taking, defendants Martin had extended water and electrical utility service past the end of the present mall and onto the parcel of land owned by them. The electrical service was extended to a concrete transformer pad on the parcel owned by defendants Martin. The water service, consisting of an underground 10 inch water main, was extended into the parcel owned by defendants Martin.

"(i) Initially, 400 feet was graded by defendants Martin on their parcel preparatory to expanding South Hills. Subsequently, and still prior to the taking, defendants Martin graded an extensive area, approximately 25 acres, to the northeast of the mall on said land owned by them. Said area was to include a substantial addition to the mall and associated parking for the shopping center. The latter grading operations occurred at different times and at different places on said parcel and continued until the date of taking.

"(j) The loans to South Hills Shopping Center, Inc., were made largely on note/deed of trust basis. . . .

"(k) The real property described in the aforesaid deeds of trust consisted of the real property described in the deeds enumerated in (e), above, i.e., the property of South Hills Shopping Center, Inc. Defendants Martin signed the various notes in question as joint obligors. None of the real property described in Exhibit 'B' attached to the complaint contiguous to the property of South Hills Shopping Center, Inc., was made subject to the aforementioned deeds of trust.

"(l) On at least one occasion, defendants Martin mortgaged a portion of certain entireties property owned by them not part of

the subject property in this action, to satisfy an obligation of South Hills Shopping Center, Inc.

"(m) In addition to owning and operating South Hills Shopping Center, South Hills Shopping Center, Inc., owns and operates certain apartments located on Avent Ferry Road, several miles distant from South Hills Shopping Center.

"(n) Defendant David Martin has other business interests conducted by different entities, including, but not limited to, David Martin and Associates, a sole proprietorship, and South Valley Apartments, Inc., a corporation which owns and operates a rental apartment complex called South Valley.

"(o) Some of the various business entities owned by defendants Martin have separate spheres of interest and activity and have separate and distinct assets and liabilities.

"(p) The trustee in Bankruptcy presently administering the business affairs of South Hills Shopping Center, Inc., is not able to utilize the entireties property of defendants Martin, nor the properties and assets of the other aforementioned business enterprises. South Hills Shopping Center, Inc., became involved in Chapter X Bankruptcy proceedings prior to the date of taking."

(7) At the time of the taking herein, South Hills Shopping Center, Inc., was, and continues to be, in voluntary reorganization under Chapter X of the Federal Bankruptcy Act; and the parties agree that the duly appointed trustee in bankruptcy, J. Larkin Pahl, is a proper party to represent said corporation in the event that its land is to be included in this action for the purpose of assessing severance damages thereto.

The trial court concluded as a matter of law that the parcel of land owned by South Hills Shopping Center, Inc., and the parcel owned by defendants Martin constitute a unity for the purposes of determining damages and that said corporation and its trustee in bankruptcy are proper parties defendant to this action.

From judgment predicated on said findings of fact and conclusions of law, plaintiff appealed.

Attorney General Rufus L. Edmisten, by Associate Attorney R. W. Newsom, III, for the State.

Maupin, Taylor & Ellis, by Richard C. Titus and Thomas F. Ellis, for defendant appellees Martin.

BRITT, Justice.

Plaintiff did not except to any fact found by the trial court. Thus, the question presented is whether the court erred in its conclusions of law and in entering an order thereon. *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975). The court concluded (1) that the parcel of land owned by South Hills Shopping Center, Inc., (South Hills) and the parcel of land owned by defendants Martin individually constituted a unit for the purpose of determining damages, and (2) that South Hills and its trustee in bankruptcy are proper parties to the action. We hold that the court erred in its conclusions and in entering an order based on said conclusions.

While the factual situation in *Barnes v. Highway Commission*, 250 N.C. 378, 109 S.E. 2d 219 (1959), differs somewhat from the facts in the instant case, we find some guidance from the following excerpts from that opinion:

> "There is no single rule or principle established for determining the unity of lands for the purpose of awarding damages or offsetting benefits in eminent domain cases. The factors most generally emphasized are unity of ownership, physical unity and unity of use. Under certain circumstances the presence of all these unities is not essential. The respective importance of these factors depends upon the factual situations in individual cases. Usually unity of use is given greatest emphasis.
>
> "The parcels claimed as a single tract must be owned by the same party or parties. It is not a requisite for unity of ownership that a party have the same quantity or quality of interest or estate in all parts of the tract. . . . Different owners of adjoining parcels may not unite them as one tract, nor may an owner of one tract unite with his land adjoining tracts of other owners for the purpose of showing thereby greater damages. *Light Co. v. Moss*, 220 N.C. 200, 207, 17 S.E. 2d 10."

* * *

"As indicated above, the factor most often applied and controlling in determining whether land is a single tract is unity of use. Regardless of contiguity and unity of ownership, ordinarily lands will not be considered a single tract unless there is unity of use. It has been said that 'there must be such a connection or relation of adaptation, convenience, and actual and permanent use, as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used.' *Peck v. Railway Co.* (1887), 36 Minn. 343, 31 N.W. 217. The unifying use must be a *present* use. A mere intended use cannot be given effect. . . ." 250 N.C., pp. 384-385.

[1] In *Barnes* this court held that two parcels of land owned by a single owner or owners might be treated as one tract where the parcels were contiguous and were similarly used. In the case before us, one parcel of land is owned jointly by two individuals; the other parcel is owned by a corporation of which one of the two individuals is the sole shareholder. The question on these facts, then, is whether the *Barnes'* requirement that there be unity of ownership between the owners of the two parcels has been met. Absent unity of ownership, the two parcels of land cannot be regarded as a single tract for the purpose of determining a condemnation award. We have not previously resolved this question, and the courts of our sister states which have addressed it appear divided in their opinions.

In *Jonas v. State*, 19 Wis. 2d 638, 121 N.W. 2d 235, 95 A.L.R. 2d 880 (1963), a factual situation similar to that in the instant case was presented. In that case the condemnees argued that the corporate entity should be disregarded to the end that lands owned by it and adjoining lands owned by certain of its shareholders should be treated as a unit for purpose of assessing damages. Answering that argument, the Supreme Court of Wisconsin stated:

"A corporation is treated as an entity separate from its stockholder or stockholders under all ordinary circumstances. Although courts have made exceptions under some circumstances, this has been done where applying the corporate

fiction 'would accomplish some fraudulent purpose, operate as a constructive fraud, or defeat some strong equitable claim * * *.' Those who are responsible for the existence of the corporation are, in those situations, prevented from using its separate existence to accomplish an unconscionable result. In the present case, those who created the corporation in order to enjoy advantages flowing from its existence as a separate entity are asking that such existence be disregarded where it works a disadvantage to them. We do not consider it good policy to do so." 121 N.W. 2d, pp. 238-239.

In *Sams v. Redevelopment Authority*, 431 Pa. 240, 244 A. 2d 779 (1968), the two plaintiffs, operating a scrap metal yard as a partnership, owned the parcel of land condemned; they also owned an adjoining parcel on which a corporation, all of whose stock was owned by them, operated a foundry. Plaintiffs argued that there was unity of use and that the corporate veil should be pierced in order to establish a single user for purposes of allowing increased damages. In rejecting that argument, the Supreme Court of Pennsylvania said:

"After thoroughly researching case authority in this Commonwealth, we are firmly convinced that recovery has never been permitted under the unity of use doctrine absent joint identical users of both parcels of land. In fact, the very concept of unity of use, in our view, dictates that there be identical users as well as identical ownership of the properties involved. It is difficult to conceive that a unity of use can exist when there are two separate and distinct legal entities operating each parcel of land. It is a contradiction in terms to speak of a unity of use where there is more than a single user, since implicit in the definition of unity of use is the connotation that both parcels are so completely integrated, inseparable and interdependent so as to make the operation of one impossible without the operation of the other. Where there are separate users (completely different entities) of the parcels involved, the use of both cannot be said to be so inseparable as to make them a unit for purposes of damages in a condemnation proceeding."

* * *

"The corporate entity or personality will be disregarded only when the entity is used to defeat public convenience, justify wrong, protect fraud or defend crime. See Fletcher, Corporations, § 41 (Rev. Ed. 1963), and the numerous cases cited therein; Stevens, Corporations, § 18 (1949). *Gagnon v. Speback*, 389 Pa. 17, 131 A. 2d 619 (1957); *Satler v. Rice*, 184 Pa. Super. 550, 135 A. 2d 775 (1957). Here the corporate shareholders are requesting that the corporate enterprise, voluntarily formed for certain business advantages, ought to be disregarded for their benefit in order to receive increased damages as a result of the present condemnation proceedings. This we refuse to do." 244 A. 2d, p. 781.

Plaintiff has relied on the rule set out in the above cases. Defendants Martin rely on authority from other jurisdictions where results contrary to those based upon the rule adopted in Wisconsin and Pennsylvania have been obtained on a variety of theories. *See: Housing Authority of Newark v. Norfolk Realty Company*, 71 N.J. 314, 364 A. 2d 1052 (1976) ("Normal business considerations . . . may indicate that a bifurcated ownership of the assets of a functionally integrated enterprise is more desirable than ownership by a single entity."); *Erly Realty Development, Inc. v. Ryan*, 43 A.D. 2d 301, 351 N.Y.S. 2d 457 (Sup. Ct., App. Div., 1974), *cert. denied*, 34 N.Y. 2d 515, 357 N.Y.S. 2d 1025 (Ct. App., 1974) (close control of one ownership entity by the other held tantamount to ownership); *In Re North Park Urban Renewal Project*, 67 Misc. 2d 259, 324 N.Y.S. 2d 158 (1971); *M.T.M. Realty Corp. v. State of New York*, 47 Misc. 2d 44, 261 N.Y.S. 2d 815 (1965); *Guptill Holding Corp. v. State of New York*, 23 A.D. 2d 434, 261 N.Y.S. 2d 435 (1965).

[1] We have carefully reviewed the opinions of the courts of our sister states and we find the reasoning of the decisions in Wisconsin and Pennsylvania more persuasive. We, therefore, hold that a parcel of land owned by an individual and an adjacent parcel of land owned by a corporation of which that individual is the sole or principal shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages.

A corporation is an entity distinct from the shareholders which own it. *Troy Lumber Co. v. Hunt*, 251 N.C. 624, 112 S.E. 2d 132 (1960). This is true whether the owner of the corporation be

another corporation, a single individual, or a group of individuals. *Huski-Bilt, Inc. v. Trust Co.*, 271 N.C. 662, 157 S.E. 2d 352 (1967); *Acceptance Corp. v. Spencer*, 268 N.C. 1, 149 S.E. 2d 570 (1966). Where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so. *Schenley Distillers Corp. v. United States*, 326 U.S. 432, 66 S.Ct. 247, 90 L.Ed. 181 (1946); *see generally:* 18 Am. Jur. 2d, Corporations §§ 13-15.

Defendants have also relied on cases from other jurisdictions which cite *Barnes, supra*, for the principle that unity of ownership may be found although the party seeking to have two parcels of land treated as one tract does not have the same quantity or quality of interest in both parcels. *See, e.g., People v. Hemmerling*, 58 Cal. Rptr. 203 (1967); *City of Milford v. .2703 Acres of Land*, 256 A. 2d 759 (Del. Super., 1969); *Sauvageau v. Hjelle*, 213 N.W. 2d 381 (N.D., 1973). These cases are distinguishable from the case before us. In each of them the party seeking to have two parcels of land treated as one tract held a fee interest alone or as a tenant by the entirety in one parcel and a fee interest as a tenant in common in the other. The quantity or duration of interest in the two parcels was the same; only the quality of interest, the manner in which the interest was held, was different. In each case there was a single claimant who held an interest in both parcels. In the case before us there is no difference in the quantity and quality of the estate claimed in the two parcels, but a different party owns each of them.

Even if we chose to follow the rule of the New York and New Jersey cases, a course we have rejected, two substantial obstacles would still preclude treating the two parcels of land in this case as a single tract. The first of these is the difficulty presented by the bankruptcy of South Hills. The second is the requirement that both parcels be presently, actually, and permanently used in such a manner that the enjoyment of the parcel taken is reasonably and substantially necessary to the enjoyment of the remaining parcel; this is referred to as unity of use. *Barnes, supra* at 385.

At the time of the taking herein involved, South Hills was attempting a corporate reorganization under Chapter X of the Federal Bankruptcy Act. Under Chapter X title to the property of South Hills vested in the trustee in bankruptcy. 11 U.S.C.

§ 586. The property's ultimate disposition is subject to the confirmation and consumation of a plan of reorganization. 9 Am. Jur. 2d, Bankruptcy § 1609. Whether the debtor, South Hills, will ever reacquire title to its property is therefore uncertain. *See, generally:* 9 Am. Jur. 2d, Bankruptcy §§ 1493-1600.

The parcel of land owned by defendants Martin is not subject to the jurisdiction of the bankruptcy court. Neither Martin nor South Hills presently has the power to act upon the property of the corporation. Between the trustee in bankruptcy and defendants there is clearly no unity of ownership.

[2] Finally, even if unity of ownership were proven in this case, it would still be necessary to show unity of use.

> "The unifying use must be a *present* use. A mere intended use cannot be given effect. If the uses of two or more sections of land are different and inconsistent, no claim of unity can be maintained." *Barnes, supra* at 385.

In the case before us the parcel of land owned by South Hills had been developed and was being used for a large, commercial shopping center. The parcel of land owned by the Martins was an undeveloped tract. While grading operations had been undertaken on it and water and sewer lines had been extended to it, this parcel of land was not *presently* being used in a manner which made its continued use essential to the enjoyment of the tract owned by South Hills. The intended future development of the Martin tract for use in conjunction with the South Hills tract is not adequate to support a finding of unity of use.

For the reasons stated, the order appealed from is vacated and the cause is remanded for further proceedings consistent with this opinion.

Order vacated and cause remanded.

STATE OF NORTH CAROLINA v. ARTHUR BARRYMORE CARSON

No. 42

(Filed 28 November 1978)

1. **Criminal Law § 66.9— photographic identification—no impermissible suggestiveness**

A photographic identification procedure in a rape case was not impermissibly suggestive because the picture of defendant contained a placard on the front indicating his height, weight and other personal information since this single difference between defendant's photograph and the other photographs did not necessarily suggest that defendant was the witness's assailant, and since the witness had ample opportunity to see her assailant at close range on two occasions, the record disclosed no major discrepancies between the witness's initial description of defendant and his actual appearance, the witness never identified anyone except defendant as the man who raped her, and there was no previous failure of identification.

2. **Arrest and Bail § 3.4; Criminal Law § 66.7— legal arrest—photographic identification not tainted by arrest**

The arrest of defendant for illegal possession of a controlled substance was legal where defendant was taken into custody by officers who sought to serve him with a nontestimonial identification order; defendant fled and was apprehended in a wooded area under conditions which made the officers reasonably believe he was in possession of a weapon; officers searched defendant's person and found that he possessed a quantity of marijuana; and officers then placed him under arrest. Therefore, a photographic identification procedure was not illegal on the ground that defendant was being illegally detained when he was photographed.

3. **Criminal Law § 66.8— arrest for misdemeanor—photographs—use for identification**

A defendant who was under arrest for a misdemeanor could be photographed by the police, G.S. 15A-502, and such photograph could be used in a photographic identification procedure.

4. **Criminal Law § 66.7— photographic identification—no right to counsel**

A defendant had no constitutional right to counsel at a photographic identification procedure.

5. **Criminal Law §§ 43.1, 66.7— nontestimonial identification order—right to counsel—arrest for misdemeanor—photographing of defendant**

Provisions of Art. 14 of G.S. Ch. 15A which require that an order for nontestimonial evidence shall contain a statement that the person is entitled to counsel and to the appointment of counsel if he cannot afford to retain one were inapplicable to the photographing of defendant where officers arrested defendant for the misdemeanor of illegally possessing marijuana while attempting to serve him with a nontestimonial identification order, and defendant could therefore properly be photographed without the aid of the nontestimonial order.

6. Jury § 7.6— challenge for cause after juror accepted by both sides

The trial judge did not err in allowing the State's challenge for cause of a prospective juror who had been passed by the State and defendant because the juror indicated on voir dire by defense counsel that he had known defendant's family all his life and that it would be uncomfortable for him to sit as a juror, since the fact that the juror had been passed by both parties did not affect the court's control of jury selection. Furthermore, even if there were not sufficient grounds to support the allowance of a challenge for cause, defendant was not prejudiced thereby where the jury actually impaneled consisted of persons who were competent and qualified to serve, and defendant failed to exhaust his peremptory challenges.

7. Criminal Law § 50— testimony that witness "thought" she saw knife

Testimony that the witness "thought" she saw a knife was competent since the witness was testifying from firsthand knowledge, and the weight to be given the testimony was for the jury.

8. Rape § 5— use of deadly weapon—first degree rape—sufficiency of evidence

The State's evidence was sufficient to support a jury finding that defendant used a deadly weapon to overcome the resistance of the victim and that he was guilty of first degree rape where it tended to show that defendant was over sixteen years of age, and where the victim testified: when defendant came up behind her in the parking lot of a shopping mall, she felt something in her back; defendant forced her into her car and drove to another location; after defendant stopped the car, she observed the knife with a blade five to six inches long in his left hand; defendant told her if she did not submit, she would never go home; she tried to escape, physically resisted defendant's advances and pleaded with him not to commit the act, but he placed his private parts into her private parts on two separate occasions.

9. Constitutional Law § 51— 10 month delay between arrest and trial—speedy trial

The trial court properly denied defendant's motion to dismiss a rape charge for lack of a speedy trial where defendant was arrested on 2 March 1977; there were three criminal sessions and one mixed session of superior court in the county in 1977; defendant filed a motion for speedy trial on 28 July 1977; defendant's case was not calendared for trial at the July 1977 session at the request of defense counsel; the court ordered that the case be calendared for trial at the next criminal session, but the district attorney could not reach the case at the October 1977 session because of a murder trial; the court entered an order requiring the district attorney to try defendant's case by the April 1978 session of court and providing that the failure to do so would result in a dismissal for failure to prosecute; defendant's case was brought to trial on 16 January 1978; and defendant failed to show the delay created public suspicion against him or deprived him of any means of proving his innocence.

10. Criminal Law § 169.6— failure of record to show excluded answer

When the record fails to show what the answer would have been had the witness been permitted to answer a challenged question, the trial judge's ruling cannot be held to be prejudicial error.

11. Criminal Law § 97.1— rebuttal testimony—recall of witness

It was within the trial judge's discretion to permit the State to recall a witness for rebuttal testimony.

12. Criminal Law §§ 97.1, 128— additional testimony—motion for mistrial

The trial court did not err in denying defendant's motion for a mistrial because a witness was permitted to give additional testimony after the State had rested its case and the court had denied defendant's motion to dismiss, since the court has discretionary power to permit the introduction of additional evidence after a party has rested and even after arguments to the jury have begun; and if defendant was taken by surprise by the additional evidence, he should have moved for a continuance or a recess in order to meet the additional evidence instead of moving for a mistrial.

13. Rape § 6.1— failure to submit lesser offenses

The trial court in a rape case did not err in failing to submit the lesser included offenses of assault with intent to commit rape and assault on a female where all the evidence disclosed completed acts of intercourse, and defendant's defense was in the nature of an alibi.

14. Rape § 6— use of deadly weapon—instructions

The trial court in a first degree rape case did not err in instructing the jury concerning procurement of the victim's submission by use of a deadly weapon where the evidence showed that when the victim was abducted from a parking lot, she "felt something in her back"; when defendant pulled her in the back seat of her car, she saw a knife about five or six inches long in his left hand; defendant had intercourse with her after she saw the knife; and defendant told her that if she did not submit, she would never go home.

15. Rape § 6— instruction that knife was deadly weapon—harmless error

In this prosecution for first degree rape, the jury's verdict could not have been influenced by the court's instruction that a knife is a deadly weapon where the evidence showed that defendant had a five inch knife in his hand when he forced the victim into the back seat of her automobile and that she observed the knife within striking distance as she lay prostrate just before the rape occurred, and the court charged the jury in its final mandate that in order to convict defendant of first degree rape it had to find beyond a reasonable doubt that defendant procured the victim's submission by the use of a deadly weapon.

APPEAL by defendant from *Mills, J.*, 16 January 1978 Criminal Session of DAVIE Superior Court. Defendant was indicted upon a bill of indictment charging him with the first degree rape of Betty Elizabeth Piner. Defendant entered a plea of not guilty, and the jury returned a verdict of first degree rape. Defendant appealed from judgment imposing a sentence of life imprisonment.

The facts pertinent to decision of this case will be stated in our consideration of the assignments of error.

Rufus L. Edmisten, Attorney General, by David S. Crump, Special Deputy Attorney General, and Tiare Smiley Farris, Associate Attorney, for the State.

William G. Ijames, Jr., and Wade H. Leonard, Jr., for defendant appellant.

BRANCH, Justice.

Defendant assigns as error the trial judge's denial of his motion to suppress the prosecuting witness's identification testimony and the court's admission of evidence, over objection, concerning pretrial identification procedures.

Pursuant to defendant's motion to suppress testimony of the prosecuting witness's identification of defendant as her assailant, Judge Mills conducted a voir dire hearing in the jury's absence.

On voir dire, Betty Elizabeth Piner testified that on 17 September 1975 at about 6:00 p.m., she was unlocking her automobile which was parked in Hanes Mall in Winston-Salem, North Carolina, when she was forced into the car by a black man. She was only a foot away from this person when she was forced into the car, and there was enough light for her to see him. He held her down on the seat and drove to a place unknown to her where he stopped the car and forced her to lie in the front seat with her head on the driver's side. By this time it was dark, but as her head pressed against the door, the interior lights came on. She stated: "The lights were on for about a minute when he first raped me . . . I did at this time get a good look at the individual involved." The witness then identified her assailant as defendant, Arthur Barrymore Carson. She testified that she was in defendant's presence for two and one-half to three hours.

Within a week, she was shown six pictures of different black men by Sergeant Hartsoe and another police officer. The photographs were handed to her in a stack, and she put them on the table. After ten or fifteen minutes, she picked out a photograph of defendant and told the officers she believed this was the man who raped her. She did not look at the back of the photograph of defendant, but she testified that it differed from

the other photographs in that "it had a plate or whatever in front of him." She stated that all the photographs were of black men of about the same age and that the police officers made no suggestions concerning the identification other than to request that she look at the photographs.

In March, 1977, she observed another series of photographs at the Davie County jail in Mocksville, North Carolina. At that time, Sergeant Hartsoe and another police officer placed on a table five or six recently developed photographs. The officers without any other comment asked her to see if she recognized anybody in this series of photographs. This group of photographs consisted of head shots of black males, all of about the same age and size. At that time, she identified the photograph of defendant as being a likeness of the man who raped her. She stated:

> . . . I believe I could recognize the defendant today if I had not seen the photographs nor if I had seen him in District Court in the preliminary hearing.

The State also offered the testimony of the police officers which tended to corroborate the testimony of the witness Piner concerning the pretrial photographic procedures except one officer's testimony failed to corroborate her as to the *place* where the first group of photographs was shown. The State's evidence also tended to show that defendant had been served with a nontestimonial identification order and was in custody upon a charge of illegal possession of a contraband substance when the photograph which appeared in the second group was taken. Before his photographs were taken, defendant was advised of his right to have a lawyer present and that one would be furnished if he could not afford to hire one. There was evidence tending to show that defendant gave his consent for the taking of his photograph.

During the voir dire, counsel agreed upon and placed into evidence the following stipulation:

> MR. FULLER: We have stipulations we would like to get into the record. It is stipulated by and between the State of North Carolina and counsel for Mr. Carson that the in-court identification which occurred at the preliminary hearing in this case on the 18th of April, 1977, was conducted at the re-

quest of defendant's counsel, Mr. Ijames, that defendant's counsel, Mr. Ijames selected each of the individuals that appeared in that lineup with the exception of the defendant who was there because he was in court for his preliminary hearing, that Mrs. Piner selected defendant from this group of black males in this lineup, that at the time the selection was made, defendant was not seated beside of counsel at the defense table, but in the group of several black males, is that right?

MR. IJAMES: Yes, sir.

At the conclusion of voir dire evidence, the trial judge found facts consistent with the facts above summarized and concluded:

NOW, THEREFORE, THE COURT FINDS AND DETERMINES that from clear and convincing evidence and beyond a reasonable doubt that the in-Court identification of the defendant, Arthur Barrymore Carson, by the prosecuting witness, Betty Elizabeth Piner, is of independent origin based solely on what she saw at the time of her abduction and rape, and does not result from out of Court viewing of any photographs or any pretrial identification procedures and conducive to mistaken identification . . . .

Based on his findings and conclusions, the trial judge thereupon denied defendant's motion to suppress the identification testimony of the witness Piner.

In the landmark case of *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968), the United States Supreme Court held that convictions based on eyewitness identification will not be set aside because of an improper pretrial identification by photograph unless the "photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

We set forth in *State v. Knight*, 282 N.C. 220, 192 S.E. 2d 283 (1972), certain factors to be applied in employing the *Simmons* test:

(1) The manner in which the pretrial identification was conducted; (2) the witness's prior opportunity to observe the alleged criminal act; (3) the existence of any discrepancies between the defendant's actual description and any descrip-

tion given by the witness before the photographic identification; (4) any previous identification by the witness of some other person; (5) any previous identification of the defendant himself; (6) failure to identify the defendant on a prior occasion; and (7) the lapse of time between the alleged act and the out-of-court identification.

Accord: *State v. Blackwell*, 276 N.C. 714, 174 S.E. 2d 534 (1970), *cert. denied*, 400 U.S. 946.

[1] Defendant argues that the first photographic identification procedure was impermissibly suggestive because the picture of defendant contained a placard on the front indicating his height, weight and other personal information. At this point, it must be borne in mind that defendant did not move to suppress the evidence of the pretrial identification techniques, and we are not presented with a question as to the effect of such a photograph upon a jury verdict as was the case in *State v. Hatcher*, 277 N.C. 380, 177 S.E. 2d 892 (1970). This single difference between defendant's photograph and the other photographs included in the procedure did not necessarily suggest that defendant was the witness's assailant. Further, defendant's argument is diluted by the fact that the witness had ample opportunity to see her assailant at close range on two occasions. The record discloses no major discrepancies between the witness's initial description of defendant and his actual appearance. The witness never identified anyone except defendant as the man who raped her. There was no previous failure to identify defendant although the first identification was somewhat equivocal. However, the witness explained the reason that her identification was not positive and showed a commendable desire to be certain by requesting that she be shown a clearer photograph or be permitted to view a lineup.

[2] A second set of photographs was shown to the witness Piner in 1977 at the Davie County jail in Mocksville, North Carolina. At that time, she positively identified a photograph of defendant as a likeness of the man who raped her. Defendant first argues that this procedure was illegal because he was being illegally detained. Defendant was taken into custody by officers who sought to serve him with a nontestimonial identification order. Defendant fled and was apprehended in a wooded area under conditions which made the officers reasonably believe that he was in possession of a

weapon. Therefore, before serving the order, they made a search of his person and found that he was carrying a quantity of marijuana. The officers immediately warned him of his rights and placed him under arrest for illegal possession of a controlled substance. Under the circumstances of the case, the arrest and ensuing search were legal. G.S. 15A-502 provides:

> § 15A-502. *Photographs and fingerprints.*—(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:
>
> (1) *Arrested* or committed to a detention facility, or
>
> * * *
>
> (e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies. [Emphasis added.]

[3] Defendant was under arrest for a misdemeanor at the time he was photographed. Clearly, it was the intent of the Legislature that such photographs could be used for any law enforcement purpose.

[4] Defendant also argues that the second photographic procedure was illegal because he did not waive his right to presence of counsel. We find no merit in this contention.

Handwriting samples, blood samples, fingerprints, clothing, hair, voice demonstrations, *even the body itself,* are identifying physical characteristics and are outside the protection of the Fifth Amendment privilege against self-incrimination. Such pretrial police investigative procedures do not constitute a "critical" stage of the trial at which the accused is entitled to the assistance of counsel as guaranteed by the Sixth Amendment and made obligatory upon the states by the Fourteenth Amendment. *State v. Wright,* 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. denied,* 396 U.S. 934; *State v. Gaskill,* 256 N.C. 652, 124 S.E. 2d 873 (1962); *Schmerber v. California,* 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966); *Gideon v. Wainwright,* 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963).

We note that the United States Supreme Court held in the recent case of *United States v. Dionisio*, 410 U.S. 1, 35 L.Ed. 2d 67, 93 S.Ct. 764 (1973), that a directive by a federal grand jury to a witness to furnish voice exemplars did not violate the witness's Fourth Amendment rights. In so holding, the Court stated:

> In *Katz v. United States, supra*, we said that the Fourth Amendment provides no protection for what "a person knowingly exposes to the public, even in his own home or office . . . ." 389 US, at 351, [19 L.Ed. 2d 576]. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world. . . .

[5] We are advertent to the provisions of Article 14 of Chapter 15A of the General Statutes which require that an order for nontestimonial evidence shall contain a statement that the person is entitled to counsel at the procedure and to appointment of counsel if he cannot afford to retain one. In our opinion, the provisions of this article of the General Statutes are not here applicable since defendant was legally arrested on a misdemeanor charge, and under these circumstances, he could be photographed without the aid of the nontestimonial order.

When the two pretrial photographic procedures and the lineup, which was arranged by and held in the presence of defendant's counsel, are considered either singly or collectively, we conclude that the pretrial identification procedures were not so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Even had the pretrial procedures been impermissibly suggestive, the finding by the trial judge that the in-court identification of defendant was of independent origin was based on clear and convincing evidence heard on a properly conducted voir dire hearing and is, therefore, binding on this Court. *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902; *State v. Tuggle*, 284 N.C. 515, 201 S.E. 2d 884 (1974).

We hold that the trial judge correctly denied defendant's motion to suppress identification testimony of the prosecuting witness and correctly admitted evidence concerning the pretrial identification procedures.

[6] Defendant assigns as error the ruling of the trial judge which permitted the State to challenge a juror who had been passed by the State and defendant.

After prospective juror Jones had been passed by the State, he indicated on voir dire by defense counsel that he had known defendant's family all his life and that it would be uncomfortable for him to sit as a juror. The trial judge was not in the courtroom at that time, and the jury selection continued. When the judge returned, he was informed of the statements made by prospective juror Jones but made no ruling at that time. After the jury selection was completed, but before the jury was impaneled, the court allowed the State's challenge for cause as to prospective juror Jones. Thereafter the jury selection was completed, and the jury was impaneled.

A trial judge, in the exercise of his duty to see that a competent, impartial jury is impaneled, may in his discretion excuse a prospective juror even without challenge by either party. Decision as to a prospective juror's competency to serve is a matter resting in the trial judge's sound discretion and is not subject to review unless accompanied by some imputed error of law. The fact that the juror has been passed by both parties to the cause does not affect the court's control of jury selection. *State v. Waddell*, 289 N.C. 19, 220 S.E. 2d 293 (1975), *death sentence vacated*, 428 U.S. 904; *State v. Wetmore*, 287 N.C. 344, 215 S.E. 2d 51 (1975), *death sentence vacated*, 428 U.S. 905. Further, assuming arguendo that there were not sufficient grounds to support a challenge for cause, defendant would not have been entitled to a new trial so long as the jury as actually impaneled consisted of persons who were competent and qualified to serve. This is especially true when defendant has not exhausted his peremptory challenges. *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death sentence*, 403 U.S. 948. This record does not show that defendant exhausted his peremptory challenges or that the jury as impaneled contained anyone who was not competent and qualified to serve. This assignment of error is overruled.

[7] Defendant contends that the court erred by permitting the prosecuting witness to testify that she *thought* she saw a knife. This testimony was competent. The witness was testifying from her own firsthand knowledge, and the weight to be given this testimony was for the jury. *State v. Haney,* 263 N.C. 816, 140 S.E. 2d 544 (1965).

[8] Defendant next assigns as error the trial court's denial of his motion to dismiss the charge of first degree rape.

G.S. 14-21 provides:

> Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:
>
> (a) First-Degree Rape—
> (1) If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death; or
>
> (2) If the person guilty of rape is more than 16 years of age, and the rape victim had her resistance overcome or her submission procured by the use of a deadly weapon, or by the infliction of serious bodily injury to her, the punishment shall be death.
>
> (b) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

Defendant first argues that the State has failed to produce evidence tending to show that he used a deadly weapon to overcome the resistance of the prosecuting witness.

Betty Elizabeth Piner testified that when defendant came up behind her in the parking lot that she felt something in her back; that after he stopped the car in the cornfield and put her in the back seat of the automobile, she observed a knife with a blade about five or six inches long in his left hand, and at that time,

defendant told her that if she did not submit, she would never go home. She struggled and tried to push defendant away. She hit him, kicked him and asked him to stop. She tried to escape on two occasions "but he was just very strong, there was nothing I could do." She testified that she was afraid of defendant, and she did not know what he might do. The prosecuting witness further testified that defendant placed his private parts into her private parts on two separate occasions. The State also offered evidence which tended to show that defendant was over sixteen years of age. Thus, when considered in the light most favorable to the State and giving the State the benefit of every reasonable inference to be drawn from the evidence, there was competent evidence to support the allegations in the bill of indictment which charged defendant with first degree rape. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974); *State v. Block*, 245 N.C. 661, 97 S.E. 2d 243 (1957). Neither do we find merit in defendant's argument that the charges of rape should have been dismissed because there was no evidence that the prosecuting witness did not consent to the sexual intercourse. Examination of the evidence recited above permits reasonable inferences that the prosecuting witness was forcibly abducted and that she tried to escape and physicially resisted defendant's advances and pleaded with him not to commit the act. Further, the evidence would permit a reasonable inference that the prosecuting witness submitted because she feared for her life and safety.

[9] Defendant assigns as error the trial judge's denial of his motions to dismiss the charges against him for lack of a speedy trial.

In *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972), we considered a similar question and there stated:

> The constitutional right to a speedy trial protects an accused from extended imprisonment before trial, from public suspicion generated by an untried accusation, and from loss of witnesses and other means of proving his innocence resulting from passage of time. Whether defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. The accused has the burden of showing that the delay was due to the State's wilfulness or neglect. Unavoidable delays and delays caused or requested by defendant do not

violate his right to a speedy trial. Further, a defendant may waive his right to a speedy trial by failing to demand or to make some effort to obtain a speedier trial. *State v. Ball*, 277 N.C. 714, 178 S.E. 2d 377; *State v. Hollars*, 266 N.C. 45, 145 S.E. 2d 309; *State v. Lowry* and *State v. Mallory*, 263 N.C. 536, 139 S.E. 2d 870. The constitutional right to a speedy trial prohibits arbitrary and oppressive delays by the prosecution. *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274. But this right is necessarily relative and is consistent with delays under certain circumstances. *Beavers v. Haubert*, 198 U.S. 77, 49 L.Ed. 950, 25 S.Ct. 573.

In instant case, defendant was taken into custody on 2 March 1977. On 28 July 1977, he filed a motion for a speedy trial. Judge Robert Collier signed an order requiring the case to be *calendared* for trial at the next criminal term of Superior Court in Davie County. In his order, Judge Collier found that pursuant to a request of defendant's attorney, the case had not been calendared at the July, 1977, Session of Davie Superior Court. On 28 October 1977, the court entered an order pursuant to a motion by defense counsel for a speedy trial in which it was indicated that the district attorney could not reach defendant's case at the October, 1977, Session of Davie Superior Court because of a murder trial. In the same order, the court ordered defendant's counsel to submit a written motion for dismissal because of a lack of a speedy trial. The written motion was filed, and after a hearing, an order was entered requiring the district attorney to place defendant's case on the calednar for trial by the April, 1978, Session of Davie Superior Court and provided that failure to do so would result in a dismissal from failure to prosecute. In the year 1977, there were three Criminal Sessions of Davie Superior Court and one mixed session. Defendant was brought to trial on 16 January 1978.

Defendant has failed to show that there was any arbitrary, purposeful or oppressive delay by the State. Neither does he show that the delay of approximately ten months created public suspicion against him or deprived him of any means of proving his innocence. Under the circumstances of this case, the trial judge correctly overruled defendant's motion to dismiss for lack of speedy trial.

[10] Defendant argues that the trial judge committed prejudicial error by excluding testimony describing an individual by the name of Lee Fleming.

The record discloses the following:

Q. Would you describe the best you could an individual by the name of Lee Fleming in 1975?

OBJECTION. SUSTAINED.

EXCEPTION #12

Q. Tell us what Lee Fleming looked like.

OBJECTION. SUSTAINED.

EXCEPTION #13

Q. Would you tell us how tall Lee Fleming was?

OBJECTION. SUSTAINED.

EXCEPTION #14

We do not know what the witness would have said in response to defense counsel's questions. It is the rule in this jurisdiction that when the record fails to show what the answer would have been had the witness been permitted to answer the challenged question, the trial judge's ruling cannot be held to be prejudicial error. *State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. Brewer*, 202 N.C. 187, 162 S.E. 363 (1932).

[11, 12] Defendant's contention that it was error to recall the witness Stanley for rebuttal testimony is without merit. It is within the trial judge's discretion to admit evidence on rebuttal which would have been otherwise admissible, and the appellate courts will not interfere absent a showing of gross abuse of discretion. No such abuse is shown here. *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973). Neither do we find substance in defendant's contention that the trial judge erred by denying his motion for a mistrial because the witness Williams was permitted to testify as a surprise witness and give additional testimony after the State had rested its case and after the court had denied defendant's motion to dismiss.

A trial judge has discretionary power to permit the introduction of additional evidence after a party has rested. *State v. Coffey*, 255 N.C. 293, 121 S.E. 2d 736 (1961); *State v. Perry*, 231 N.C. 467, 57 S.E. 2d 774 (1950). This is so even after arguments to the jury have begun. *State v. Jackson*, 265 N.C. 558, 144 S.E. 2d 584 (1965). If defendant had been taken by surprise by the additional evidence, he should have moved for a continuance or a recess in order to prepare to meet the additional evidence instead of making a motion for a mistrial. *State v. Coffey, supra.*

[13] Defendant assigns as error the failure of the trial judge to submit to the jury the lesser included offenses of assault with intent to commit rape and assault on a female.

The necessity for instructing on lesser included offenses of the crime charged arises only when there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Dawson*, 281 N.C. 645, 190 S.E. 2d 196 (1972); *State v. Bryant*, 280 N.C. 551, 187 S.E. 2d 111 (1972); *State v. Carnes*, 279 N.C. 549, 184 S.E. 2d 235 (1971). In the case *sub judice*, all the evidence discloses completed acts of intercourse. Defendant's defense was in the nature of alibi. Thus, there was no evidence to warrant submitting to the jury the lesser included offenses of assault with intent to commit rape and assault on a female.

[14] Defendant takes the position that the trial judge erred in charging the jury concerning the use of a deadly weapon.

Under this assignment of error, defendant first argues that the charge was erroneous because the evidence does not show that Betty Elizabeth Piner's assailant overcame her resistance or obtained her submission by the use of a deadly weapon.

In *State v. Thompson*, 290 N.C. 431, 226 S.E. 2d 487 (1976), this Court, speaking through Chief Justice Sharp, stated:

> The decision in *Dull* is authority for the proposition that a deadly weapon is used to procure the subjugation or submission of a rape victim within the meaning of G.S. 14-21(a)(2) when (1) it is exhibited to her and the defendant verbally, by brandishment or otherwise, threatens to use it; (2) the victim knows, or reasonably believes, that the weapon remains in the possession of her attacker or readily accessible to him;

and (3) she submits or terminates her resistance because of her fear that if she does not he will kill or injure her with the weapon. In other words, the deadly weapon is used, not only when the attacker overcomes the rape victim's resistance or obtains her submission by its actual functional use as a weapon, but also by his threatened use of it when the victim knows, or reasonably believes, that the weapon is readily accessible to her attacker or that he commands its immediate use.

The facts in this case show that when the prosecuting witness was abducted from the parking lot, she "felt something in her back," and that when defendant pulled her in the back seat of the car, she saw a knife which was about five or six inches long in his left hand. She testified, "He did place his private parts in my private parts in the back seat. That was after I saw the knife." Defendant told her that if she did not do what he wanted her to do, she would never go home, and this statement was made at a time when the knife was instantly accessible to him. This evidence permits an inference that when the second rape was committed that defendant procured the victim's submission by the use of a deadly weapon.

[15] Defendant also argues by this assignment of error that the trial judge committed prejudicial error by charging that a knife is a deadly weapon.

Some weapons, under particular circumstances, such as guns, revolvers, pistols and swords when used in striking distance of the victim are so clearly lethal that the court may declare them deadly weapons as a matter of law. Other weapons, including a knife, may be declared deadly weapons according to the manner in which they were used. In the latter class, whether the weapon is lethal is ordinarily a question for the jury. 79 Am. Jur. 2d, *Weapons and Firearms*, Section 1, page 4.

Here the judge in his final mandate to the jury on a charge of first degree rape charged "that if you find from the evidence and beyond a reasonable doubt that on or about September 17, 1975, Arthur Barrymore Carson . . . had sexual intercourse with Betty Elizabeth Piner without her consent . . . and procured her submission by the use of a deadly weapon, a knife, it would be your duty to return a verdict of guilty of first degree rape. . . ."

The evidence shows that defendant had a five inch knife in his hand when he forced the prosecuting witness into the back seat of the automobile and that she observed the knife within striking distance as she lay prostrate just before the rape occurred. Under these circumstances, we do not believe that the jury was misled or that its verdict was influenced by the court's initial instruction that a knife was a deadly weapon.

Finally, defendant contends that the trial judge expressed an opinion as to defendant's guilt in his charge to the jury. He avers that the "tone" of the instructions conclusively charged that defendant was the one who committed the assault on Betty Elizabeth Piner. We disagree. Suffice it to say that we have read the entire charge and find nothing which expresses an opinion on the part of the court that defendant was guilty of the crime charged.

We have carefully examined defendant's assignments of error and find nothing which warrants that the verdict returned or the judgment entered be disturbed.

No Error.

STATE OF NORTH CAROLINA v. KENNETH BERNARD HOLMES

No. 16

(Filed 28 November 1978)

1. **Criminal Law § 102.5— remarks by district attorney improper—no prejudice to defendant**

Though remarks by the district attorney that he could have tried defendant for first degree murder, that he believed defendant would hire somebody to kill and that a witness had lied for his son were improper, the trial judge, in light of the strong evidence of defendant's guilt, did not commit prejudicial error by failing to instruct the jury to disregard the remarks or by failing to declare a mistrial on his own motion.

2. **Criminal Law § 86.9— State's objections sustained—witness answers anyway—no prejudice to defendant**

Defendant's assignment of error to the trial judge's ruling sustaining the State's objections to questions, directed to a witness who had plea bargained, which sought to elicit statements made to him by his counsel that he would be

tried for first degree murder if he did not testify against defendant is without merit, though such declarations were admissible to evidence the witness's state of mind, since, after a brief delay, the witness answered the question, and the information sought by the questions was already in the record.

3. **Criminal Law § 66.7— pretrial photographic identification—no taint—independent origin of in-court identification**

In a second degree murder prosecution the trial court did not err in denying defendant's motion to strike identification testimony, since defendant never objected throughout the witness's lengthy testimony, and since the court, upon defendant's motion to strike, made findings supported by the evidence and concluded that a pretrial photographic identification procedure was not impermissibly suggestive and that the witness's identification was of independent origin and not tainted by any pretrial procedure.

4. **Criminal Law § 117.2— interested witness—jury instructions proper**

Defendant's contention that the trial judge erred in failing to explain to the jury why a witness who had plea bargained was an interested witness is without merit since it was clear from the court's instruction on interested witnesses, given *ex mero motu*, and from the record evidence why the witness was an interested witness.

5. **Homicide § 2— accessory before the fact to second degree murder—punishment greater than conviction for second degree murder—accessory before the fact is lesser included offense**

Defendant's contention that the crime of accessory before the fact to second degree murder is not a lesser included offense of the charge of second degree murder because a conviction of accessory before the fact carries a mandatory sentence of life imprisonment while a conviction of second degree murder permits the imposition of a discretionary sentence ranging from two years to life imprisonment is without merit since the Supreme Court has held that the crime of accessory before the fact is included in the charge of the principal crime.

APPEAL by defendant from *Lewis, J.*, 14 November 1977 Criminal Session of ALEXANDER Superior Court.

Defendant was charged by a bill of indictment with the first degree murder of Horace Andrew Morrison, Jr. The State elected to try defendant for second degree murder.

The State offered as its principal witness Marshall Brown, who was indicted for the same murder. He had previously entered a plea of guilty to second degree murder as a result of plea negotiations between his attorney and the district attorney. Brown testified that defendant had hired him to murder Horace Andrew Morrison, Jr., who was a witness in a pending criminal case against defendant. Defendant had promised to pay Brown

the sum of $2,000.00 and to deliver to him a pound of marijuana as the price for the killing. On 3 July 1977, pursuant to the arrangement with defendant, he shot and killed Morrison, who was visiting in a friend's home in Taylorsville, North Carolina.

The State offered other witnesses whose testimony tended to show that on the day preceding the shooting, defendant had furnished money to buy a .30 caliber carbine which weapon was actually purchased by Johnny Ray Porter. There was also expert testimony to the effect that a .30 caliber carbine which was found in defendant's possession after his arrest in Washington, D. C., was the weapon which fired a bullet that was removed from the wall of the room in which Morrison was sitting and that casings found in a wooded area about 70 feet from the house where Morrison was shot were also from the same weapon.

Defendant testified and stated that he had never asked Brown to kill anyone. He further denied going to a gun shop and furnishing money to buy the .30 caliber carbine and ammunition. He also offered other evidence in the nature of an alibi.

At the close of the evidence, the following issues were submitted to the jury:

(1) Do you find the defendant guilty of accessory before the fact of second-degree murder? or,

(2) Do you find the defendant not guilty?

The jury returned a verdict of guilty of accessory before the fact to murder in the second degree. Defendant appeals from judgment imposing a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

T. C. Homesley, Jr., for defendant appellant.

BRANCH, Justice.

[1] Did the trial judge commit prejudicial error by failing to declare a mistrial on his own motion or in the alternative by failing to instruct the jury to disregard certain remarks made by the district attorney in the presence of the jury? The answer to this question is governed by the followed well recognized rules.

Every person charged with a crime has the right to be tried before an impartial judge and by an unprejudiced jury. It is the duty of the court and the prosecuting attorney to see that this right is not denied. *State v. Britt*, 288 N.C. 699, 220 S.E. 2d 283 (1975); *State v. Monk*, 286 N.C. 509, 212 S.E. 2d 125 (1975). The prosecuting attorney should use every honorable means to secure a conviction, but it is his duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of an accused. *State v. Britt, supra; State v. Monk, supra.* It is improper for counsel to place before the jury incompetent and prejudicial matter by injecting his personal beliefs and opinions which are not supported by the evidence. *State v. Noell*, 284 N.C. 670, 202 S.E. 2d 750 (1974), *death sentence vacated*, 428 U.S. 902; *State v. Monk, supra.* The prosecuting attorney owes a duty to the state which he represents and to the court of which he is an officer to observe these often repeated rules of practice which are created by law to ensure that every defendant is afforded the safeguards guaranteeing him a fair trial. *State v. Phillips*, 240 N.C. 516, 82 S.E. 2d 762 (1954). To do otherwise would be to demean the courts and to impugn the constitutional guarantees of due process.

The conduct of a trial and the prevention of unfair tactics by all connected with the trial must be left in a large measure to the discretion of the trial judge, and it is the duty of the trial judge to intervene when remarks of counsel are not warranted by the evidence and are calculated to prejudice or mislead the jury. *State v. Miller*, 271 N.C. 646, 157 S.E. 2d 335 (1967); *State v. Kirkman*, 234 N.C. 670, 68 S.E. 2d 315 (1951). We will not interfere with the exercise of the court's discretion unless the impropriety of counsel was gross and calculated to prejudice the jury. *State v. Barefoot*, 241 N.C. 650, 86 S.E. 2d 424 (1955).

We turn to the alleged improprieties which are assigned as error.

During the cross-examination of the State's witness Brown concerning his plea bargaining arrangement with the State, defense counsel asked the witness if he knew that he could have received the death penalty on the charge contained in the bill of indictment for first degree murder. The district attorney objected and added, "I could have tried your man for first degree murder

too." The trial judge overruled the State's objection without any further instruction or comment. We find little prejudice in this remark of the district attorney since from the time of arraignment when the indictment charging defendant with first degree murder was read in the presence of the jury and the district attorney elected to try defendant "for second degree murder or whatever verdict the evidence may warrant," it must have been crystal clear that the district attorney could have in fact tried defendant upon the charge of first degree murder.

As defense counsel continued his cross-examination of the witness Brown, the following exchange took place:

MR. HOMESLEY: I believe he [defendant] is sort of a health nut. . . . jogs and runs?

MR. ZIMMERMAN: Objection to what Mr. Homesley believes. I believe he'd hire somebody to kill somebody, too.

COURT: Overruled.

It is true that at the proper time for argument, the district attorney may argue the evidence and the legitimate inferences that the jury might draw from the evidence, however, it is not proper for the district attorney to interpose his personal opinions before the jury as to the guilt or innocence of an accused during the presentation of evidence and before all the evidence is in. Here the district attorney's statement that he believed defendant would hire somebody to kill was improper.

During the cross-examination of defendant's father, Fred Alexander Holmes, the district attorney apparently elicited from the witness that under some circumstances he would lie for his son. On redirect examination by defense counsel, the record discloses that the following occurred:

MR. HOMESLEY: Mr. Holmes, have you lied for him at any time?

MR. ZIMMERMAN: Objection, Your Honor, he certainly has.

COURT: Just a minute. You gentlemen are trying my patience. Do not use the word lie in my Courtroom again. Members of the Jury, you will not consider that.

WITNESS: I have told the truth today.

MR. HOMESLEY: All right.

The district attorney's statement that the witness has lied for his son exceeded the bounds of propriety. *State v. Miller, supra; State v. Thompson,* 278 N.C. 277, 179 S.E. 2d 315 (1971). However, the action of the trial judge in immediately interceding and cautioning the jury not to consider this statement tended to cure any prejudice to defendant. Ordinarily, such action by the trial judge cures the impropriety of counsel since the presumption is that the jurors will understand and comply with the court's instructions. *State v. Britt, supra; State v. Self,* 280 N.C. 665, 187 S.E. 2d 93 (1972). We do not believe that this is one of the instances where the impropriety was so gross and highly prejudicial that a curative instruction would not remove the prejudice from the minds of the jurors. *See, State v. Roach,* 248 N.C. 63, 102 S.E. 2d 413 (1958).

The conduct of the district attorney in making gratuitous remarks concerning the case in connection with his objections and during the cross-examination by defense counsel is not approved. Comments upon the evidence should be made in his argument to the jury or to the judge in the jury's absence.

Finally, we must determine if the remarks of the district attorney, singly or collectively, resulted in such impropriety as would justify disturbing the verdict and judgment entered in this case. The trial judge's intervention and instruction to the jury not to consider the statement that the witness Fred Holmes had lied tended to cure the prejudicial effect of this statement. The dignity and decorum of the court suffered more prejudicial effect from the conduct of the district attorney than did defendant. In view of the strong evidence of defendant's guilt, we are of the opinion that these isolated remarks in the heat of battle did not affect the verdict of the jury. We, therefore, hold that the trial judge did not commit prejudicial error by failing to instruct the jury to disregard certain remarks of the district attorney and by failing to declare a mistrial on his own motion.

[2] Defendant assigns as error the ruling of the trial judge sustaining the State's objections to questions directed to the witness Marshall Lee Brown which sought to elicit statements made to him by his counsel.

The record shows the following:

MR. HOMESLEY: And he told you as late as today if you didn't testify against Holmes that they were going to try you for first degree murder?

MR. ZIMMERMAN: Objection. I don't know what he told him about that, Your Honor.

COURT: Sustained.

MR. HOMESLEY: Is that your understanding?

MR. ZIMMERMAN: Objection.

COURT: Overruled.

WITNESS: No, he didn't tell me that today.

Defendant argues that these declarations were admissible to evidence the witness's state of mind, *e.g.*, to charge him with knowledge or notice of the facts declared. Volume 1, Stansbury's North Carolina Evidence (Brandis Rev.), Section 141, pages 469, 470. We are of the opinion that this is a correct statement of the rule. However, it is obvious that there is no merit in this assignment of error since, after a brief delay, the witness answered the question. Further, the stipulation concerning the plea arrangement with the witness Brown was in the record, and the witness unequivocally testified that he understood that if he did not testify against defendant, he would be tried for first degree murder rather than upon the charge of second degree murder. This assignment of error is without merit.

[3] Defendant assigns as error the trial judge's denial of his motion to strike the identification testimony given by the witness Johnny Ray Porter.

The witness Porter testified, without objection, that on 2 July 1972, he, Marshall Brown, Steve Turner and defendant went to the P and G Gun Shop in Statesville, North Carolina, where he "signed" for and purchased a .30 caliber carbine. He made the purchase at the request of Marshall Brown and paid for the weapon with money furnished by the defendant. The group then proceeded to a wooded area where the weapon was test-fired. Throughout his lengthy testimony, the witness, without objection, many times referred to defendant as the person who furnished the money to buy the weapon. It was not until the State had

rested it case that defense counsel challenged Porter's identification testimony by lodging a motion to strike.

In *State v. Cook*, 280 N.C. 642, 187 S.E. 2d 104 (1972), the defendant was charged with rape of an eight year old child who identified her assailant. Defendant did not object or request a *voir dire* hearing at the time the identification testimony was given. On appeal, the defendant contended that certain pretrial photographic procedures were so impermissibly suggestive that the identification testimony should have been suppressed. In rejecting this contention, Justice Lake, speaking for the Court, stated:

> In *State v. Accor* and *State v. Moore*, 277 N.C. 65, 79, 175 S.E. 2d 583, Chief Justice Bobbitt said: "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 identification 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." 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.

Accord: *State v. Wilson*, 289 N.C. 531, 223 S.E. 2d 311 (1976); *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971).

In the case before us, there was no objection or request for a *voir dire* at the time identification testimony was received. Even so, upon defendant's motion to strike the testimony, the trial judge, after further examination of the witness Porter, *inter alia*, found:

5. That the SBI Agent Lester had a package of photographs with him at the time he took a statement from the witness

Porter; these photographs being of black males of varying sizes and ages, and numbering anywhere from four to eight.

6. That there is no testimony by anyone that the officer pointed out the photograph which he, Officer Lester, wanted the witness Porter to identify; and the record is silent as to whether or not these photographs were placed in any suggestive order.

7. The photographs are not available to this trial.

Based on his findings, the trial judge concluded:

. . . that there was no pretrial identification procedure so unnecessarily suggestive and conductive [sic] to irreparably mistaken identification as to offend fundamental standards of decency, fairness and justice. The Court further concludes that even if it be found (and there is no evidence to so find) that the pretrial identification procedure by Officer Lester was made under impermissible circumstances, the Court concludes that the witness Porter's in-court identification of the Defendant Holmes is and was of independent origin and, under the totality of the circumstances, is not tainted by any illegal pretrial proceeding.

There was ample evidence to support the trial judge's findings, and the findings in turn support his conclusions and ruling.

For the reasons stated, this assignment of error is overruled.

[4] Defendant contends that the trial judge erred in failing to explain to the jury *why* Marshall Brown was an "interested witness."

The trial judge is not required to give a cautionary instruction that the jury should scrutinize the testimony of a witness on the grounds of interest or bias absent a request that he so instruct. *State v. Roberts*, 293 N.C. 1, 235 S.E. 2d 203 (1977). Here defense counsel did not request such instruction, but the trial judge, *ex mero motu*, gave the following instruction:

In this case, you may find that a witness is interested in the outcome of this trial. In deciding whether or not to believe such a witness, you may take his or her interest into

account. If, after doing so, you believe his or her testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

The State has advised you and, in cross-examination, Mr. Marshall Brown has admitted that Brown shot Drew Morrison and killed him and that Brown was testifying under an agreement with the State for a charge reduction in exchange for his testimony from first-degree murder to what he pleaded guilty to of second-degree murder.

I instruct you that you should examine Brown's testimony with great care and caution in deciding whether or not to believe him. If after doing so, you believe his testimony in whole or in part, you should treat what you believe the same as any other believable evidence.

This instruction was adequate, and the instruction and the record evidence made it perfectly clear *why* Brown was an interested witness.

[5] Finally, defendant assigns as error the court's instruction to the jury to return a verdict of either guilty of accessory before the fact to murder in the second degree or a verdict of not guilty.

Defendant was indicted for murder in the first degree. At his arraignment during the week of his trial, the district attorney elected to try defendant on the charge of second degree murder or "whatever verdict the evidence may warrant." The trial judge submitted to the jury only the possible verdicts of guilty of accessory before the fact to murder in the second degree or a verdict of not guilty.

Defendant takes the position that the only permissible verdicts that the judge should have submitted to the jury were guilty of murder in the second degree or not guilty. He points to the fact that since the charge of accessory before the fact to second degree murder carries a mandatory sentence of life imprisonment and a conviction upon a charge of second degree murder permits the imposition of a discretionary sentence ranging from two years to life imprisonment that the crime of accessory before the fact is not a lesser included offense of the charge of second degree murder.

It is true that G.S. 14-6 provides that any person convicted as an accessory before the fact in either of the degrees of murder shall be imprisoned in the State's prison for life and that G.S. 14-17 provides for a discretionary sentence of imprisonment for a term ranging from two years to life imprisonment upon a conviction on a charge of murder in the second degree. However, this Court has held that the imposition of a life sentence upon a conviction of accessory before the fact of murder when the actual murderer received a lesser sentence was not constitutionally impermissible. In so holding, the Court stated that it cannot be assumed that the Legislature's division of murder into degrees together with a reduction of punishment for murder in the second degree implied a reduction in the punishment for conviction as an accessory before the fact to murder. *State v. Benton*, 276 N.C. 641, 174 S.E. 2d 793 (1970). *Benton* also stands for the proposition that there may be accessories before the fact to murder in the first degree and murder in the second degree. Thus, standing alone, the disparity in punishment would not support defendant's position. Whether accessory before the fact to second degree murder is a lesser included offense of murder in the second degree poses a more difficult question which has caused an apparent split of authority and a division among members of the Court.

In *State v. Green*, 119 N.C. 899, 26 S.E. 112 (1896), this Court, citing *State v. Dewer*, 65 N.C. 572 (1871), held that it was necessary to *indict* and try an accused as an accessory in order for his conviction to stand. However, these cases were followed by *State v. Bryson*, 173 N.C. 803, 92 S.E. 698 (1917), which, without expressly overruling the preceding cases, held that the crime of accessory before the fact was included in the charge of murder and that the court could legally impose punishment upon conviction as an accessory before the fact to murder when the bill of indictment charged murder. We here note that in *State v. Simons*, 179 N.C. 700, 103 S.E. 5 (1920), the Court quoted the rule set forth in *Bryson* with approval, noting that *Bryson* substantially overruled an earlier case.

In *State v. Jones*, 254 N.C. 450, 119 S.E. 2d 213 (1961), Chief Justice Winborne, speaking for the majority, with Justices Parker, Bobbitt and Higgins dissenting, flatly stated:

"Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or a less degree of the same crime * * *." G.S. 15-170. The crime of accessory before the fact is included in the charge of the principal crime. . . .

We have followed *Jones* in the recent cases of *State v. Philyaw*, 291 N.C. 312, 230 S.E. 2d 370 (1976); *State v. Hunter*, 290 N.C. 556, 227 S.E. 2d 535 (1976), *cert. denied*, 429 U.S. 1093; *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907. Thus, the weight of authority dictates that we adhere to the line of the cases represented by *Jones* and *Philyaw*. Further, we do not think that this case is a proper vehicle for further consideration and clarification of the rule. However, recognizing that the primary problem which has caused a split of authority and a division among the members of the Court arises from the drawing of the bills of indictment and that possible questions of double jeopardy lurk in the present rule, it might be proper for the Legislature to consider clarifying the matter by abolishing the distinction between accessory before the fact and principal and providing the same punishment for both offenses.

This assignment of error is overruled.

Our careful examination of defendant's assignments of error and this entire record reveals no error which warrants a new trial.

No Error.

STATE OF NORTH CAROLINA v. PEGGY MASSEY LEONARD

No. 11

(Filed 28 November 1978)

1. Jury § 6— examination of jury as whole rather than individually—no abuse of court's discretion

The trial court did not abuse its discretion in denying defense counsel permission to ask each prospective juror, rather than the entire panel, a question concerning their willingness to return a verdict of not guilty if defendant could prove her insanity.

2. **Jury § 7.13— no death penalty to be sought for first degree murder conviction—number of peremptory challenges**

In a first degree murder prosecution where the district attorney announced at the beginning of the trial that the state would not ask for the death penalty, the case lost its "capital nature" and the defendant was therefore not entitled to fourteen peremptory jury challenges.

3. **Jury § 7.8— refusal to acquit because of insanity—challenge for cause improperly denied**

The failure of the trial court to dismiss for cause three prospective jurors who indicated that they would not be willing to return a verdict of not guilty by reason of insanity even though defendant introduced evidence that would satisfy them that she was insane at the time she allegedly shot her sister, coupled with defendant's subsequent exhaustion of her peremptory challenges, forced defendant to accept a jury which could not be considered impartial, and she was therefore entitled to a new trial.

4. **Criminal Law § 5— insanity—burden of proof—issue properly submitted to jury**

The burden of proving insanity is properly placed on the defendant in a criminal trial, and even if the evidence of insanity presented by defendant is uncontradicted by the state, it is the defendant's burden to satisfy the jury of the existence of the defense. The state's evidence in this case consisting of testimony by witnesses who observed defendant at the time of the crime and who saw her flee, coupled with the presumption of sanity and the defendant's burden of proof, made the issue of insanity one which the court should properly have submitted to the jury.

5. **Criminal Law § 112.6— insanity—presumption—burden of proof on defendant—instructions proper**

The trial court's instruction that "sanity or soundness of mind is a normal condition of men and women; therefore, everyone is presumed sane until the contrary is made to appear," followed by an instruction on the test for insanity and a reminder that defendant had the burden of proving the existence of the defense was a proper instruction on the defense of insanity.

APPEAL by defendant from *Mills, J.*, at the 12 December 1977 Criminal Session of DAVIDSON Superior Court.

By an indictment proper in form, defendant was charged with the murder of her sister, Minnie Lee Kiger. The first attempt to try defendant ended in a mistrial on 3 November 1977. At her second trial she pled not guilty by reason of insanity.

The State's evidence tended to show:

Between 8:30 and 9:00 p.m. on 17 May 1977 the decedent, her son, and her daughter were seated in the living room of their

home in Lexington. Decedent was assisting her daughter with some schoolwork. A car drove into the driveway in front of the house and decedent went to the window to see who was in the car. She told the children that defendant was in the car. After locking the front door, she went out the side door, through the carport, and down the driveway toward defendant's car. Decedent carried nothing in her hands. The two children watched from the house's front window as their mother approached to within four or five feet of the car. At that point, defendant stepped out, shot decedent several times with a small rifle and then fled in a yellow car. The children summoned neighbors and police to assist their mother. Both children identified the defendant at trial and testified she was the assailant.

A member of the Davidson County Sheriff's Department testified concerning statements given to him by the two children on the night of the incident, both of which corroborated their testimony at trial. A second member of the sheriff's department testified that he arrested the defendant, who owned a yellow car, on the basis of these statements.

At the close of the state's evidence, the parties stipulated that decedent's death resulted from multiple gunshot wounds. Defendant then moved for dismissal on the ground that the state had failed to prove her sanity. This motion was denied.

Defendant did not testify; nor did she offer any evidence tending to contradict the state's version of the events culminating in the death of Minnie Lee Kiger. Evidence offered for the defendant related solely to the issue of sanity and tended to show the following:

Defendant had a history of mental illness dating back to 1967. At the request of her mother, defendant, in March, 1972, had been committed to Dorothea Dix Hospital for several weeks. On that occasion she had wandered away from home and had attacked her mother. After the shooting death of her sister defendant was again committed to Dorothea Dix Hospital for observation. Two expert psychiatrists who examined her testified that she was incapable of knowing right from wrong at the time of the shooting, that she suffered various delusions—among them, the belief that God had directed the killing of her sister, and that her thought processes were irrational.

The state offered no rebuttal of the testimony concerning insanity. The experts were cross-examined, however. The first of them testified on cross-examination that defendant understood the charges against her and could aid her attorney in preparing her defense. He further testified that "circumstances could arise that she would again assault somebody and that could result in death." The second expert was questioned about the length of time in which he had observed defendant; he stated that he interviewed her for 45 minutes in jail after the shooting.

At the close of all the evidence defendant again moved for dismissal, which was denied. Following arguments and instructions to the jury, defendant moved for a mistrial. This motion was also denied. The jury returned a verdict of guilty of first-degree murder and from judgment imposing a life sentence of imprisonment, defendant appeals.

Attorney General Rufus L. Edmisten, by Associate Attorney Jane Rankin Thompson, for the State.

Robert B. Smith, Jr., for the defendant.

BRITT, Justice.

[1] By her first assignment of error defendant contends the trial court erred in denying her request that her counsel be allowed to ask each prospective juror, rather than the entire panel, the following question: "If the defendant should satisfy you by medical testimony that she was insane at the time of the alleged crime, would you be willing to return a verdict of not guilty even though the evidence would show she did kill her sister?"

We find no merit in this assignment. ". . . [A] motion to examine jurors individually, rather than collectively, is directed to the sound discretion which the trial court possesses for regulating the jury selection process." *State v. Thomas*, 294 N.C. 105, 115, 240 S.E. 2d 426 (1978); *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Jarrette*, 284 N.C. 625, 202 S.E. 2d 721 (1974); 8 Strong's N.C. Index 3d, Jury § 6. We perceive no abuse of discretion in this case.

[2] By her fourth assignment of error, defendant contends the court erred in not allowing her 14 peremptory jury challenges. This contention has no merit. In *State v. Barbour*, 295 N.C. 66, 70,

243 S.E. 2d 380 (1978), this court, speaking through Justice Copeland, said:

> "If, . . . , it is determined during jury selection in a prosecution for a crime which formerly had been punishable by death that the death penalty may not be imposed upon conviction, the case loses its capital nature, thereby rendering statutes providing for an increased number of peremptory challenges in capital cases inapplicable. *United States v. McNally*, 485 F. 2d 398 (8th Cir., 1973), *cert. denied*, 415 U.S. 978, 39 L.Ed. 2d 874, 94 S.Ct. 1566 (1974); *Martin v. State*, 262 Ind. 232, 314 N.E. 2d 60 (1974), *cert. denied*, 420 U.S. 911, 42 L.Ed. 2d 841, 95 S.Ct. 833 (1975); *State v. Haga*, 13 Wash. App. 630, 536 P. 2d 648, *cert. denied*, 425 U.S. 959, 48 L.Ed. 2d 204, 96 S.Ct. 1740 (1976); *People v. Watkins*, 17 Ill. App. 3d 574, 308 N.E. 2d 180 (1974). . . ."

See also State v. Clark, 18 N.C. App. 621, 197 S.E. 2d 605 (1973). In this case the district attorney announced at the beginning of the trial that the state would not ask for the death penalty, therefore, this case lost its "capital nature".

[3] By her second assignment of error, defendant contends the trial court erred in denying her motion to excuse for cause three prospective jurors who indicated that they would not be willing to return a verdict of not guilty by reason of insanity even though defendant introduced evidence that would satisfy them that she was insane at the time her sister was killed. This assignment has merit.

Defendant properly preserved her exception to the court's denial of her challenge for cause by (1) exhausting her peremptory challenges and (2) thereafter asserting her right to challenge peremptorily an additional juror. *State v. Young*, 287 N.C. 377, 214 S.E. 2d 763 (1975); *State v. Fox*, 277 N.C. 1, 175 S.E. 2d 561 (1970).

Challenges for cause are granted to ensure that defendants are tried by fair, impartial, and unbiased juries. *State v. Madden*, 292 N.C. 114, 232 S.E. 2d 656 (1977); *State v. Williams*, 275 N.C. 77, 165 S.E. 2d 481 (1969); *State v. Allred*, 275 N.C. 554, 169 S.E. 2d 833 (1969). A juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to

such an extent that he can no longer be considered competent. One "who is unwilling to accept as a defense, if proved, that which the law recognizes as such" should be removed from the jury when challenged for cause. 50 C.J.S., Juries § 227, p. 974; *see also:* 112 A.L.R. 531.

While this court has not previously dealt with the exact factual situation presented by defendant's second assignment, we have held in analogous situations that jurors who are predisposed with regard to the law or evidence in a case are properly dismissed for cause. In *State v. Noell,* 284 N.C. 670, 202 S.E. 2d 750 (1974), *vacated in part,* 428 U.S. 902, 96 S.Ct. 3203, 49 L.Ed. 2d 1205 (1976), three prospective jurors who stated that they could not find defendant guilty even though the state's evidence should show him guilty beyond a reasonable doubt were held to have been properly excused for cause as they were not impartial and thus could not render a fair verdict. This same principle has been applied in upholding the dismissal for cause of jurors whose conscientious objections to capital punishment precluded them from returning a verdict of guilty in a capital case regardless of the evidence. *State v. Squire,* 292 N.C. 494, 234 S.E. 2d 563 (1977).

In the case before us those jurors who stated that they could not acquit the defendant even though her insanity was proven to them were committed to disregarding the evidence presented to them as well as the court's instructions on the law arising from that evidence. The failure of the court to dismiss them for cause, coupled with the subsequent exhaustion of the defendant's peremptory challenges, forced her to accept a jury which cannot be considered impartial. For this reason she must be granted a new trial.

By various assignments of error defendant raises several issues which evolve from the trial court's handling of her insanity defense. She first contends that the court erred in placing the burden of proving insanity on her rather than the state. Secondly, she contends that her motion to dismiss should have been granted because the state failed to offer evidence of her sanity in its case-in-chief and failed to rebut the evidence of insanity produced on her behalf. For this same reason, she contends that it was error to instruct the jury on the presumption of sanity.

We find no merit in these contentions and hold that the motion to dismiss was properly denied. We also hold that the burden of proving insanity was properly placed on defendant and that the court correctly instructed the jury on the presumption of sanity. 6 Strong's N.C. Index 3d, Homicide § 7.

Defendant's motion for dismissal challenges the sufficiency of the evidence to go to the jury. *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). She acknowledges that a criminal defendant in North Carolina is presumed sane until the contrary is made to appear by evidence produced at the trial. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976). She contends, however, that this rebuttable presumption is dissipated by the instroduction of evidence of insanity and that a motion to dismiss must be granted if the state thereafter fails to produce evidence of the sanity of the defendant.

[4] We have repeatedly held, and we again reiterate the rule, that the burden of proving insanity is properly placed on the defendant in a criminal trial. Furthermore, a defendant must establish his insanity to the satisfaction of the jury if it is to provide a defense to a criminal charge. *State v. Pagano*, 294 N.C. 729, 242 S.E. 2d 825 (1978); *State v. Caldwell*, 293 N.C 336, 237 S.E. 2d 742 (1977); *State v. Harris*, 290 N.C. 718, 228 S.E. 2d 424 (1976); *State v. Hammonds, supra; State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *State v. Cooper*, 286 N.C. 549, 213 S.E. 2d 305 (1975); *State v. Atkinson*, 275 N.C. 288, 167 S.E. 2d 241 (1969), *rev'd as to death penalty*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2283 (1971); *State v. Swink*, 229 N.C. 123, 47 S.E. 2d 852 (1948). The correctness of this rule is reinforced by the holding of the Supreme Court of the United States in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977). There the court held that placing the burden on the defendant of proving the defense of extreme emotional disturbance as defined by New York law did not violate the Due Process Clause of the Fourteenth Amendment to the United States' Constitution. We likewise find that no unconstitutional burden is imposed upon defendants by the requirement of North Carolina law which compels them to prove the defense of insanity.

Defendant's argument fails to take into account the effect which placing the burden of proving insanity upon the defendant

has on the presumption of sanity. ". . . [T]he prosecution may assume, as the law does, that the defendant is sane. The assumption persists until challenged and the contrary is made to appear from circumstances of alleviation, excuse, or justification; and it is incumbent on the defendant to show such circumstances to the satisfaction of the jury, unless they arise out of the evidence against him. *S. v. Grainger*, 223 N.C. 716, 28 S.E. 2d 228 (1943). If no evidence of insanity be offered, the presumption of sanity prevails. And where the defendant offers evidence of his insanity, the state may seek to rebut it or to establish the defendant's sanity *by the presumption of law, or by the testimony of witnesses, or by both* (emphasis added)." *State v. Harris*, 223 N.C. 697, 703, 28 S.E. 2d 232, 237 (1943). Even if the evidence of insanity presented by the defendant is uncontradicted by the state, it is the defendant's burden to satisfy the jury of the existence of the defense. The credibility of the defense witnesses in this case was a proper matter for the jury. A diagnosis of mental illness by an expert is not in and of itself conclusive on the issue of insanity. *State v. Taylor*, 290 N.C. 220, 226 S.E. 2d 23 (1976); *State v. Potter*, 285 N.C. 238, 204 S.E. 2d 649 (1974).

Furthermore, the state did not, as defendant suggests, rely solely on the presumption of sanity. Testimony of witnesses who observed the defendant's actions at the time of the incident was offered. Those witnesses observed that defendant had sufficient presence of mind to flee after the shooting. This fact has been held to raise an inference of sanity. *State v. Journegan*, 185 N.C. 700, 117 S.E. 27 (1923). In addition, the diagnosis and opinion of each of defendant's expert witnesses was challenged by cross-examination. This cross-examination focused on the length of time each expert spent in interviewing defendant as well as on the factors which were observed in defendant's behavior and ultimately formed the basis for the experts' opinions. This evidence and cross-examination, coupled with the presumption of sanity and the defendant's burden of proof, make the issue of insanity one which the court was clearly justified in submitting to the jury.

[5] In charging the jury the trial judge informed them that defendant relied on the defense of insanity, which would be a complete defense to the crime of murder if proven to their satisfaction. He then made the following statement to which the defendant took exception: "I instruct you that sanity or soundness

of mind is a normal condition of men and women; therefore, everyone is presumed sane until the contrary is made to appear." The trial judge then stated the test for insanity and again reminded the jury that defendant had the burden of proving the existence of the defense to their satisfaction.

We find no error in this aspect of the charge. The instruction which was given constitutes an accurate and clear statement of the law on an issue raised by the defendant's plea and the evidence in the case. *State v. Watson*, 294 N.C. 159, 240 S.E. 2d 440 (1978); G.S. 1-180; 4 Strong's N.C. Index 3d, Criminal Law § 111.

We deem it unnecessary to discuss defendant's other assignments of error as they are not likely to recur upon the retrial of the case.

For the reasons stated, defendant is granted a

New trial.

STATE OF NORTH CAROLINA v. MARION URIAH HODGES, JR.

No. 5

(Filed 28 November 1978)

1. **Homicide § 19.1 — reputation of deceased — exclusion of evidence — harmless error**

While the trial judge in a homicide case erred in sustaining the State's objections to questions to defendant which sought to elicit evidence that defendant shot deceased because he knew of deceased's reputation as a dangerous man and was afraid of him, defendant was not prejudiced by such error where defendant had the benefit of this evidence because the trial judge did not sustain the State's objection until defendant had answered the questions in the presence of the jury and there was no motion to strike or instruction to the jury to disregard defendant's answers; similar testimony was admitted without objection; and the rulings of the trial judge in no way indicated an opinion as to defendant's guilt or innocence or as to the weight and credibility of the evidence offered.

2. **Homicide § 21.7 — second 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 second degree murder where it tended to show

that defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death.

3. **Criminal Law § 162.6— evidence competent in part—general objection**

The trial court did not err in overruling defendant's general objection to a witness's testimony concerning a telephone conversation with defendant where all of the testimony to which defendant objected was not inadmissible since a substantial portion of it had been previously admitted without objection, and defendant failed to specify the portion of the evidence which was objectionable.

4. **Homicide § 19.1— State's rebuttal of evidence of deceased's character for violence—waiver of objection**

The trial court in a homicide prosecution did not err in instructing the jury that the State could rebut defendant's evidence of deceased's character for violence by evidence of the good character of deceased for peace and quiet, and defendant will not be granted a new trial because the State presented evidence of deceased's good character and evidence that he was neither a dangerous nor violent man where defendant failed to object at the time the evidence was offered.

5. **Criminal Law §§ 74.1, 75— confession—instructions—surrounding circumstances—consideration as whole**

The trial court did not err in instructing the jury that, if it found defendant made a pretrial statement to an officer, it should consider the circumstances under which it was made in determining whether it was truthful and the weight to be given it, or in failing to instruct the jury that the whole of a confession must be taken together, considering those portions favorable as well as those portions against the defendant.

Justice BRITT took no part in the consideration or decision of this case.

APPEAL by defendant pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 35 N.C. App. 328, 241 S.E. 2d 365, finding no error in the trial before *Small, J.*, at the 27 June 1977 Criminal Session of MARTIN County Superior Court.

Defendant was charged in a bill of indictment with the first degree murder of Kenneth Harris. The State elected to seek no greater verdict than second degree murder. Defendant entered a plea of not guilty.

We summarize the evidence presented at trial.

On the morning of 22 November 1976, defendant and four other men were deer hunting on a rural dirt road in Martin County. Shortly before noon, defendant was sitting in his truck which was parked on the left side of the road. One of his hunting

companions was in the truck with him and the others were standing nearby. The deceased, Kenneth Harris, drove up and parked his truck in the middle of the road near the front of defendant's truck. Harris left his truck and, without speaking to anyone, went directly to the driver's side of defendant's truck. The driver's door was closed, but the window was open. Defendant called Harris "pretty boy," and Harris called defendant an "ugly s.o.b." Harris reached through the window and grabbed defendant's shoulders and throat. A scuffle ensued during which the truck door was opened, and defendant was pulled from the truck. As he was being pulled from the truck, defendant seized a .22 Derringer pistol from the seat of the truck. He fell or was thrown to the ground, and upon hitting the ground, he fired a shot which struck Harris. Defendant asked his companions to call the rescue squad and then proceeded to the sheriff's department where he gave a statement admitting that he had shot Harris with the .22 caliber Derringer.

It was stipulated that the deceased died as a result of a gunshot wound inflicted by defendant.

Deceased's wife testified that sometime during the month before the shooting, defendant called their home and, upon being told that deceased could not come to the phone, told Mrs. Harris to tell deceased that he would hunt on land deceased was farming anytime he pleased, and, furthermore, he had something for deceased. Defendant admitted making the telephone call but testified that he called only to inquire of deceased if it would be all right for him to hunt in the area and that Mrs. Harris told him to "go to hell" and hung up.

Defendant testified that he was aware of Harris's reputation as a dangerous man, and he shot Harris because he knew he would be hurt if he did not stop him. On cross-examination, defendant stated that he had had no previous trouble with Harris although Harris had told him to keep his dogs out of his fields. He admitted that Harris's actions made him mad and that he shot him in the chest. Defendant further explained that he kept the pistol in his truck because he often carried money between his home and his store.

Two of defendant's hunting companions testified to hearing complaints and threats passed between Harris and defendant

several weeks prior to the shooting. Five witnesses testified that Harris had a bad reputation in the community for being a dangerous and violent man. Six witnesses testified as to defendant's general good character and reputation in the community.

The State presented evidence on rebuttal tending to show that Harris's general character and reputation in the community was good and that he was neither a dangerous nor violent man. There was also evidence that Harris at the time of his death was 39 years of age, was approximately six feet tall and weighed about 200 pounds, and that defendant was 42 years of age, was five feet eight inches tall and weighed 195 pounds.

The court instructed the jury that they could return a verdict of guilty of second degree murder, guilty of manslaughter or not guilty. The jury returned a verdict of guilty of manslaughter, and defendant was sentenced to a prison term of eighteen years. He appealed to the Court of Appeals which found no error. Judge Webb dissented.

Rufus L. Edmisten, Attorney General, by Kaye R. Webb, Associate Attorney, for the State.

W. B. Carter and Clarence W. Griffin, attorneys for defendant appellant.

BRANCH, Justice.

[1] We first consider whether the Court of Appeals correctly decided that there was no error in the rulings of the trial judge which sustained objections to questions relating to defendant's acts of self defense.

In this connection, the record discloses the following:

Q. Mr. Hodges, why did you shoot Mr. Harris?

A. Well, I was afraid of him and I knew he was going to hurt me.

Objection of the District Attorney sustained.

Q. Can you tell us why you shot Mr. Harris?

A. I knew he was going to hurt me.

Objection of District Attorney sustained.

I was afraid of him because I knowed he had a bad reputation. He had a reputation for being dangerous . . .

Q. I ask you, Mr. Hodges, why you were afraid of him.

Objection by the District Attorney sustained.

The witness was permitted to make the following answer to the court reporter in the absence of the jury: "because he had a dangerous reputation. He assaulted his brother, was charged with assaulting his brother and two or three more in the neighborhood."

Defendant contends that these rulings precluded a showing that he killed his adversary under circumstances which caused defendant to reasonably believe that it was necessary to shoot in order to save himself from death or great bodily harm in the lawful exercise of his right of self-defense.

We are of the opinion that the trial judge erred by sustaining the objections to the questions which sought to present evidence that defendant acted because of a reasonable apprehension of death or great bodily harm when he shot and killed Kenneth Harris. *See, State v. Champion*, 222 N.C. 160, 22 S.E. 2d 232. However, we agree with the conclusion of the majority of the Court of Appeals that the rulings of the trial judge did not result in prejudicial error to defendant.

In *State v. Edmondson*, 283 N.C. 533, 196 S.E. 2d 505, under virtually identical circumstances, this Court answered the question posed by this assignment of error adversely to the defendant. There, Justice Lake, speaking for the Court, stated:

The third assignment of error is to the court's sustaining objections to the defendant's testimony as to whether Jones overheard the defendant's statement by telephone to Scott as to the reason why the defendant did not like to ride around with Jones. It appears from the record that the solicitor's objections were sustained after the witness had answered in the presence of the jury and the jury was not instructed to disregard the testimony. Thus, as a practical matter, the defendant had the benefit of the evidence. Furthermore, without objection, the defendant subsequently

testified that when he and his companions arrived at the scene of the shooting, in response to an inquiry by the deceased, the defendant stated to the deceased exactly the same reason for not wanting to ride around with him. This cured any error which there may have been in the ruling of the court now assigned as error. "The exclusion of testimony cannot be held prejudicial when the same witness is thereafter allowed to testify to the same import, or the evidence is thereafter admitted, or the party offering the evidence has the full benefit of the fact sought to be established thereby by other evidence." Strong, N.C. Index 2d, Appeal and Error, § 49, and numerous cases there cited.

Here the record indicates that, with one exception, the trial judge did not sustain the State's objections until defendant had answered the questions in the presence of the jury. Thus, as a practical matter defendant had the benefit of this evidence, and there was no motion to strike or instruction to the jury to disregard defendant's answers. The answers which the jury heard and the one response that was placed in the record in the jury's absence all tended to show that deceased had a reputation of being a dangerous man and that defendant was aware of that reputation. Moreover, similar testimony was admitted without objection. Finally, we note that the rulings of the trial judge in no way indicated an opinion as to the defendant's guilt or innocence or as to the weight and credibility of the evidence offered. Under the particular circumstances of this case, we hold that the Court of Appeals correctly decided that these rulings by the trial judge did not result in prejudicial error. The facts in instant case, as in *Edmondson*, do not present the question of whether the trial judge's erroneous rulings would have been prejudicial absent the admission of evidence of like import without objection. We reserve decision on this question until presented by a proper case.

[2] Defendant assigns as error the failure of the trial judge to grant his motion for judgment of nonsuit as to the charge of murder in the second degree.

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296, *death sentence*

vacated, 429 U.S. 809; *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393.

In instant case, all the evidence tends to show that defendant intentionally inflicted a wound with a deadly weapon which caused deceased's death. Such evidence raises inferences of an unlawful killing with malice which are sufficient to permit, but not require, the jury to return a verdict of murder in the second degree. *State v. Jackson*, 284 N.C. 383, 200 S.E. 2d 596; *State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221. Defendant's evidence of self defense or that he killed in a heat of passion upon sudden provocation are matters of excuse and mitigation which should be weighed against the raised inferences of unlawfulness and malice. *State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575, *rev'd on other grounds*, 432 U.S. 233.

We hold that there was ample evidence to permit the jury to draw reasonable inferences that defendant unlawfully and with malice killed Kenneth Harris on 22 November 1976.

[3] Defendant argues that the Court of Appeals erred in finding no error in the trial judge's ruling which admitted, over objection, the testimony of Mrs. Kenneth Harris concerning a telephone conversation with defendant.

This record indicates that the witness had previously testified at some length, without objection, concerning this telephone conversation. When she was later recalled, she, in substance, repeated the same testimony and added that she told defendant that she considered his statement a threat. She also expanded her original testimony by stating that she had engaged in prior telephone conversations with defendant during which she recognized his voice. It was at this point that defendant finally lodged a general objection.

Clearly, all of the testimony to which defendant objected was not inadmissible since a substantial portion of it had been previously admitted without objection. Defendant failed to specify the portion of the testimony to which he directed his objection.

In *State v. Ledford*, 133 N.C. 714, 45 S.E. 944, this Court considered a question similar to the one presented by this assignment of error and stated:

> The objections are general, and the rule is well settled that such objections will not be entertained if the evidence consists of several distinct parts, some of which are competent and others not. In such a case the objector must specify the ground of the objection, and it must be confined to the incompetent evidence. Unless this is done he cannot afterwards single out and assign as error the admission of that part of the testimony which was incompetent.

See also, Wilson v. Williams, 215 N.C. 407, 2 S.E. 2d 19; *Nance v. Telegraph Co.*, 177 N.C. 313, 98 S.E. 838.

In instant case, defendant's objection to the testimony of this witness is to portions of the evidence *en masse*. He failed to point out the portion of the evidence which was objectionable. Defendant's failure to so do waived his right to assign as error the portion of the testimony which he contended was incompetent.

[4] Defendant assigns as error the trial court's instruction to the jury as to the State's right to rebut evidence of deceased's character for violence. The State presented evidence of deceased's good character and evidence that he was neither a dangerous nor violent man. Defendant did not object to the introduction of any of this evidence. Judge Small instructed the jury that, "The State may rebut the defendant's evidence of deceased's character for violence by evidence of the good character of Kenneth Harris for peace and quiet." The instruction correctly stated the law. *State v. Johnson*, 270 N.C. 215, 154 S.E. 2d 48; *State v. Champion, supra*. Defendant contends, however, that this instruction was improper as the State introduced no evidence of Kenneth Harris's reputation for peace and quiet. Although some support may be found in *Johnson* and *Champion* for defendant's contention, we think that defendant's reliance upon these cases is misplaced. In *Johnson* and *Champion*, the defendant timely objected to the questioned evidence. Here defendant failed to object.

It is well established that, nothing else appearing, the admission of incompetent evidence is not ground for a new trial where there was no objection at the time the evidence was offered. *State v. Jones*, 280 N.C. 322, 185 S.E. 2d 858; *State v. Lowery*, 286 N.C. 698, 213 S.E. 2d 255, *modified* 428 U.S. 902, and cases cited therein.

This assignment of error is overruled.

[5] Defendant assigns as error the trial court's instruction as to the law and as to the weight to be given to a statement defendant made to a deputy sheriff prior to trial. The jury was instructed that, "If you find the defendant made the statement, then you should consider all the circumstances under which it was made in determining whether it was a truthful statement, and the weight that you will give to it." Defendant contends that the trial judge should have given the instruction set out in *State v. Edwards*, 211 N.C. 555, 191 S.E. 1, to the effect that the whole of a confession must be taken together, considering those portions favorable to as well as those portions against the defendant. *Edwards* differs from this case in that in *Edwards* the trial judge instructed the jury to take the defendant's exculpatory statements "with a grain of salt." The *Edwards* instruction was not warranted in the instant case because here the trial judge did not instruct the jury to weigh the statement in favor of either party.

We find no error in the instructions given. Moreover, the record shows no exception 14 which was the basis for the assignment of error concerning the weight to be given the statement. Such assignment of error is, therefore, not to be considered on appeal. Rule 10, Rules of Appellate Procedure.

We have carefully examined the remaining assignments of error and this entire record. Our examination discloses nothing which would warrant disturbing the verdict of the jury or the judgment entered thereon.

Affirmed.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. WALTER LEE JONES

No. 65

(Filed 28 November 1978)

1. **Arson § 4.1— burning of apartment—sufficiency of evidence of arson**

Evidence was sufficient to be submitted to the jury in a prosecution for arson where it tended to show that defendant and another person lived in an apartment building which contained four occupied apartments; defendant and his apartment mate quarrelled; defendant then poured kerosene on the floor and threw lighted matches at it; the kerosene ignited and the flames consumed the apartment; and when an officer arrived at the scene of the fire, he noted the odor of kerosene about defendant.

2. **Constitutional Law § 30; Criminal Law § 131— failure of prosecutor to give defendant access to lab report—grounds for new trial**

In a prosecution for arson, failure by the prosecutor to give defendant access to a laboratory report showing no presence of kerosene or other flammable accelerants on defendant's outer clothing was grounds for a new trial.

3. **Constitutional Law § 30— request for voluntary discovery—compliance promised by prosecutor—due diligence of defendant**

A defendant in a criminal case seeking discovery of a laboratory report has exercised due diligence within the meaning of G.S. 15A-1415(6) despite not making a motion to the court to compel discovery when he has made a request for voluntary discovery to which the prosecutor has agreed to comply and there is nothing that would put him on notice that the prosecutor has in fact failed to comply.

Justice BRITT took no part in the consideration or decision of this case.

BEFORE *Stevens, J.*, at the 26 April 1978 Session of WILSON Superior Court and on a bill of indictment proper in form, defendant was tried and convicted of arson. He was sentenced to life imprisonment. From this conviction and sentence, he appeals pursuant to G.S. 7A-27(a). While his appeal was pending in this Court, defendant, pursuant to G.S. 15A-1418(a),[1] filed a motion for appropriate relief.

1. "§ 15A-1418. *Motion for appropriate relief in the appellate division.*—(a) When a case is in the appellate division for review, a motion for appropriate relief based upon grounds set out in G.S. 15A-1415 must be made in the appellate division. For the purpose of this section a case is in the appellate division when the jurisdiction of the trial court has been divested as provided in G.S. 15A-1448, or when a petition for a writ of certiorari has been granted. When a petition for a writ of certiorari has been filed but not granted, a copy or written statement of any motion made in the trial court, and of any disposition of the motion, must be filed in the appellate division."

Rufus L. Edmisten, Attorney General, by Richard L. Griffin, Assistant Attorney General, for the State.

E. J. Kromis, Jr., Attorney for defendant.

EXUM, Justice.

This case presents two questions for review. The first is whether defendant's motion for nonsuit at the close of all the evidence was properly denied. We conclude that it was. The second, raised by defendant's motion under G.S. 15A-1418(a), is whether defendant is entitled to relief because of the prosecutor's failure to provide him an SBI laboratory report containing potentially exculpatory material. We conclude that he is and, pursuant to G.S. 15A-1417(a)(1),[2] we order that he be granted a new trial.

[1] The state's evidence consisted of the testimony of two witnesses, Wallace Eatmon and Officer James O. Braswell of the Wilson Police Department. Eatmon testified that for approximately four years, until 4 March 1978, he had resided at Apartment C, 717 Black Creek Road, Wilson, North Carolina. He also testified that defendant had lived with him at this apartment; however, the lease was in Eatmon's name and he paid the rent. On the evening of 3 March 1978, Eatmon and defendant had had an argument over a debt defendant owed Eatmon. The argument had continued on and off through the evening. At about 2:30 a.m. on the morning of 4 March 1978, defendant, apparently angered by the argument, dashed a jug of kerosene on the floor and began throwing lighted matches at it. The kerosene ignited; and, despite Eatmon's attempt to smother it, the flame spread and consumed the apartment.

Braswell testified that he observed the fire while on patrol, radioed an alarm and went to investigate. At the scene, he questioned Eatmon, who related substantially the same story he told at trial. He next questioned defendant and "noted the odor of kerosene." He placed defendant under arrest, charging him with the crime of arson.

Defendant testified that he and Eatmon were homosexual lovers. He also testified to a series of arguments between them

2. "§ 15A-1417. *Relief available.*—(a) The following relief is available when the court grants a motion for appropriate relief:

(1) New trial on all or any of the charges."

on 3 March 1978, giving a somewhat different version of the events than Eatmon's. He stated that Eatmon became very angry at one point and threatened to "do something to have him [defendant] sent back to prison." Sometime on the morning of 4 March 1978, after they had returned to their apartment, Eatmon became ill and asked defendant to go to a local restaurant to get a cup of coffee. Defendant did so. When he returned ten to fifteen minutes later the apartment was on fire. After assuring himself that Eatmon was not in the apartment, he rushed to the other three apartments in the building to warn the occupants.

Defendant assigns as error the denial of his motions for nonsuit at the close of the state's evidence and at the close of all the evidence. "By introducing testimony at the trial, defendant waived his right to except on appeal to the denial of his motion for nonsuit at the close of the state's evidence. His later exception to the denial of his motion for nonsuit made at the close of *all* the evidence, however, draws into question the sufficiency of all the evidence to go to the jury." *State v. McWilliams*, 277 N.C. 680, 687, 178 S.E. 2d 476, 480 (1971). This procedure is mandated by G.S. 15-173.

Upon consideration of all the evidence there can be no doubt that the case was sufficient to go to the jury. Defendant argues on this point that he cannot be convicted of common law arson because the evidence conclusively shows that he was an occupant of the apartment that was burned. Without commenting on the merits of his argument either in general or upon these particular facts, we point to defendant's testimony indicating that there were three other occupied apartments in the building where he and Eatmon resided. "[I]f a dweller in an apartment house burns the building he is guilty of arson and the building may properly be described as the dwelling of one of the other tenants. . . . [T]he tenant who sets fire to his own rooms . . . may be convicted of arson for burning the 'dwelling' of one of the other tenants even if the fire was actually confined to the rooms occupied by the wrongdoer." Perkins on Criminal Law, at 227 (2d ed. 1969), *citing Levy v. People*, 80 N.Y. 327 (1880). As defendant correctly points out in his brief, the main purpose of common law arson is to protect against danger to those persons who might be in the dwelling house which is burned. Where there are several apartments in a single building, this purpose can be served only by subjecting to

punishment for arson any person who sets fire to any part of the building. Defendant's assignment of error is overruled.

[2] The next question presented arises from defendant's motion for appropriate relief filed 2 October 1978 on the ground set out in G.S. 15A-1415(6) as follows:

> "Evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant."

We are given authority to hear this motion by G.S. 15A-1418(a).[3] The procedure on such a motion is set forth in G.S. 15A-1418(b):

> "When a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings. If the appellate court does not remand the case for proceedings on the motion, it may determine the motion in conjunction with the appeal and enter its ruling on the motion with its determination of the case."

Having examined the motion and the supporting affidavits, briefs and other documents filed by defendant and by the state, we determined: (1) the facts were sufficiently developed in these documents to enable us to rule on the legal question presented; (2) there was no controversy between the state and defendant as to any of the essential facts; and (3) it was not necessary to remand the case to the trial division for further proceedings. We therefore on 4 October 1978 ordered that the motion be heard in conjunction with defendant's appeal. Both parties addressed the motion in their briefs and oral argument. We now proceed to a decision on the merits of the motion.

The motion and supporting documents show without contradiction the following: At the time of defendant's arrest, his outer clothing was seized. It was sent to the SBI laboratory in Raleigh for analysis. This analysis showed no evidence of the

3. *See* note 1 *supra.*

presence of kerosene or other flammable accelerants in the clothing. The report of this analysis was mailed from the SBI laboratory on 12 April 1978 and was in the possession of the prosecutor at the time of trial on 26 April 1978. On 5 April 1978 defendant filed a request for voluntary discovery with the prosecutor which included a request for "all results, or reports of test(s) . . . which are . . . or . . . may become known to the State as provided by G.S. 15A-903(e)." On 14 April 1978 the prosecutor indicated he would comply, noting that "[l]aboratory reports will be forwarded when available to this office." On 21 April 1978 defendant acknowledged the prosecutor's compliance with his request and again asked for the laboratory reports. The report, although in the prosecutor's possession, was neither made available prior to trial nor introduced at trial. According to the prosecutor, he "saw the report in the file but did not recall that it had not already been forwarded to the defendant's attorney." The report was discovered by defendant around 14 July 1978. In connection with defendant's request to have his personal effects returned, Wilson police officers examined the contents of a locker containing defendant's outer clothing (which apparently had been returned by the SBI) and found the report attached. They subsequently gave a copy of it to defendant.

In order to grant defendant's motion, we must find that: (1) the report was unavailable to him at the time of trial; (2) it could not have been made available upon the exercise of due diligence; and (3) it has a direct and material bearing on his guilt or innocence. G.S. 15A-1415(6). On the first point there is no difficulty. It is clear that the prosecutor failed to make the report available to defendant even though it was in his files at the time of the trial.

[3] On the second point the state urges that defendant failed to exercise due diligence because he did not make a motion to the court to compel discovery. See G.S. 15A-902(a) and G.S. 15A-910(1). We do not agree. Defendant had filed a request for voluntary discovery. The prosecutor had agreed to comply and had, in part, complied. He was under a continuing duty to disclose relevant, discoverable information as he received it. G.S. 15A-907. The

report was both relevant and discoverable. G.S. 15A-903(e).[4] Apparently through oversight the prosecutor failed to make it available when it came into his possession. There was nothing to put defendant on notice that the prosecutor had refused or failed to comply with his request for discovery. Defendant was not therefore lacking in due diligence because he did not make a motion to compel discovery. Such a motion may be made only after the party from whom discovery is sought has responded either negatively, or unsatisfactorily, or has failed to respond at all for seven days to a request for voluntary discovery. G.S. 15A-902(a). None of these conditions precedent to filing a motion to compel discovery existed here. The state had responded, and on the face of it satisfactorily, to defendant's request for voluntary discovery.

Finally, the laboratory report has a direct and material bearing on defendant's guilt or innocence. Both Eatmon's and defendant's versions of the events of 4 March 1978 are, on their face, believable. The credibility of Eatmon's testimony is, however, greatly bolstered by the testimony of Braswell that he smelled kerosene on defendant. The report could tend to show that Braswell might have been mistaken. It could therefore, depending on how the jury regarded it, undercut the credibility of the only evidence upon which defendant was convicted. The report was clearly, on these facts, a factor which defendant was entitled to have the jury consider.

For the reasons stated above and pursuant to G.S. 15A-1417(a)(1), we order that defendant be granted a

New trial.

Justice BRITT took no part in the consideration or decision of this case.

4. G.S. 15A-903 designates various matters subject to discovery. Subsection (e) provides:

"(e) Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physicial evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case."

RICHARD PITTS v. VILLAGE INN PIZZA, INC.

No. 10

(Filed 28 November 1978)

1. **Rules of Civil Procedure § 56.4— defendant's motion for summary judgment— plaintiff's reliance on complaint**

Plaintiff could not rely on his complaint alone to defeat defendant's motion for summary judgment where the motion was accompanied by competent evidentiary matters in support of it.

2. **Malicious Prosecution § 1— elements of action**

To make out a case of malicious prosecution, plaintiff must show (a) malice, (b) want of probable cause, and (c) a favorable termination of the proceeding upon which the action is based.

3. **Malicious Prosecution § 13.3— implied malice—want of probable cause**

In a malicious prosecution case, implied malice may be inferred from want of probable cause in reckless disregard of plaintiff's rights.

4. **Malicious Prosecution § 6— favorable termination of prosecution—voluntary dismissal**

In a malicious prosecution case, favorable termination of an embezzlement charge against plaintiff was sufficiently shown by a voluntary dismissal of the charge in the superior court.

5. **Malicious Prosecution § 13.2— want of probable cause—conflicting evidence— no summary judgment**

In an action for malicious prosecution, conflicts in the evidence before the trial judge presented a jury question as to the existence of probable cause and precluded the entry of summary judgment for defendant where evidence that probable cause was found in the district court, that defendant was bound over to superior court and that the grand jury thereafter found a true bill of indictment tended to show prima facie the existence of probable cause, and evidence of a voluntary dismissal of the prosecution by the assistant district attorney in charge of the case with no reason assigned for the dismissal tended to show prima facie the absence of probable cause.

6. **Rules of Civil Procedure § 56.4— summary judgment—stipulations—materials in conflict—no moving party**

When supporting documents and materials are stipulated into evidence for consideration by the court upon motion for summary judgment, and the stipulated materials are in conflict and support opposing conclusions with respect to a material fact, the non-moving party may not be charged with failure to offer rebuttal evidence and thus incur dismissal by way of summary judgment.

ON certiorari to review decision of the Court of Appeals affirming judgment of *Tillery, J.*, allowing defendant's motion for summary judgment entered 9 November 1976 in WAYNE Superior Court.

On 14 May 1976 plaintiff brought this action alleging, among other things, that he was wrongfully discharged from his job as manager of the Village Inn Pizza in Goldsboro and was indicted for embezzlement of funds belonging to the company and in his control as manager; that he was served with a criminal warrant for embezzlement, appeared in the Criminal District Court of Wayne County where the presiding judge found probable cause and bound him over to superior court for trial; that on 17 February 1976 the district attorney took a voluntary dismissal in the case; that defendant acted maliciously in procuring the instigation of the criminal action against him; that as a result of defendant's malicious prosecution of him, plaintiff's reputation and future ability to obtain and hold a responsible job has been diminished and plaintiff has been damaged in the sum of $5,000 actual damages and $300,000 as punitive damages.

On 10 June 1976 defendant moved for summary judgment on the ground that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

When defendant's motion for summary judgment came on for hearing before Judge Tillery, it was agreed by counsel for both parties that the court could examine the records in the case of "*State v. Richard D. Pitts*," File No. 75CR5014. That was done and the following documents from that file are, by stipulation, "treated as Exhibits without further identification or proof for the purposes of this appeal," to wit:

Complaint for arrest
Judgment in district court on probable cause hearing
Indictment
Arraignment
Dismissal by prosecutor
Order of payment for legal services for indigent

Following an examination of the pleadings, the records in the clerk's office in the action entitled "*State v. Richard D. Pitts*" (File No. 75CR5014), and upon hearing the argument of counsel

for both parties, the court found that "the following facts exist without controversy:

"1. On or about February 15, 1974, the plaintiff was induced to obtain employment with the defendant at a salary rate of $800.00 per month, plus a bonus of 8% of the net profits.

2. That on or about April 21, 1975, the plaintiff was discharged from his employment by the defendant.

3. That at the time of his discharge, the plaintiff alleges that he was owed one month bonus and six days salary and the amount of such salary and bonus has not been alleged by the plaintiff.

4. On or about April 22, 1975, the plaintiff in this action was served with a valid warrant for arrest charging him with the crime of embezzlement, and the complainant on such warrant was Sergeant R. D. Hart of the Goldsboro Police Department.

5. On or about August 14, 1975, the plaintiff appeared before the Honorable Herbert W. Hardy in the Wayne County District Court, Criminal Division, for the purpose of a probable cause hearing. At the conclusion of such hearing the Honorable Herbert W. Hardy entered an order finding that probable cause existed and ordered that the plaintiff in this action be bound over for trial in the Wayne County Superior Court.

6. On or about August 25, 1975, a duly authorized Wayne County Grand Jury returned a true bill of indictment against the plaintiff in this action charging him with the crime of embezzlement.

7. On or about February 17, 1976, the Assistant District Attorney of the Eighth Judicial District, the Honorable Ken Ellis, voluntarily dismissed the action then pending against the plaintiff in this action.

8. The warrant for arrest, probable cause order, the bill of indictment, and dismissal were all entered in the case entitled "*State vs Richard D. Pitts*," said case bearing File No. 75 CR 5014. It was agreed by counsel for both parties that

the court could examine the records contained in 75 CR 5014; and that the plaintiff's claim for relief in this action is based upon the alleged institution of the action against the plaintiff in case No. 75 CR 5014."

Based upon the enumerated findings of fact the court concluded as a matter of law that (1) plaintiff and defendant did not have a contract of employment for a fixed or definite duration and such employment was terminable at the will of either party, and (2) at the time the warrant for plaintiff's arrest in this action was issued probable cause existed for the institution of such action.

Based upon the findings and conclusions above set out, Judge Tillery ordered:

1. That defendant's motion for summary judgment as to plaintiff's claim for relief based upon the tort of wrongful discharge be allowed.

2. That defendant's motion for summary judgment as to plaintiff's claim for relief based on the tort of malicious prosecution be allowed.

3. That plaintiff be given thirty days in which to amend his complaint to allege a cause of action based on defendant's failure to pay one month's bonus and six days' salary allegedly owed the plaintiff by defendant.

On plaintiff's appeal, the Court of Appeals affirmed, 35 N.C. App. 270, 241 S.E. 2d 155 (1978), and we allowed certiorari to review that decision.

Barnes, Braswell & Haithcock by Michael A. Ellis, attorneys for plaintiff appellant.

Taylor, Warren, Kerr & Walker by Robert D. Walker, Jr., attorneys for defendant appellee.

HUSKINS, Justice.

Upon argument of the case in this Court plaintiff's counsel stated that he was not pursuing any claim for wrongful discharge or for punitive damages but was seeking only actual damages of $5,000 for malicious prosecution. We therefore treat as abandoned

his claim for damages for wrongful discharge and his claim for punitive damages for malicious prosecution. There remains for determination by this Court the question whether the Court of Appeals erred in affirming the order of Judge Tillery allowing defendant's motion for summary judgment as to plaintiff's claim for actual damages based upon the tort of malicious prosecution.

We have applied the guiding principles applicable to summary judgment under Rule 56, Rules of Civil Procedure, in many cases including *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Schoolfield v. Collins*, 281 N.C. 604, 189 S.E. 2d 208 (1972); *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E. 2d 35 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972); *Harrison Associates v. State Ports Authority*, 280 N.C. 251, 185 S.E. 2d 793 (1972); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971).

Our Rule 56 and its federal counterpart are practically identical. Decisions both state and federal hold that the party moving for summary judgment has the burden of "clearly establishing the lack of any triable issue of fact by the record properly before the Court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Moore's Federal Practice § 56.15[8] at 642 (2d ed. 1976). The language of the rule itself conditions rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. G.S. 1A-1, Rule 56(b); *Kessing v. Mortgage Corp., supra.*

[1] Rule 56(e) provides, among other things: "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 pleadings, 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." Thus, plaintiff here cannot rely on his complaint alone to defeat defendant's motion for summary judgment since the motion is accompanied by competent evidentiary matters in support of it.

Even so, the movant always has the burden of showing that there is no triable issue of fact and that movant is entitled to judgment as a matter of law; and the party opposing the motion "may yet succeed in defending against the motion for summary judgment if the evidence produced by the movant and considered by the court is insufficient to satisfy the burden." *Page v. Sloan, supra*, 281 N.C. at 705, 190 S.E. 2d at 194, and cases cited. "Where by the nature of things, the moving papers themselves demonstrate that there is inherent in the problem a factual controversy then, while it is certainly the part of prudence for the advocate to file one, a categorical counter-affidavit is not essential." *Inglett and Co. v. Everglades Fertilizer Co.*, 255 F. 2d 342, 348 (5th Cir. 1958). Or, as stated differently but to the same effect in *Murphy v. Light*, 257 F. 2d 323, 326 (5th Cir. 1958): "Where the moving papers affirmatively disclose that the nature of the controversy presents good faith, actual, as distinguished from formal, dispute on one or more material issues, summary judgment cannot be used."

In light of the foregoing principles, we now consider the materials and documents presented in support of defendant's motion together with the agreement of the parties with respect thereto.

Due consideration of the documents and materials offered by defendant, *i.e.*, the "exhibits" and the agreement of counsel for Judge Tillery to examine them, leads us to conclude that the granting of summary judgment by the trial court was erroneous. The evidence produced and considered by the court is insufficient to satisfy movant's burden of showing no triable issue of fact and that movant is entitled to judgment as a matter of law. The documents and materials were presented by agreement of the parties and must therefore be considered as supporting evidence for both sides.

[2] To make out a case of malicious prosecution, plaintiff must show (a) malice, (b) want of probable cause, and (c) a favorable termination of the proceeding upon which the action is based. *Taylor v. Hodge*, 229 N.C. 558, 50 S.E. 2d 307 (1948), and cases therein cited.

[3, 4] Aside from express malice, which plaintiff may or may not be able to show at trial, implied malice may be inferred from

want of probable cause in reckless disregard of plaintiff's rights. *Taylor v. Hodge, supra*; *Dickerson v. Refining Co.*, 201 N.C. 90, 159 S.E. 446 (1931). Favorable termination of the embezzlement charge against plaintiff is sufficiently shown by a voluntary dismissal of the charge in the superior court. *Taylor v. Hodge, supra*; *Wilkinson v. Wilkinson*, 159 N.C. 265, 74 S.E. 740 (1912); *Hatch v. Cohen*, 84 N.C. 602 (1881). Hence, the case here must rise or fall on the question of probable cause for the embezzlement prosecution.

In cases grounded on malicious prosecution, probable cause "has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907). The existence or nonexistence of probable cause is a mixed question of law and fact. *Cook v. Lanier*, 267 N.C. 166, 147 S.E. 2d 910 (1966); *Taylor v. Hodge, supra*. If the facts are admitted or established it is a question of law for the court. *Carson v. Doggett*, 231 N.C. 629, 58 S.E. 2d 609 (1950). Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

[5] A portion of the evidence placed before Judge Tillery tends to show prima facie the existence of probable cause, *i.e.*, that after a hearing before Judge Hardy probable cause was found and defendant was bound over to superior court for trial and the grand jury thereafter found a true bill of indictment. *Newton v. McGowan*, 256 N.C. 421, 124 S.E. 2d 142 (1962). A different portion of the evidence placed before Judge Tillery tends to show prima facie the absence of probable cause, *i.e.*, a voluntary dismissal of the prosecution by the assistant district attorney in charge of the case with no reason assigned for the dismissal. In this posture, we hold that there remains a genuine issue of material fact as to the existence of probable cause to prosecute plaintiff for embezzlement. The conflicts in the evidence before Judge Tillery present a jury question and summary judgment for defendant was improvidently granted.

[6] When supporting documents and materials are stipulated into evidence for consideration by the court upon motion for summary judgment, and the stipulated materials are in conflict and support opposing conclusions with respect to a material fact, the

non-moving party may not be charged with failure to offer rebuttal evidence and thus incur dismissal by way of summary judgment. *See generally*, 6 Moore's Federal Practice §§ 56.23 at 1388, 56.11[1.8] at 202 (2d ed. 1976); *F & D Property Co. v. Alkire*, 385 F. 2d 97, 100 (10th Cir. 1967).

For the reasons stated the decision of the Court of Appeals upholding summary judgment for defendant is

Reversed.

PAUL O. PERRY, EMPLOYEE v. HIBRITEN FURNITURE COMPANY, EMPLOYER AND LIBERTY MUTUAL INSURANCE CO., CARRIER

No. 27

(Filed 28 November 1978)

1. **Master and Servant § 96.1 — workmen's compensation — award for permanent partial disability — sufficiency of evidence**

Evidence was sufficient to support the findings of the Industrial Commission that plaintiff sustained a fifty percent permanent partial disability or loss of use of his back and that the healing period ended on or before 25 March 1976.

2. **Master and Servant § 72 — workmen's compensation — back injury — partial disability**

The language of G.S. 97-31 compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn any wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 unless, as in this case, all his injuries are included in the schedule set out in G.S. 97-31.

3. **Master and Servant §§ 65.2, 94 — workmen's compensation — back injury compensated — evidence of injury to legs — failure to make findings**

Where there was medical testimony that plaintiff suffered leg pain related to his back injury which was compensable under the Workmen's Compensation Act, one doctor testified that plaintiff had absent ankle jerk on the left "and some numbness of the lateral calf on the left," and plaintiff testified that he was currently suffering pain in his back and legs, that his legs hurt when walking or driving, the Industrial Commission erred in failing to make any attempt to elicit medical evidence or to find facts as to whether plaintiff had suffered any permanent loss of use of either or both legs.

Justice BRITT took no part in the consideration or decision of this case.

ON certiorari to review decision of the Court of Appeals affirming award of the North Carolina Industrial Commission, 35 N.C. App. 518, 241 S.E. 2d 697 (1978).

This is a workmen's compensation case. The record reveals that plaintiff was injured under compensable circumstances on 17 April 1973 while working for defendant Hibriten Furniture Company. The Industrial Commission awarded compensation for temporary total disability until plaintiff reached maximum improvement, *i.e.*, until the end of the healing period. The case was reset for hearing to determine when the healing period ended and the degree of permanent disability plaintiff had sustained as a result of his injury.

Medical testimony was taken from Drs. Angus McBryde and Donald G. Joyce of Charlotte and Dr. Ted J. Waller of Boone. Plaintiff testified further in his own behalf. Based upon the entire record, including the additional evidence, Deputy Commissioner Shuford found that plaintiff reached the end of the healing period on 25 March 1976 and had suffered a 50 percent permanent partial disability or loss of use of his back. Based thereon, plaintiff was awarded compensation at the rate of $56 per week commencing 25 March 1976, the end of the healing period, and continuing for 150 weeks as provided by G.S. 97-31(23). On plaintiff's appeal, the full Commission affirmed; the Court of Appeals affirmed the full Commission, and we allowed certiorari to review that decision.

Finger, Watson & di Santi by Donald M. Watson, Jr. and Anthony S. di Santi, attorneys for plaintiff appellant.

Hedrick, Parham, Helms, Kellam, Feerick & Eatman, by Edward L. Eatman, Jr., attorneys for defendant appellees.

HUSKINS, Justice.

Plaintiff contends the Court of Appeals erred in affirming the Industrial Commission's finding that he has sustained only a 50 percent permanent partial disability of the back with compensation after the healing period limited to 150 weeks under the provisions of G.S. 97-31(23). He argues that he is totally disabled and therefore entitled to compensation for permanent total disability under G.S. 97-29. Resolution of this question is determinative of this appeal. We first examine the evidence.

Dr. McBryde, a medical expert specializing in orthopedic surgery, testified:

> "I have an opinion satisfactory to myself as to whether or not Mr. Perry's injury will render him permanently disabled. My opinion is, following his two surgeries [laminectomies], and with a possibility of further surgery he's probably unable to carry out gainful employment. . . . I have an opinion satisfactory to myself as to the degree of permanent disability that Mr. Perry will suffer. That opinion is probably within the range of 25, 35% permanent partial disability to the spine.
>
> When a person has a 25, 35% disability of the spine, the activities that he can accomplish are the activities of daily living, which would be all those functions which would enable him to take care of himself. He could possibly do light activities for a limited number of hours in a day, interrupted, perhaps by periods of rest. He could do desk work for limited periods of time, could do errand type activity, particularly if it wasn't a hard labor requiring long time standing. He could do other similar activities interrupted by periods of rest. As for hard labor, pick and shovel, heavy lifting, bending, and getting into small places, I don't think he can do any of these.
>
> . . . I feel that if Mr. Perry did not go through with any further surgery, he had reached maximum improvement when I saw him in February of this year [20 February 1976]."

Dr. Ted J. Waller, a medical expert specializing in orthopedic surgery, testified that he performed the second laminectomy on plaintiff's back, removing bulging intervertebral discs between L-4 and L-5 and between L-5 and S-1. The L-4-L-5 area had been previously operated upon by another physician but a bulging disc was removed by Dr. Waller at both levels. Dr. Waller said his last formal examination of plaintiff was in January 1976 and that plaintiff's last office visit was in July 1976. At all times up to the last visit plaintiff had tenderness in both sciatica notches. The range of motion of his lumbar spine was markedly limited. Straight leg raising produced pain on the back of his legs. In July 1976 plaintiff complained of increased pain, especially in the left

leg. With respect to plaintiff's degree of permanent disability Dr. Waller testified as follows:

> "I have an opinion as to his disability to perform, let's say, manual labor, such as lifting or driving. He is unable to perform manual labors, any sort of heavy lifting, any sort of bending, carrying, long driving, things of this nature."

When asked the percentage of physical loss of use of the back which plaintiff had sustained, Dr. Waller replied: "I would still have to say 75 percent." Dr. Waller admitted on cross-examination that he had written a letter to defense counsel dated 2 June 1976 in which he stated: "For the purpose of the Workmen's Compensation Act, I would rate him as 50% permanent partial disability of the back," but Dr. Waller pointed out that the first sentence of the letter states: "Mr. Perry is having pain in his legs sufficient to cause total disability."

Dr. Donald G. Joyce, a medical expert specializing in orthopedic surgery, testified that he examined plaintiff on 24 March 1976 at which time plaintiff was complaining of low back pain, bilateral leg pain, and gave a history of an on-the-job injury in 1973 while moving a large crate in a furniture factory and of having had two laminectomies. Dr. Joyce found two parallel incisions in the lumbar area caused by previous surgery, marked limitation of motion of the spine of all planes, ankle jerk absent on the left and some numbness of the lateral calf on the left. X-rays were taken "and there was a question of some bony encroachment in the posterior areas of L-4 and L-5." Results from the two laminectomies were poor. With respect to plaintiff's permanent disability, Dr. Joyce stated:

> "In my opinion I felt Mr. Perry warranted a permanent partial disability of 35% of the back. . . . I did state in this written report [of the examination] that the patient is probably disabled from any useful occupation. I do not believe the man can do repetitive lifting of anything over 10 pounds. Further, I do not believe that Mr. Perry would be able to do any strenuous physical activity. . . . I did not recommend any further surgery or any further treatment to Mr. Perry . . . but I feel something could be considered in the way of pain relief to this individual, but I, apparently, haven't anything to offer him."

Plaintiff testified he completed the 8th grade in school in 1950, had no formal training, left the farm to go to work for Brown Brothers Construction Company doing common labor, and went to work in a furniture factory in 1963 in Lenoir. In 1965 or 1966 he began work for Hibriten Furniture Company and worked there from that date until the date of the accident involved in this case.

With respect to the injury, plaintiff testified he was currently suffering pain in his back and legs; that his legs hurt when he walks or drives a motor vehicle; that since his injury he can no longer lift or bend over without hurting; that he sleeps poorly due to the pain.

It now becomes our duty to apply pertinent legal principles to the evidence, the findings and the conclusions of the Industrial Commission.

[1] We first note that jurisdiction of appellate courts on appeal from an award of the Industrial Commission is limited to the questions (1) whether there was competent evidence before the Commission to support its findings and (2) whether such findings support its legal conclusions. *McRae v. Wall*, 260 N.C. 576, 133 S.E. 2d 220 (1963); *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E. 2d 706 (1952); *Henry v. Leather Co.*, 231 N.C. 477, 57 S.E. 2d 760 (1950). If the findings of fact are supported by competent evidence and are determinative of the questions at issue in the case, appellate courts must accept such findings as final truth and then determine whether they justify the legal conclusions of the Commission. In no event may the appellate court consider the evidence for the purpose of finding the facts for itself. *Pardue v. Tire Co.*, 260 N.C. 413, 132 S.E. 2d 747 (1963). If the findings of fact of the Commission are insufficient to enable the court to determine the rights of the parties upon the matters in controversy, the proceeding must be remanded for the Commission to make proper findings. *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E. 2d 439 (1958). Applying these principles to the testimony of Drs. McBryde, Waller and Joyce, considered collectively, we hold that the evidence supports the findings of the Industrial Commission that plaintiff sustained a 50 percent permanent partial disability or loss of use of his back and that the healing period ended on or before 25 March 1976. We are bound by those findings even

though the evidence would have supported a finding of disability to a greater or lesser degree.

We next consider plaintiff's contention that he is entitled to compensation for permanent total disability under G.S. 97-29.

The term "disability," when used in the Workmen's Compensation Act, "means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." G.S. 97-2(9).

We said in *Little v. Food Service*, 295 N.C. 527, 246 S.E. 2d 743 (1978), that if "an employee's age, education and work experience are such that an injury causes him a greater degree of incapacity for work than the same injury would cause some other person, the employee must be compensated for the incapacity which he or she suffers, and not for the degree of disability which would be suffered by someone with superior education or work experience or who is younger or in better health." *See* Larson, Workmen's Compensation, § 57.51, at nn. 96-97 (1976), and cases collected therein. Even so, when all of an employee's injuries are included in the schedule set out in G.S. 97-31, as here, his entitlement to compensation is exclusively under that section. *Little v. Food Service, supra.* This is true because G.S. 97-31, in pertinent part, provides:

> "In cases included by the following schedule the compensation in each case shall be paid for disability during the healing period and in addition the disability shall be deemed to continue for the period specified, *and shall be in lieu of all other compensation, including disfigurement* . . . ." (Emphasis added.)

See Watts v. Brewer, 243 N.C. 422, 90 S.E. 2d 764 (1956); *Stanley v. Hyman-Michaels Co.*, 222 N.C. 257, 22 S.E. 2d 570 (1942). *Compare Larson, supra*, § 58.20, n. 34 *et seq.*

[2] The language of G.S. 97-31 above quoted compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn *any* wages he is totally disabled, G.S. 97-2(9), and entitled to compensation for permanent total disability under G.S. 97-29 *unless all his injuries are included in the schedule set out in G.S. 97-31.* In that event the injured employee is entitled to compensation exclusively under G.S. 97-31

regardless of his ability or inability to earn wages in the same or any other employment; and such compensation is "in lieu of all other compensation, including disfigurement." *Little v. Food Service, supra.* "We think it is elementary where an award is properly made under specific schedules and the Commission has found as a fact that the employee is not totally and permanently disabled, as in the instant case, the Commission is only required to find the percentage of disability of the member or members affected." *Stanley v. Hyman-Michaels Co., supra.*

For the reasons given the decision of the Court of Appeals affirming the Commission's finding that plaintiff sustained a 50 percent permanent partial disability or loss of use of his back with compensation for that injury limited to 150 weeks as provided by G.S. 97-31(23) is affirmed. Another aspect of the case, however, requires that the proceeding be remanded to the Industrial Commission for further findings.

[3] Dr. McBryde's testimony tends to show "some drawing-type pain in his [plaintiff's] left leg, which was associated with back pain, he had some previous right leg pain, but this was static at the time that I talked with him." Dr. Waller's testimony tends to show that in July 1976 plaintiff complained of increased pain, especially in his left leg. In a letter to defense counsel dated 2 June 1976 Dr. Waller said, among other things, "Mr. Perry is having pain in his legs sufficient to cause total disability." Dr. Joyce mentioned in his testimony that plaintiff had absent ankle jerk on the left "and some numbness of the lateral calf on the left." Plaintiff testified he was currently suffering pain in his *back and legs;* that his legs hurt when walking or driving. Despite the cumulative evidence with respect to plaintiff's legs, no attempt was made to elicit medical evidence or to find facts as to whether plaintiff had suffered any permanent loss of use of either or both legs.

If plaintiff has suffered any permanent loss of use of either leg, the award must take into account all compensable injuries resulting from the accident. The injured employee is entitled to an award "which encompasses all injuries received in the accident. The employee is required to file but a single claim, and the amount of compensation payable is predicated on the extent of the disability resulting from the accident." *Giles v. Tri-State*

Erectors, 287 N.C. 219, 214 S.E. 2d 107 (1975). *Accord, Little v. Food Service, supra; Smith v. Red Cross*, 245 N.C. 116, 95 S.E. 2d 559 (1956). "Until all of an injured employee's compensable injuries and disabilities have been considered and adjudicated by the Commission, the proceeding pends for the purpose of evaluation, absent laches or some statutory time limitation." *Hall v. Chevrolet, Inc.*, 263 N.C. 569, 139 S.E. 2d 857 (1965).

For the reasons stated, the case is remanded to the Court of Appeals for further remand to the Industrial Commission. With respect to plaintiff's legs, that agency will consider the evidence of record and any additional evidence either party may desire to offer, make findings of fact thereon as to the amount of permanent disability or loss of use, if any, of either or both of plaintiff's legs caused by the injury in question. If plaintiff has suffered no loss of use of a leg by reason of his injury, the case is closed. If, in addition to his back injury, he has suffered some loss of use of either or both legs, the Commission shall make findings of fact as to the amount and, within statutory limits, issue an award pursuant to G.S. 97-31(15).

Affirmed in part and remanded.

Justice BRITT took no part in the consideration or decision of this case.

SAMUEL O. CURRENCE v. FAYE ALICE HARDIN

No. 20

(Filed 28 November 1978)

1. Appeal and Error § 49.1 — excluded evidence — significance must be shown for review

Whether an objection be to the admissibility of testimony or to the competency of a witness to give that, or any, testimony, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review; unless the significance of the evidence is obvious from the record, counsel offering the evidence must make a specific offer of what he expects to prove by the answer of the witness.

2. Appeal and Error § 49.1— physician's diagnosis excluded—necessity for record to show what testimony would have been

An offer of proof under G.S. 1A-1, Rule 43(c) must be specific and must indicate what testimony the excluded witness would have given; therefore, a simple indication or assertion that testimony will concern a physician's diagnosis of the party's condition, though it indicates the general subject of the testimony, is not sufficiently specific for purposes of review.

Justice BRITT took no part in the consideration or decision of this case.

APPEAL by plaintiff pursuant to G.S. 7A-30(2) from the decision of the Court of Appeals, reported in 36 N.C. App. 130, 243 S.E. 2d 172, which found no error in the trial before *Sentelle, J.*, at the 28 February 1977 Civil Session of MECKLENBURG District Court.

Plaintiff instituted this action to recover damages for personal injury and property damage incurred in an automobile collision on 29 December 1975 in Charlotte, North Carolina. At trial plaintiff presented evidence which tended to show that he was driving down Bellhaven Boulevard and that his automobile was struck on the right side by defendant's automobile as defendant entered Bellhaven from Nelson Avenue. Plaintiff testified that his automobile was damaged and that he received injury to his mouth, face, shoulder, elbow and neck. On the day of the accident plaintiff visited the office of Dr. J. Timothy Logan, a chiropractor, for treatment. Plaintiff visited Dr. Logan on some twenty occasions prior to trial. After the collision, plaintiff experienced soreness in various parts of his body for approximately two months.

Dr. J. Timothy Logan testified that he was licensed to practice chiropractics in North Carolina. Defense counsel stipulated that Dr. Logan was duly licensed and that he was an expert in the field of chiropractics. Dr. Logan then testified that he first saw plaintiff on or about 29 December 1975. Plaintiff told him of the collision with defendant which caused plaintiff's right shoulder to be thrown forward into the steering wheel of his car. At that time plaintiff complained of pain in his cervical spine (neck region), with pain radiating into his right shoulder. Dr. Logan conducted a physical examination of plaintiff and took several x-rays. Based on the x-rays, Dr. Logan determined and testified that plaintiff had a loss of the normal anterior curve of

the neck, a limit to the range of motion in the neck, and a dislocation of the right shoulder joint. Dr. Logan gave further testimony regarding his findings and the nature of plaintiff's condition. On objection by defendant, the trial court refused to permit Dr. Logan to testify regarding his chiropractic diagnosis of plaintiff.

Plaintiff then rested and defendant testified and gave her account of the collision. The jury found the defendant guilty of negligence and awarded plaintiff $300 for property damages, but found that plaintiff was not entitled to recover damages for personal injuries.

Plaintiff appealed and the Court of Appeals, with one member of the panel dissenting, found no error in the trial.

Paul J. Williams for plaintiff appellant.

Caudle, Underwood & Kinsey by C. Ralph Kinsey, Jr. for defendant appellee.

MOORE, Justice.

The sole question for review is whether the trial court erred in not permitting plaintiff's witness, Dr. J. Timothy Logan, to testify concerning his chiropractic diagnosis of plaintiff's condition. In the absence of the jury, the trial judge implied that the basis of his ruling was that a chiropractor was incompetent to testify concerning his diagnosis of a condition in the absence of other competent medical evidence. Plaintiff contends that a chiropractor, as an expert witness, is fully qualified to give his expert opinion and diagnosis in the absence of other medical evidence.

G.S. 90-157.2, enacted in 1977, says: "A Doctor of Chiropractic, for all legal purposes, shall be considered an expert in his field and, when properly qualified, may testify in a court of law as to etiology, diagnosis, prognosis, and disability, including anatomical, neurological, physiological, and pathological considerations within the scope of chiropractic."

This statute was not in effect at time of trial, but plaintiff contends that it is, in part, but a clarification of law existing prior to its enactment, and that a chiropractor is, and was, competent to testify as an expert concerning matters within the scope

of the profession and practice of chiropractic (citing 31 Am. Jur. 2d, Expert and Opinion Evidence § 107).

Our Court of Appeals, in *Allen v. Hinson*, 12 N.C. App. 515, 183 S.E. 2d 852 (1971), and *Teachey v. Woolard*, 16 N.C. App. 249, 191 S.E. 2d 903 (1972), dealt with the law concerning the competency and scope of chiropractic testimony prior to the enactment of G.S. 90-157.2. This Court has not had an occasion to pass on the law as it existed prior to the enactment of G.S. 90-157.2, nor do we now find it necessary to do so for purposes of deciding the case before us.

The Court of Appeals in this case held that it could not determine whether the proposed testimony of Dr. Logan would come within the case law in effect at the time of trial because plaintiff had failed to include in the record what Dr. Logan's testimony would have been had he been allowed to testify. *See Heating Co. v. Construction Co.*, 268 N.C. 23, 149 S.E. 2d 625 (1966). Plaintiff, citing *Hampton v. Hardin*, 88 N.C. 592 (1883), argues that the rule requiring offer of proof (*see* Rule 43(c) of the Rules of Civil Procedure) does not apply in cases such as this where the trial court's ruling concerns the competency of the witness, but applies only to rulings concerning the admissibility of a witness's answer. In *Hampton v. Hardin, supra*, the Court said:

> "When a witness is ruled out as incompetent to testify *at all*, it is not necessary to set out what it was expected to prove; for the error in such case lies in the rejection of a competent witness. But if the objection be to his competency to testify to *certain definite matters*, it ought to appear what the witness proposed to testify, in order that the court may determine whether they are such as the law forbids him to speak of or are not. . . ." (Emphasis added.) 88 N.C. at 596.

Plaintiff has apparently misinterpreted the Court's holding in *Hampton*. That case clearly limits the exception to present Rule 43(c) to those instances where a witness is not permitted to testify concerning any matter relevant to the case. In present case Dr. Logan was duly qualified as an expert in the field of chiropractics. He was permitted to testify at length concerning the nature of plaintiff's injuries. The admission of this testimony indicates that the witness was not "ruled out as incompetent to testify at all." *Hampton, supra*. The sustaining of the defendant's

objection to a question asking for Dr. Logan's diagnosis of plaintiff, together with the judge's ruling, indicates that the witness was ruled incompetent to testify regarding a specific matter. The *Hampton* exception would therefore be inapplicable to the facts of this case.

Hampton v. Hardin, supra, was decided long before the enactment of Rule 43(c) of the Rules of Civil Procedure. The *Hampton* rule, creating what would be an exception to present Rule 43(c), was declared in dictum, and the case has not since been cited as support for the exception created. Professor Brandis terms the *Hampton* exception to the basic rule "highly questionable," and suggests that when a witness is ruled incompetent to testify at all the substance of his testimony should be made to appear for purposes of review. *See* 1 Stansbury, N.C. Evidence § 26, p. 64 (Brandis rev. 1973). This would appear to be the practice in the federal courts and in the majority of states. *See* 10 Moore, Federal Practice § 103.21; 4 Am. Jur. 2d, Appeal and Error § 522, and cases cited therein; *Herencia v. Guzman,* 219 U.S. 44, 55 L.Ed. 81, 31 S.Ct. 135.

It would appear, moreover, that this Court has decided not to recognize the exception set forth in *Hampton.* In *Eubanks v. Eubanks,* 273 N.C. 189, 159 S.E. 2d 562 (1968), plaintiff's counsel stated, at the conclusion of defendant's evidence, that he would like to offer additional evidence on paternity. The trial court refused and plaintiff assigned his refusal as error. Justice Sharp (now Chief Justice), speaking for the Court, said: ". . . The record does not disclose the identity of the proposed witnesses or what their testimony would have been. It cannot be determined, therefore, whether either *the witness* or his testimony would have been *competent.* 'Failure to show what the witness would have answered renders the ruling nonprejudicial.' *Westmoreland v. R.R.,* 253 N.C. 197, 198, 116 S.E. 2d 350, 351. . . ." (Emphasis added.)

[1] Accordingly, we would hold that, whether an objection be to the admissibility of testimony or to the competency of a witness to give that, or any, testimony, the significance of the excluded evidence must be made to appear in the record if the matter is to be heard on review. Unless the significance of the evidence is obvious from the record, counsel offering the evidence must make a

specific offer of what he expects to prove by the answer of the witness. *See United States v. Smith*, 464 F. 2d 222 (8th Cir. 1972), *cert. denied*, 409 U.S. 986; *Armour & Co. v. Nard*, 463 F. 2d 8 (8th Cir. 1972).

[2] Plaintiff further argues that Rule 43(c) does not require that a witness's answer be included in the record when the substance of the witness's proposed testimony is apparent from the record. Plaintiff says that it is clear that the substance of Dr. Logan's testimony would have been his diagnosis of plaintiff. Hence, the substance of his testimony was obvious and he was not required to include the witness's answer for review. An offer of proof under Rule 43(c) must be specific and must indicate what testimony the excluded witness would give. *See Armour & Co. v. Nard, supra; Andrews v. Olin Mathieson Chem. Corp.*, 334 F. 2d 422 (8th Cir. 1964); *see also* 89 A.L.R. 2d 279, on form and sufficiency of offer of proof. A simple indication or assertion that testimony will concern a physician's diagnosis of the party's condition, though it indicates the general subject of the testimony, is not sufficiently specific for purposes of review. A showing of the essential content or substance of the witness's testimony is required before this Court can determine whether the error in excluding the evidence is prejudicial. *Cf. Andrews v. Olin Mathieson Chem. Corp., supra.* In present case, due to plaintiff's failure to make a specific offer of proof, we do not know what Dr. Logan's diagnosis would have been nor whether it would have been sufficiently favorable to plaintiff's case to have affected the jury verdict. Plaintiff has not shown that any alleged error was prejudicial to his case.

For the reasons stated, the decision of the Court of Appeals finding no error in the trial before Judge Sentelle is affirmed.

Affirmed.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. REX CARSWELL

No. 53

(Filed 28 November 1978)

Larceny § 7.8— removal of air conditioner from window base—placement on floor—taking and asportation

Evidence that defendant and a companion picked up an air conditioner from its window base in a motel room and placed it on the floor some four to six inches toward the door was sufficient evidence of a taking and asportation to support a conviction of larceny.

Justice BRITT took no part in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals reported in 36 N.C. App. 377, 243 S.E. 2d 911 (1978) (opinion by *Erwin, J., Brock, C.J.* and *Vaughn, J.* concurring), which reversed in part and affirmed in part the judgment of *Thornburg, J.*, 16 November 1976 Criminal Session of BURKE County Superior Court.

Upon a proper bill of indictment defendant was tried and convicted of felonious breaking and entering and felonious larceny. Respective consecutive sentences of ten and five years were imposed. He appealed both convictions to the Court of Appeals but they reversed as to the larceny conviction only and we allowed discretionary review thereon.

The State's evidence tended to show the following:

On the morning of 18 April 1976, Donald Ray Morgan was at the Day's Inn Motel where he was employed as a security guard. With him was Richard Strickland, a helper, and Mrs. Strickland, Richard's mother, who had brought her son some food. The motel was not in use at that time as it was still under construction. Upon inspection of the premises that morning, Mr. Morgan discovered that five or six rooms had been broken into during the night. In one of these, Room 158, the window air conditioner had been pried away from the base on which it rested in the bottom of the window, but it had not been removed.

Mr. Morgan asked Mrs. Strickland to stay at the motel while he called to report the incident to the Sheriff's Department. While he was gone, a pickup truck pulled into the motel with

three people in it, one of them being the defendant. They wanted to get into the motel building and claimed that they were sent there by their boss. They left after Mrs. Strickland would not let them in.

Instead of relocking the doors that had been broken into, Mr. Morgan stayed at the motel and guarded the rooms from a point on the balcony of the second level some fifty to seventy-five feet away. Around 10:30 p.m. that night, the defendant and another man walked onto the premises of Day's Inn Motel from some nearby woods and entered Room 158. Through the window running across the entire front of the room, Mr. Morgan saw the two men take the air conditioner off its stand in the window and put it on the floor. The unit was moved approximately four to six inches toward the door.

After setting the air conditioner on the floor, the men left Room 158. Mr. Morgan stopped them as they appeared to be entering another room. The guard sent Mrs. Strickland, who again had come to the motel that night with food for her son, to the nearby Holiday Inn to call the Sheriff's Department.

Later that night, a pickup truck was seen driving up and down a road adjacent to the Day's Inn Motel. Mrs. Strickland testified that it was the same truck she had seen the defendant in that morning at the motel.

The defendant's evidence tended to show the following:

On 18 April 1976, the defendant and a friend had been drinking at a bar in Cleveland County and later at a club called The Shamrock in Burke County. They walked up the road to the Day's Inn Motel. The two men decided to go into a room to lie down because they were tired and drunk and could not get a ride home.

They entered a room that had its door ajar; however, the two of them left because "it stunk so bad in there." As they started down the sidewalk outside the room, a man yelled and ordered them to stop. Thereafter they were arrested.

Defendant testified that he did not touch the air conditioner at any time. He also stated that he had not gone to the Day's Inn Motel earlier that day and had never seen Mrs. Stickland before.

Attorney General Rufus L. Edmisten by Associate Attorney Henry H. Burgwyn for the State.

Simpson, Baker, Aycock & Beyer by Richard W. Beyer for the defendant.

COPELAND, Justice.

The Court of Appeals held that the movement of the air conditioner in this case was an insufficient taking and asportation to constitute a case of larceny against the defendant. Because we believe that there was enough evidence to send the larceny charge to the jury, we reverse the Court of Appeals on this point and reinstate the judgment of Judge Thornburg.

This case comes to the Court only on the contention that the judge erroneously denied defendant's motion for nonsuit on the larceny charge. It is well settled that in ruling on such a motion, the evidence is considered in the light most favorable to the State, and the State is given the benefit of all reasonable inferences. *State v. Holton*, 284 N.C. 391, 200 S.E. 2d 612 (1973); *State v. Henderson*, 276 N.C. 430, 173 S.E. 2d 291 (1970).

Larceny has been defined as "a wrongful taking and carrying away of the personal property of another without his consent, . . . with intent to deprive the owner of his property and to appropriate it to the taker's use fraudulently." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E. 2d 230, 232 (1953). "A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away." 4 W. Blackstone, Commentaries 231.

In *State v. Green*, 81 N.C. 560 (1879), the defendant unlocked his employer's safe and completely removed a drawer containing money. He was stopped before any of the money was taken from the drawer. This Court found these actions sufficient to constitute asportation of the money, and we upheld the larceny conviction.

The movement of the air conditioner in this case off its window base and four to six inches toward the door clearly is "a bare removal from the place in which the thief found [it]." The Court of Appeals apparently agreed; however, it correctly recognized that there is a taking element in larceny in addition to the asportation requirement. 4 W. Blackstone, *supra* at 231. *See also State v.*

Parker, 262 N.C. 679, 138 S.E. 2d 496 (1964). The Court of Appeals stated that "here the problem with the State's case is that the evidence of asportation does not also constitute sufficient evidence of taking." 36 N.C. App. at 379, 243 S.E. 2d at 913.

This Court has defined "taking" in this context as the "severance of the goods from the possession of the owner." *State v. Roper*, 14 N.C. 473, 474 (1832). Thus, the accused must not only move the goods, but he must also have them in his possession, or under his control, even if only for an instant. *State v. Jackson*, 65 N.C. 305 (1871). This defendant picked the air conditioner up from its stand and laid it on the floor. This act was sufficient to put the object briefly under the control of the defendant, severed from the owner's possession.

In rare and somewhat comical situations, it is possible to have an asportation of an object without taking it, or gaining possession of it.

> "In a very famous case a rascal walking by a store lifted an overcoat from a dummy and endeavored to walk away with it. He soon discovered that the overcoat was secured by a chain and he did not succeed in breaking the chain. This was held not to be larceny because the rascal did not at any time have possession of the garment. He thought he did until he reached the end of the chain, but he was mistaken." R. Perkins, Criminal Law 222 (1957) (*discussing People v. Meyer*, 75 Cal. 383, 17 P. 431 (1888)).

The air conditioner in question was not permanently connected to the premises of Day's Inn Motel at the time of the crime. It had previously been pried up from its base; therefore, when defendant and his companion moved it, they had possession of it for that moment. Thus, there was sufficient evidence to take the larceny charge to the jury.

The defendant's and the Court of Appeals' reliance on *State v. Jones*, 65 N.C. 395 (1871), is misplaced. In that case, the defendant merely turned a large barrel of turpentine, that was standing on its head, over on its side. This Court held that shifting the position of an object without moving it from where it was found is insufficient asportation to support a larceny conviction. The facts of this case show that there was an actual removal of the air con-

ditioner from its base in the window to a point on the floor four to six inches toward the door. Thus, *Jones* is not controlling.

For the reasons stated above, the decision of the Court of Appeals is reversed, and the larceny judgment reinstated.

Reversed.

Justice BRITT took no part in the consideration or decision of this case.

BLAKE v. NORMAN

No. 86 PC.

Case below: 37 N.C. App. 617.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 November 1978.

GRIFFITH v. GRIFFITH

No. 90 PC.

Case below: 38 N.C. App. 25.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978.

MARTIN v. AMUSEMENTS OF AMERICA, INC.

No. 107 PC.

Case below: 38 N.C. App. 130.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 28 November 1978.

SPENCER v. SPENCER

No. 51 PC.

Case below: 37 N.C. App. 481.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978. Appeal dismissed ex mero motu for lack of substantial constitutional question 28 November 1978.

STATE v. BROWN

No. 121 PC.

Case below: 33 N.C. App. 84.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 November 1978.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. CAGLE

No. 118 PC.

Case below: 38 N.C. App. 391.

Petition by defendants for discretionary review under G.S. 7A-31 denied 28 November 1978.

STATE v. CORRELL

No. 130 PC.

Case below: 38 N.C. App. 451.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978.

STATE v. FAISON

No. 71 PC.

Case below: 37 N.C. App. 233.

Application by defendant for further review denied 28 November 1978.

STATE v. GRADY

No. 117 PC.

Case below: 38 N.C. App. 152.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 28 November 1978.

STATE v. OAKES

No. 101 PC.

Case below: 38 N.C. App. 113.

Application by defendant for further review denied 28 November 1978.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. PARKER

No. 115 PC.

Case below: 38 N.C. App. 316.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978.

STATE v. SMART

No. 110 PC.

Case below: 38 N.C. App. 243.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978.

STATE v. THOMAS

No. 106 PC.

Case below: 37 N.C. App. 233.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 28 November 1978.

STATE v. VIETTO

No. 103 PC.

Case below: 38 N.C. App. 99.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 28 November 1978.

STATE v. WILLIAMS

No. 114 PC.

Case below: 38 N.C. App. 138.

Petition by defendant for discretionary review under G.S. 7A-31 denied 28 November 1978.

IN RE: INQUIRY CONCERNING A JUDGE NO. 53 LINWOOD T. PEOPLES

No. 71

(Filed 29 December 1978)

1. Courts § 2— statute conferring jurisdiction over class—power over person not member of class

When a statute confers power on a court or administrative body to adjudicate cases involving the members of a certain class, a court's attempt to exercise its power over one who is not a member of that class is void for lack of jurisdiction.

2. Courts § 2— jurisdiction—state of affairs when invoked

The jurisdiction of a court depends on the state of affairs existing at the time it is invoked.

3. Courts § 2.1— jurisdiction over person, subject matter—how obtained

Jurisdiction over the person of a defendant or respondent is obtained by service of process upon him, by his voluntary appearance or consent; jurisdiction of a court or administrative agency over the subject matter of a proceeding is derived from the law which organized the tribunal and cannot be conferred upon a court by consent, waiver or estoppel.

4. Public Officers § 3— resignation—effective date

When a resignation of a public officer specifies the time at which it will take effect, the resignation is not complete until that date arrives.

5. Courts § 2— attachment of jurisdiction—effect of subsequent events

Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events, even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance.

6. Judges § 7— jurisdiction over misconduct charges—subsequent resignation of judge

The Judicial Standards Commission and the Supreme Court acquired jurisdiction over a district court judge and the charges against him when the Commission filed its complaint against the judge, and such jurisdiction was not divested by the judge's resignation which became effective two days after the complaint was filed.

7. Actions § 3— moot question

Whenever during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for the courts will not entertain or proceed with a cause merely to determine abstract propositions of law.

8. Judges § 7— action to remove judge—other sanctions—resignation of judge—mootness

A proceeding before the Judicial Standards Commission to remove a district court judge from office was not rendered moot by respondent judge's resignation from office since the remedies against a judge who engages in serious misconduct justifying his removal include not only loss of present office but also disqualification from future judicial office and loss of retirement benefits.

9. Trial § 12— failure of defendant to testify—consideration in civil proceeding

It is only in criminal cases that the failure of the defendant to testify creates no presumption against him. In all other proceedings the failure of a party to take the stand to testify as to facts peculiarly within his knowledge and directly affecting him is a pregnant circumstance for the fact finder's consideration.

10. Judges § 7— misconduct—improper disposition of case

Any disposition of a case by a judge 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.

11. Judges § 7— misconduct—absence of personal benefit

The fact that a judge receives no personal benefit, financial or otherwise, from his improper handling of a case does not preclude his conduct from being prejudicial to the administration of justice.

12. Judges § 7— criminal cases—necessity for disposition in open court

The trial and disposition of criminal cases is the public's business and ought to be conducted in open court.

13. Judges § 7— misconduct—criminal cases—disposition without notice to district attorney

Any disposition of a criminal case without notice to the district attorney who was prosecuting the docket when the matter was not on the printed calendar for disposition improperly excluded the district attorney from participating in the disposition.

14. Judges § 7— misconduct—ex parte disposition of case

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.

15. Judges § 7— misconduct—payment of fine and costs for defendant

A judge may not with propriety handle any financial transaction for a defendant (or any other party) which is incident to a case in which he sits in judgment. *A fortiori*, if a judge is indiscreet enough to take money for the purpose of paying a defendant's fine and costs he should forthwith pay it to the clerk of court, and any use or retention of such funds, whether it be inadvertently, forgetfully, or because the judge is short of cash and intends to

apply the money eventually to the purpose for which it was received, if not criminal, is wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

16. Judges § 7— conduct prejudicial to administration of justice—wilful misconduct in office—seriousness

Conduct prejudicial to the administration of justice, unless knowingly and persistently repeated, is not per se as serious and reprehensible as wilful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. Art. IV, § 4, and Art. VI, § 8 of the N. C. Constitution.

17. Judges § 7— removal of judge—disqualification from further judicial office—wilful misconduct in office

A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of wilful misconduct in office.

18. Judges § 7— *wilful misconduct in office—removal—disqualification from further judicial office*—loss of retirement benefits

Respondent district court judge is removed from office by the Supreme Court, disqualified from holding further judicial office and disqualified from receiving retirement benefits for "wilful misconduct in office" on the basis of the following conduct: (1) respondent consistently and improperly precluded the district attorney from participating in the disposition of cases on which he was entitled to be heard on behalf of the State, and removed the disposition of cases from public view in open court by transacting the court's business in secrecy; (2) respondent dismissed three criminal cases without a trial, in the absence of the defendent, without knowledge of the district attorney, and on a day when the cases were not calendared for trial; (3) respondent caused the clerks of three counties to remove cases from the active criminal dockets in those counties and to hold such cases in special files until he directed otherwise, in consequence of which those cases were not tried speedily or calendared and disposed of in open court in the normal course of business in the district courts of the respective counties; and (4) respondent from time to time paid to the clerk money which he had collected from defendants in cases which he disposed of in their absence; on two occasions respondent recieved money to pay a defendant's court costs when respondent disposed of his case, but respondent neglected to dispose of the case and never paid the costs or returned the money to defendant; and in a third such case respondent returned the money after keeping it eleven months and only after another judge had disposed of the case.

19. Judges § 7— wilful misconduct in office—removal—disqualification from further judicial office—constitutionality

The provisions of G.S. 7A-376 which bar a judge who has been removed for misconduct from future judicial office are authorized by Art. IV, § 17(2) of the N. C. Constitution. Furthermore, an adjudication of "wilful misconduct in office" by the Supreme Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence"

is equivalent to an adjudication of guilt of "malpractice in any office" as used in Art. VI, § 8 of the N. C. Constitution, and such constitutional provision also authorized the legislature to make disqualification from judicial office a consequence of removal for wilful misconduct under G.S. 7A-376.

20. Judges § 7— wilful misconduct in office—removal—loss of retirement benefits—constitutionality

The General Assembly acted within the authority given it by Art. IV, § 8 of the N. C. Constitution to "provide by general law for the retirement of Justices and Judges" when it provided in G.S. 7A-376 that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation.

THIS proceeding is before the Court upon the recommendation of the Judicial Standards Commission (Commission) that Linwood T. Peoples (Respondent), a judge of the General Court of Justice, District Court Division, Ninth District, be removed from office as provided in G.S. 7A-376 (Cum. Supp. 1977). The recommendation, filed in the Supreme Court on 25 April 1978, was argued as Case No. 71 on 15 November 1978.

On 1 December 1977 the Judicial Standards Commission, in accordance with its Rule 7 (J.S.C. Rule 7), 283 N.C. 763-770 (1973), notified Respondent that on its own motion it had ordered a preliminary investigation to determine whether formal proceedings should be instituted against him under J.S.C. Rule 8. The notice informed Judge Peoples (1) that the subject of the investigation would be his "alleged misconduct in the handling or disposition of criminal cases in the Ninth Judicial District, including the placing of numerous criminal cases in an inactive file in lieu of disposing of such cases in open court"; (2) that the investigation, reports and proceedings before the Commission would remain confidential as provided in J.S.C. Rule 4; and (3) that he had the right to present to the Commission for consideration "such relevant matter" as he might choose.

Judge Peoples had been a district court judge since 2 December 1968, the date the district court was established in the Ninth Judicial District. On 10 January 1978 Judge Peoples tendered his resignation as a district court judge to the Governor in the following letter:

"Honorable James B. Hunt, Jr.
Governor of the State of North Carolina
Raleigh, North Carolina 27602

Dear Governor Hunt:

I hereby submit my resignation as a Judge of District Court for the Ninth Judicial District, State of North Carolina, effective February 1, 1978.

I have been honored to serve the people of the District as a District Court Judge and hope to continue to serve them in some other capacity within the Judiciary.

Respectfully,

s/ LINWOOD T. PEOPLES"

On 20 January 1978 Governor Hunt accepted Judge Peoples' resignation to be effective on 1 February 1978.

On 30 January 1978 Judge Peoples was served with a formal complaint and notice which informed him (1) that the Commission had concluded "upon the original complaint and the evidence developed by the preliminary investigation" that formal proceedings should be instituted against him; (2) that H. D. Coley, Jr., would act as special counsel for the Commission; (3) that the charges against him were (a) wilful misconduct in office, and (b) conduct prejudicial to the administration of justice that brings the judicial office into disrepute; (4) that the alleged facts upon which the foregoing charges were based are specifically set out in the verified complaint attached to the notice; and (5) that it was his right to file a verified answer to the charges within 20 days.

The complaint, in summary, alleged the following:

Count I. In April, July, and September 1976 Respondent dismissed three separate criminal cases pending in the District Court of Vance County against defendants Briley, Catlett, and Riggan without having calendared the cases for trial, without notice to the district attorney, and without entering the judgment in open court.

Counts II, III, and IV. Over a period of years Respondent caused specified criminal cases to be removed from the active

pending-case files in Vance, Granville, and Franklin Counties and placed in an inactive or special "Judge Peoples file" where they were retained for varying lengths of time before being dismissed or otherwise disposed of without having been regularly calendared for trial, without notice to the district attorney, and not in open court in the normal course of business. On 13 September 1977, in Vance County, 27 cases were pending in Judge Peoples' special file; 18 such cases in Franklin County; and four cases in Granville County.

Count V. In three of the cases enumerated in Counts II, III, and IV, the defendants—Smith, Walker, and Hudson—had each paid, or caused to be paid the sum of $27.00 ("the cost of court") to Respondent, who had agreed "to take care of" the respective traffic citations. The money paid in behalf of Walker and Hudson was never returned to the payor; the $27.00 which Smith paid was returned to him in September 1977 after his case was calendared for trial before the Chief District Court Judge of the Ninth Judicial District.

Judge Peoples has filed no answer to the charges contained in the complaint. His only pleading is a special appearance, filed 17 February 1978, in which he moved to dismiss this proceeding on the ground that the Commission's jurisdiction extended only to persons holding judicial office and, the Governor having accepted his resignation, "Respondent is not now a judge."

After considering the briefs filed by Respondent and Special Counsel, the Commission denied the motion to dismiss and scheduled a formal hearing upon the charges set out in the complaint. At this hearing, which began 31 March 1978, Mr. Eugene Boyce of the Raleigh Bar and Mr. Bobby W. Rogers of the Henderson Bar appeared in behalf of Respondent. In answer to the chairman's inquiry whether Respondent would be present for the hearing, his counsel informed the Commission that it was Judge Peoples' "election" not to be present. Special Counsel Coley then presented the evidence against Respondent. Respondent offered no evidence but his attorneys cross-examined the witnesses whom Mr. Coley called and examined. A summary of the evidence adduced at the hearing follows:

From May 1969 until September 1976 Mrs. Lucy Longmire was the courtroom clerk for the criminal sessions of the District Court of Vance County. In September 1976 she became an assistance clerk of the Superior Court, and Mrs. Jo Whitus took over her duties as criminal courtroom clerk in the District Court. Mrs. Longmire's testimony tended to show the following facts:

In Vance County the clerk keeps three separate records of every criminal case docketed in the District Court: (1) an index card on which is recorded the name of the case, the date of trial, any continuances, a short description of the charge, and the final disposition of the case (In the other counties of the District an index book is used instead of an index card. Both serve the same function); (2) the shuck, a drop-type, glassine-front envelope which holds the warrant or traffic ticket and all succeeding papers filed in the case, including the final judgment; and (3) the court calendar, which is prepared for each day the court is in session for the trial of criminal cases. The courtroom clerk keeps the calendar, which lists every case scheduled for trial that day by name and docket number with a "shorthand" designation of the charge. This daily calendar constitutes the minutes of the court, records the disposition of each case, and is kept as a permanent record. If a case is not tried as scheduled on the calendar a notation shows the date to which it is continued. If the court disposes of a case which was not originally listed on the calendar, that case would be added to the calendar at the time of disposition.

Sometime after Mrs. Longmire became courtroom clerk she established a special file labeled "LTP File." She did this in order to keep up with the cases which Judge Peoples had given to her "with instructions" to hold for his later disposition. The file was kept on the corner of her desk. Judge Peoples was aware that this file was the repository of the shucks containing the cases he had told her to hold. The cases in the "LTP File" did not qualify for the "inactive file" because all the defendants had been served with criminal process and no entry showed them to be beyond the jurisdiction of the court.

As long as a case remained in the "LTP File" it would not be placed on a trial calendar unless Judge Peoples instructed the courtroom clerk to calendar it. Mrs. Longmire was unable to estimate "the average number of cases which stayed in that file,"

but she said that "over a period of two or three years" some cases were disposed of and new ones were added. No other judge kept a special file or had a place in which pending cases were "held up." From time to time the other district court judges would continue a case or delay a decision, but when that was done they usually recalendared the case for a definite date.

Other than telling her to hold a particular case in suspension until further notice, Mrs. Longmire said Judge Peoples never gave her any instructions with reference to the shucks in his file. He never gave her any money "to pay or remit the costs in any of the cases that were in the 'LTP File.'" When questioned specifically with reference to the calendaring of cases which Judge Peoples dismissed after having had them held up in the "LTP File," Mrs. Longmire said that some of these dismissals were made when the case was not actually calendared. In those instances, in order for her minutes to show those dispositions she would add the case to a calendar at the next session after he had signed the judgment in the case.

In July 1976, after being trained by Mrs. Barnett and Mrs. Longmire, Mrs. Jo Whitus succeeded Mrs. Lucy Longmire as the courtroom clerk who "takes care of District Criminal Court in Vance County." Her testimony tended to show:

At the time Mrs. Whitus was first employed as deputy clerk in 1976 she was aware of the existence of the Judge Peoples file. The procedures relating to the maintenance of the "LTP File" had been in effect several years before she became courtroom deputy, but she did not know how long. When she became courtroom clerk she took over Mrs. Longmire's desk in the vault, and the "LTP File" continued to remain on top of her desk. However, "on a couple of occasions" Judge Peoples took it to his office. No attempt was ever made to conceal the presence of the file. Neither the district attorney, any of his assistants, nor the clerk of the Superior Court, Mr. Hight, ever inquired about the status of this file or gave any instructions with reference to it. When asked if the clerk of the court knew about that particular file she replied, "I'm not sure." None of the other judges ever asked her about a specific case in the "LTP File," and she does not know whether they ever saw it or knew about it. None of the other judges kept such a file and she received no instructions from any

of them "relating to different criminal court cases . . . none other than judgments given in court."

Mrs. Whitus explained that the procedure by which particular files were lodged in the "LTP File" varied. Sometimes Judge Peoples would come by her desk in the vault and inquire whether "we had a case for so and so person . . . and ask that the case be put in his file." Sometimes in court when the district attorney would call a case Judge Peoples would have him bring the shuck to the bench. Then Respondent would hand it to Mrs. Whitus and tell her what he wanted done with it, and she usually wrote "LTP File" on the shuck. The pink copies of traffic citations were handled similarly. Respondent would either give her a judgment at the time he handed them to her or tell her "to put it in his file." When he gave her the citation in court, she said, "the case may have just been called up and it may not have been called."

On cross-examination, when Mrs. Whitus was asked to explain the procedure followed in Vance County to secure a continuance and the recalendaring of a case, she replied, "All the cases set for a certain day are docketed and taken to the courtroom and then continued there if the solicitor allows them. Occasionally, when Judge Peoples was there he would come down and say continue this case until my next day and I would pull it out and put it on for when he said." To her knowledge no advance continuances were ever given by any other judge, but "on a couple of occasions the district attorney may have agreed to a continuance."

Mrs. Whitus and Mrs. Longmire both testified that once a case had been put in the "LTP File," it would not get back on the active criminal docket unless Judge Peoples requested it. "Sometimes he would come down and ask that the case be put on the calendar for his next day in court." After he had rendered a judgment in the case from his personal file the case file was disposed of just like any other.

At times Judge Peoples rendered and entered judgments out of court and out of term, but Mrs. Whitus could give no estimate of the number of such judgments. He never paid any costs or fines for a defendant in court but, on occasions, "after

court or some day after" he had entered a judgment he would deliver money to Mrs. Whitus for the costs and fine. Sometimes he would enter judgment at the time he handed her the money, "or he would have already rendered the judgment."

On cross-examination, after Mrs. Whitus had testified that she had recorded all the judgment entries which Judge Peoples had instructed her to make, Respondent's counsel asked her the following questions and she made the following answers:

Q. Well, he never told you to back date anything, did he? Show it dated on the term of court rather than on the day that you actually made the date?

A. Yes, he did.

Q. What did he tell you on those? How many occasions was that?

A. I don't know.

Q. Do you remember doing it or. . . .?

A. No, I didn't do it.

Q. On the occasions of those entries, was the request to make it an entry to correspond with the court session?

A. Yes it was.

Q. And was that in reference to the remission of any money for court costs or was it just on a dismissal of a case?

A. I don't remember what any of the judgments were.

Q. Did you discuss that with anybody else in the clerk's office?

A. No.

Q. You dated it whenever the date your writing appeared on it?

A. I dated it the day he gave me the judgment, unless he had said the case was calendared for a certain day and he says I'll tell you what to do on Monday or on Wednesday or some other day and that if it had been calendared for last Friday he just got around to telling me what to do with it

on Wednesday I would date it the last Friday, but in that case ya'll would have never found the case to begin with.

Prior to July 1977 "when the auditors came" no judge, district attorney, or official in the clerk's office had ever told Mrs. Whitus to do anything with respect to the "LTP File" and the shucks in it except what she had been doing. From time to time, however, Mrs. Barnett would ask her to ask Judge Peoples "to do something with some of them . . . set them for a court day or tell us what to do with them because they were getting cumbersome." Mrs. Whitus would comply with that request, and "Judge Peoples did make some setting of them from time to time or make some disposition of them and that would help cut the number of them back down."

Mrs. Joyce Merritt joined the staff of the Franklin County Clerk of Court in January 1969. Six months later she became a courtroom clerk. Her testimony tended to show she worked with all the district court judges of the Ninth Judicial District, none of whom were residents of Franklin County. When she first started to do courtroom work she could not complete all the judgments in time for the judges to sign them before the end of the court day; so she made a file for each judge into which she put his unsigned judgments. If the judge would "be back next week," she would get his signature then; if not, she would mail the judgments to him. However, after she became proficient in her job she discontinued all the files except the one for Judge Peoples. So many cases had accumulated in it that she had no other way to keep up with them.

From time to time Judge Peoples would give Mrs. Merritt instructions to place the shucks of specific cases in his file or would hand her a defendant's pink copy of a traffic citation to put in his file. These shucks and citations remained there until he told her to schedule a case for a particular date and notify the defendant and witnesses or until he entered judgments in the cases. On some days, before court, he would instruct Mrs. Merritt to "pull a file and put it in his folder."

Mrs. Merritt made no effort to conceal the cases which Judge Peoples had ordered pulled from the regular file for pending cases; she kept the "LTP" cases in wooden stack boxes on the corner of her desk. The difference between the files which Mrs.

Merritt had kept for other judges and the Judge Peoples "file" was that Mrs. Merritt did not hold any cases for them in which judgment had not been rendered; she held for their signatures only judgments which had been previously announced.

The judges in the Ninth Judicial District were "on a rotating basis," and Judge Peoples (a resident of Vance County) held court in Franklin County twice a month. Each time he came Mrs. Merritt would "hand up" his file and remind him that the cases "were getting some age on them." He would look through the cases and sometimes he would enter a judgment and sometimes he would not. If he entered judgment, the case was "added on" to the day's calendar so there would be a record of the costs and she would have some minutes, "but how it came to pass was not clear." As to the cases in which he did not enter judgments, Judge Peoples instructed Mrs. Merritt to retain them in his file. When he entered these judgments the defendant was "not in all cases present," and—to her knowledge—the district attorney was neither consulted nor given any notice of the court's action. The cases would not be actually called out in court.

On a few occasions Judge Peoples gave Mrs. Merritt the money to pay the costs in cases that were in his file. Several times, while he was on the bench, he handed her a defendant's traffic citation (pink slip or ticket) and told her what kind of judgment to enter—"pay the costs, or costs and fine, prayer for judgment continued." At the same time he would hand her cash in the amount the judgment demanded. The district attorney never called these cases, and he would not necessarily know what case the judge was handling. Mrs. Merritt sat right beside Judge Peoples "and he would pass it to her." At the time he handed the pink slip and money to her he had heard no evidence, but the judgment would show a plea of guilty or a verdict of guilty or usually both. Sometimes the plea of guilty was to a lesser offense than the one charged. When Mrs. Merritt was asked if "that would happen with the defendant not being present" her reply was, "Yes, sir; it has happened."

So far as Mrs. Merritt could recall no judge except Judge Peoples had ever entered a judgment dismissing a case when it was not on the calendar and neither the defendant nor his attorney were present. Nor could she recall any judge paying the court costs for a defendant except Judge Peoples.

Mrs. Ruth C. Nelms, the Clerk of the Superior Court of Granville County, testified in brief summary as follows:

Judge Peoples held court, usually once a month in Granville, on a regular rotating schedule prepared by the Chief District Court Judge. No special file for him was maintained in Mrs. Nelms' office. However, when the State auditors came in July they found in the inactive file four pending cases which Judge Peoples had directed be placed there pending his further orders. This inactive file was maintained for cases in which the warrants had not been served. The defendants named in these warrants were usually escapees from the Department of Correction, the Youth Center at Butner, or other persons who could not be found but "needed to be tried." All Mrs. Nelms knew about the four cases in question was that Katherine West, the clerk who worked in the district court, told her that Judge Peoples had instructed her "to mark them that way." In each of these cases the warrant had been served upon the defendant.

In July 1977 the State auditor checked the record of the office of clerks of court in Vance, Franklin, and Granville Counties. They checked all the docketed cases, those which had been disposed of and those which were pending for trial. Mrs. Whitus testified, "they looked for everything, and that is how they came to locate the 'LTP File.' "

In September 1977 the State auditor reported to the Director of the Administrative Office of the Courts that there were discrepancies in records in the offices of the clerks in Vance, Franklin, and Granville Counties. In consequence James L. Glenn, Administrator, Clerk Services, was directed to investigate. In the course of his investigation he discovered the final disposition or the pending status of the cases listed in the five counts of the complaint and in the findings of fact by the Commission. After Mr. Glenn's investigation, Chief District Court Judge Claude W. Allen, Jr., directed that the 27 cases which had been pending in the Judge Peoples files in Vance County, the 18 in Franklin County; and the four cases retrieved from the inactive file in Granville County, be calendared for trial during the month of September at sessions over which he himself presided. In due course Judge Allen tried and disposed of all these cases.

In support of the allegations in Count I of the complaint—that Respondent dismissed three specified criminal cases out of court and without notice to the district attorney—Special Counsel offered the evidence summarized below.

Mrs. Longmire, Assistant Clerk of Court in Vance County, identified Vance County District Court file number 76 CR 835, *State of North Carolina v. Daniel McIntosh Briley.* In pertinent part, the record disclosed that on 12 February 1976 Daniel McIntosh Briley was arrested and charged with operating a motor vehicle upon a public highway while under the influence of intoxicating liquor. His breathalyzer test showed the alcoholic content of his blood to be .19 percent at the time. Thereafter he was released on his own unsecured bond of $200.00 and ordered to appear in court for trial on Friday, 5 March 1976. On 2 April 1976 (Friday) Judge Peoples signed a judgment in the case upon a form which showed the number of the case, 76 CR 835, the name of the defendant Briley and his attorney, and the charge. The disposition of the case was "Judgment of the court is that this case dismissed." The judgment sheet showed that no plea or verdict had been entered.

From other records of the District Court (Exhibits 4 and 5), Mrs. Longmire testified that on 2 April 1976 Chief District Court Judge Julius Banzet was holding the criminal term in Vance County; that the name Daniel McIntosh Briley did not appear on the court calendar (docket) for that day; and that the docket sheet showing the disposition of cases on 2 April 1976 did not contain the name Briley or the case numbered 76 CR 835. When asked if, to her knowledge, the case of *State v. Daniel McIntosh Briley,* 76 CR 835, appeared on any court calendar or minutes which she prepared, Mrs. Longmire answered, "I don't know."

Daniel McIntosh Briley, a car dealer in Henderson, North Carolina, testified that on 12 February 1976 he "was in a ditch" and was arrested for "driving under the influence." He was given an opportunity to call his lawyer, who came down and told Briley "to take it [breathalyzer test] and say no more." After that his attorney went with him to the magistrate and then took him home. Thereafter Briley never went to court and heard nothing further about his case until his attorney called to tell him Judge Peoples had dismissed the case.

Mrs. Whitus, courtroom clerk for the criminal session of Vance County, identified Special Counsel's Exhibit D as a duly certified copy of proceedings in Case No. 76 CR 1009, *State v. Louise Branham Catlett,* who had received a citation on 18 February 1976 for driving a motor vehicle at a speed of 50 MPH in a 35 MPH speed zone. The judgment sheet showed that Judge Peoples had disposed of this case on Monday, 19 July 1976, by signing the following entry: "Judgment of the court is that . . . case is dismissed by the court." The blocks on the judgment sheet provided for the entry of the defendant's plea (guilty, not guilty, or nolo contendere) were left blank. Mrs. Whitus testified that she herself entered and dated this judgment on the day Judge Peoples dismissed the case and that no court was held in Vance County on any Monday in July 1976. Criminal sessions were held on every Tuesday and Friday.

Mrs. Whitus also identified Exhibit E as a duly certified copy of the proceedings in Vance County District Court case No. 76 CR 1832, *State v. Harry Battle Riggan.* This record disclosed that on 26 February Riggan had received a citation for driving on the wrong side of the road and that his case was first set for 12 March 1976 and then continued until 9 April 1976. A notation on the shuck showed that sometime between March 12th and April 9th the case was put in Judge Peoples' file, and on Monday, 27 September 1976, Judge Peoples entered and signed the final judgment as follows: "The case is dismissed by the court."

Mrs. Whitus testified that she dated the judgment 27 September 1976, the day it was signed, and that no court was in session in Vance County on that day or on any other Monday in September 1976. As in the Briley and Catlett cases, the blanks provided on the judgment form to show the defendant's plea were unfilled.

Harry Battle Riggan, an employee of the North Carolina Department of Transportation testified that on 26 February 1976 a highway patrolman gave him a ticket for driving to the left of the center of the highway. Hoping to keep from losing a day's work because of going to court he took the ticket to his personal friend, James H. King, a Vance County magistrate. He gave King $25.00 in cash "to take care of the ticket . . . to answer for the ticket in [his] place." Thereafter Riggan never went to court or

heard anything further about the ticket until "maybe six months or a year" later when his wife told him his name "got in the paper for the ticket" that day. Sometime later Riggan could not say when Mr. King called to say, "I have some money for you; do you want it?" He knew King was talking about the twenty-five dollars. King was "taking [him] out for supper one Saturday night"; so he told King to keep it and they would use it then.

James H. King, who became a magistrate on 1 January 1974, testified that he is a personal friend of Riggan's and "he and I, we socialize." In late February 1976 Riggan brought King the ticket which a patrolman had given him for "driving left of the center line, while pulling a trailer." Riggan asked King if there was anything he could do to help him out on the ticket. King replied that he had known Judge Peoples for several years, considered him a friend, and he would see what he could do; that if "he could get him a prayer for judgment [continued], it would probably cost him the costs of court. At that time it was $25.00." Riggan gave him twenty-five dollars in cash. Thereafter King saw Judge Peoples, "explained the case to him," and told him he would "appreciate what he could do." Judge Peoples told King "he'd see what he could do, and that's all he said to [him]." King said it was his "understanding" that if Judge Peoples could or would "take care of that citation" he would be doing so as an accommodation to both him and Mr. Riggan. King did not give Judge Peoples the twenty-five dollars. Thereafter King heard nothing further about the case until Riggan asked him about it after he "saw it in the paper." When they discussed the twenty-five dollars Riggan "said he didn't want it back, [they] would just go out and eat it up."

Counts II, III, and IV of the complaint charge that in Vance, Franklin, and Granville Counties, Respondent, without notice to the district attorney, had pending cases removed from the active files of the district courts of the respective counties and caused them to be placed in a personal file with instructions to the courtroom clerk to keep them in his file until he ordered them calendared or otherwise disposed of; that in consequence the administration of justice was delayed and the cases were not calendared or tried in open court in the regular course of business as provided by law. These cases were identified by name, file number, date and offense charged, and similarly listed in the Commission's findings of fact.

The cases specified in Count II are the 27 cases which Mr. Glenn found in the "LTP File" in the clerk's office in Vance County. In that group were six citations for speeding, two for driving after license revoked, one each for carrying a concealed weapon and an assault on a female, one for reckless driving, seven citations for relatively minor traffic offenses, and nine cases for driving under the influence of intoxicating liquor.

Of the nine cases of drunken driving two defendants had refused to take the breathalyzer test. On the other seven defendants the breathalyzer readings were .16% (2 cases), .17%, .18%, .19%, .24%, and .27%. The oldest of these cases (*State v. Hight*, 75 CR 702), (Exhibit 2A) had been pending since 2 February 1975—more than two years and seven months before it was calendared for trial before Judge Allen on September 1977 (at which time the defendant pled guilty as charged).

The most recent case of drunken driving in the "LTP File" (*State v. Shoemaker*, 77 CR 1883, Exhibit 2W) was filed 11 May 1977. In *State v. Thomas Jenkins Moore*, 77 CR 5097, Exhibit 2AA, driving under the influence, 10/16/76, the original trial date was 11/19/76. However, on the back of one of the forms in the certified copy of the court record of this case, the following handwritten, undated notation appears: "Lucy, put Tommy Moore's DUI case in my file. Linwood Peoples." Thus, this case lay dormant from 16 October 1976 until 23 September 1977 (11 months and one week) when Judge Allen disposed of the case upon the defendant's plea of guilty as charged.

The cases specified in Count III of the complaint are the four cases listed below, which Mrs. Nelms, the Clerk of the Superior Court of Granville County, delivered to Mr. Glenn in early September 1977 after the State auditors had discovered them in the inactive case files of the district court:

71 CR 4410 *State of North Carolina v. Harold Taylor Cottrell*
Driving under the influence, breathalyzer reading .20%, 11/21/71

74 CR 3689 *State of North Carolina v. Virgil Lee Twisdale*
Speeding 80 miles per hour in a 55 mile per hour zone 8/3/74

74 CR 4025 *State of North Carolina v. Jimmy Carl Knight*
Speeding 70 miles per hour in a 55 mile per hour zone 8/16/74

74 CR 5227 *State of North Carolina v. Allen Ray Moody*
Speeding 69 miles per hour in a 55 mile per hour zone 10/8/74

The certified record in *State v. Cottrell*, 71 CR 4410, (Exhibit 8-A) showed that Cottrell was arrested for drunken driving and carrying a concealed weapon on 21 November 1971. He was released upon a bond with surety and his trial date set for 15 December 1971. On the judgment sheet, which showed no plea or verdict, the following information was typed: "December 15, 1971: Prayer for judgment continued until Judge Linwood T. Peoples orders case reopened." The sheet was signed by neither the judge nor the clerk.

The certified record in *State v. Twisdale*, 74 CR 3689 (Exhibit 8-B) shows this defendant was arrested on 3 August 1974 for speeding 80 MPH in a 55 MPH zone and directed to appear in court on 4 September 1974. It appears that he did not present himself for trial on that date, for a warrant was issued for his arrest. On 9 September 1974, the deputy clerk of court, Katherine K. West, mailed the warrant to the Sherriff of Vance County along with a letter informing him that Twisdale's bond had been set at $150.00 and his trial rescheduled for September 18th. He was not tried on that date, however. Among the papers certified as the record in this case are xerox copies of both an unsigned copy of the Clerk's letter to the Sheriff and a signed copy, which appears to be the Sheriff's original. At the bottom of this letter is the following handwritten notation: "Katherine, I'm sending this ticket but w/o bond. Set for 18th when I'm there again. Linwood T. Peoples." The record contains no warrant. An undated entry shows that the case "was placed on inactive docket until reinstated by Judge Linwood T. Peoples."

The record in *State v. Knight*, 74 CR 4025 (Exhibit 8-C) shows that this defendant was arrested on 16 August 1974 for speeding 70 MPH in a 55 MPH zone and his trial scheduled for 11 September 1974. It appears, however, that Knight—like Twisdale—did not go to court on the day cited, for on September 18th a warrant was issued for his arrest. The deputy clerk transmitted the warrant to the Sheriff of Vance County by a letter which informed him that Knight's trial had been rescheduled for September 25th and his bond set at $100.00. In the Knight file are both an unsigned and a signed copy of this letter but no war-

rant. The next dated entry is on the judgment sheet: "December 4, 1974: Case placed on inactive docket until reinstated by Judge Linwood T. Peoples."

The record in *State v. Moody,* 74 CR 5227 (Exhibit 8-D) shows that defendant was arrested on 8 October 1974 for speeding 69 MPH in a 55 MPH zone and cited to court on 30 October 1974. The shuck contains no warrants but entries on the shuck show that the case was rescheduled for trial on 20 November 1974 and then on 4 December 1974. Thereafter the shuck appears to have remained in the inactive file until 21 September 1977.

The foregoing four cases were calendared for trial by Chief District Court Judge Allen on 21 September 1977. At that time, upon presentation of a certificate showing the death of defendant Cottrell on 10 July 1974, he entered a judgment abating that action. The defendant Virgil Lee Twisdale was tried and found guilty of speeding 70 MPH in a 55 MPH zone and adjudged to pay a fine and costs. Defendant Jimmie Carl Knight was found guilty as charged and adjudged to pay a fine and costs. After defendant Allen Ray Moody was "called and failed" on 21 September 1977 and again on 28 December, the prosecutor believing "that the defendant cannot readily be found, dismissed the case with leave."

The cases specified in Count IV of the complaint are the 18 untried cases pending in Judge Peoples' file in Franklin County in July 1977, a list of which the clerk delivered to Mr. Glenn. In these cases were two charges of driving under the influence of intoxicating liquor, twelve of speeding, and one each of following too closely, improper passing, and driving to the left of the center. In one case, which had been pending since 28 August 1975, the warrant charged a felony and there had been no probable cause hearing. (This charge was dismissed by Judge Allen on 7 November 1977 when the State offered no evidence at the hearing.)

The oldest case pending in the Franklin County Judge Peoples File was *State of North Carolina v. Allen,* 75 CR 4165. The defendant Allen was charged with driving under the influence of intoxicating liquor on 8 September 1975. Of the remaining cases, eight had been filed in 1976 and eight in 1977. All these cases were calendared for trial before Judge Allen on 26

September 1977. The result was that all the misdemeanor cases were finally disposed of by pleas of guilty or verdicts of guilty except one speeding case in which the defendant, a member of the armed forces, was then overseas.

The charges in Count V are, in brief summary, that in each of three cases—*State v. Michael Thomas Smith*, 76 CR 5123, pending in Vance County; *State v. Arnold Sneed Walker*, 76 CR 5685, and *State v. Ronald Travis Hudson*, 77 CR 1324, both pending in Franklin County—Respondent represented to an emissary of each defendant that he would "take care of" traffic tickets he had received; that the emissary delivered to Respondent the defendant's copy of the citation and $27.00 (the court costs); that Respondent caused the defendant's case to be removed from the active pending files and placed in his personal "Judge Peoples Files," where the cases lay dormant until September 1977 when all cases in those files were calendared and disposed of by Chief Judge Allen; that Respondent returned the $27.00 to defendant Smith after his case was tried but he never returned the $27.00 to defendants Walker and Hudson. In the general audit, which the State auditor made of the offices of the clerks of court of Vance and Franklin Counties, these three cases were among those found in the Judge Peoples' personal file. The certified records and testimony pertaining to these cases tended to show:

In *State v. Michael Thomas Smith* the certified record (Exhibit 2-K) reveals that on 12 October 1976 Smith was arrested for speeding 70 MPH in a 55 MPH zone and was cited to court on 12 November. Smith and his friend Aubrey Eugene Lewis of Henderson testified that when Smith received his speeding ticket his concern for his driver's license caused him to discuss the matter with Lewis, who was also a friend of Judge Peoples. Lewis thought "he might could have something done about it"; so Smith gave him the ticket and he took it to Judge Peoples. Following Respondent's instructions, Lewis got a check for $27.00 from Smith and delivered it to Judge Peoples. In consequence Smith did not appear in court on 12 October 1976. Having dismissed the case from his mind he was taken by surprise when he was notified to appear in court on 23 September 1977. On the advice of Lewis he went to see Judge Peoples, who told him there was nothing he could do for him; that he would have to be tried. Upon his trial before Judge Allen, Smith was allowed to plead guilty to

exceeding a safe speed and was ordered to pay a fine of $25.00 and the costs. After the trial Judge Peoples refunded Smith the $27.00.

In *State v. Arnold Sneed Walker* the certified record (Exhibit 6-J) shows that on 3 November 1976 Walker was arrested for following another motor vehicle too closely and was cited to appear in court on 29 November 1976. The testimony of Mrs. Arnold Sneed Walker, the widow of defendant, and her nephew George Wesley Harris III, a police officer of the town of Henderson, tended to show:

Mr. and Mrs. Walker, residents of Henderson, thinking that Harris might handle the ticket sought his assistance. Mr. Walker, a truck driver, wanted to get a PJC (prayer for judgment continued) to protect his driver's license and to avoid losing a day's work on account of going to court. Harris, who knew Judge Peoples "pretty well," went to see him. Respondent told him he thought "he could do that for his uncle"; that he would be holding court in Franklin County and if Walker would send him the court costs he would clear it for Walker so that he wouldn't have to lose a day's work. Harris then procured from Mrs. Walker a check for $27.00 payable to himself. He cashed the check and gave the money, along with Walker's copy of the traffic citation, to Judge Peoples, whom he happened to encounter at a service station. In consequence of this transaction Walker did not appear in court on 29 November 1976.

The Walkers heard no more about the case until "one hot day during the summer of 1977" when the sheriff arrived with a warrant for Walker's "arrest following failure to appear as directed by citation." The warrant was not executed, however, because Mrs. Walker called Officer Harris, who talked to the sheriff. The sheriff then called Judge Peoples from the Walker home and Respondent told the sheriff "to bring the warrant down there the next morning . . . he would fix it the next morning." "By that," the Walkers "figured" Judge Peoples had forgotten the case and would take care of it the next morning, but on 14 September 1977 the sheriff notified Walker to be in court on September 26th for trial on that same ticket.

On Monday 26 September 1977 Walker, who was then ill, went to court in Louisburg. He pled guilty to the charge and

Chief District Court Judge Allen imposed a fine of $5.00 and the costs, which Walker paid. Upon his return home he showed Mrs. Walker the receipt and said, "Well, I reckon I've got a receipt for it this time." Mr. Walker died on the following Monday, October 2, 1977.

Mrs. Walker testified that she never got back the $27.00 she gave Harris to be delivered to Judge Peoples. Harris testified that to his knowledge Mr. Walker never received any money back from Judge Peoples although his uncle said he went and talked to Judge Peoples about the case before it was tried on Monday.

In *State v. Ronald Travis Hudson* the certified record (Exhibit 6-M) shows that defendant Hudson, a resident of Durham, was arrested in Franklin County for speeding 69 MPH in a 55 MPH zone and ordered to appear in court on 25 April 1977. His testimony and that of Richard B. Davis III tends to show:

Hudson requested his friend Richard Davis, who was a friend of Judge Peoples, to call the judge to see if he "could get the case deferred, or whatever." Davis made the call in Hudson's presence. At the conclusion of the call Davis told Hudson if he would give him $27.00 he would take it to Judge Peoples and, in return, Hudson would receive a PJC. Hudson gave Davis a check for $27.00, which he cashed. Davis put the money, together with Hudson's copy of his traffic ticket and a note thanking the judge for his assistance, in an envelope addressed to Judge Peoples. Then, in accordance with Respondent's instructions, he left the envelope at the judge's office with his secretary.

Hudson testified that about a month after he had given Davis the $27.00 a warrant was issued for his arrest for failure to appear in court. Upon the advice of Davis, Hudson contacted Judge Peoples, who apologized to him because his case had not been taken care of. Respondent "said he would send a letter to the Sheriff's Department stating that the matter was taken care of, and for [Davis] not to worry about it any more."

A certified copy of the proceedings in Case No. 77 CR 1324 (Exhibit 6-M) shows that on 25 April 1977 a "warrant for arrest following failure to appear as directed by citation" was issued for Hudson. The sheriff's return shows that the warrant was received on May 3rd but it was not executed because "recalled by District Ct."

On 16 September 1977 Hudson's April speeding ticket again came to his attention when a deputy sheriff notified him to appear in court on 26 September 1977. Once again Hudson contacted Judge Peoples. This time he was told to come by the Judge's office early in the morning of the day he had to go to court. Hudson testified that he kept the appointment, and Judge Peoples told him there was nothing he could do for him—"to go ahead and go to Court"; that he had contacted an attorney named Jolly, who would assist him. Hudson talked to Jolly who advised him to plead guilty. Hudson protested that he didn't want any points against his record because he was manager for an insurance company, but Jolly still advised him to plead guilty. Chief District Court Judge Allen fined him $10.00 and the costs, a total of $41.00, which he paid.

When Judge Peoples talked to Hudson on the morning of his trial he told him to tell Davis the amount of his fine and costs and he would "reimburse" Davis to reimburse Hudson. Judge Peoples also told Davis he would reimburse Hudson for his fine and costs. Davis told Hudson he had talked to Judge Peoples two times about the matter. Notwithstanding Davis has received no reimbursement.

On 13 April 1978, after reciting the jurisdictional facts and the chronology of proceedings prior to the hearing, which began on 31 March 1978, the Commission found facts and made conclusions of law as follows:

> 14. That at the hearing, Special Counsel for the Commission presented evidence which established the following additional facts:
>
> (a) That on 12 February 1976 in the case *State of North Carolina v. Daniel McIntosh Briley,* Vance County file number 76Cr835, the defendant was arrested and charged with driving under the influence of intoxicating liquor; that a breathalyzer test was administered to the defendant and the test showed .19% blood alcohol content; that the court date appearing on the uniform citation no. C-2265415 is 5 March 1976 in Henderson, North Carolina; that the respondent entered the judgment "dismissed" in the case on 2 April 1976; that the defendant did not enter a plea in open court; that the respondent did not enter the judgment in an open

session of District Court; that the case does not appear on the criminal calendar or minutes for Vance County on 2 April 1976; that the respondent entered the judgment without notice and the approval of the District Attorney or his authorized assistant; that the respondent was not assigned by the Chief District Judge to preside at a session of court in any county in the Ninth Judicial District on 2 April 1976; that the defendant, Daniel McIntosh Briley, at no time appeared in court for the disposition of the case but was informed by his attorney that it had been dismissed.

(b) That in the case *State of North Carolina v. Louise Branham Catlett*, Vance County file number 76Cr1009, the defendant was charged with speeding 50 mph in a 30 mile per hour zone on 18 February 1976; that the court date appearing on the uniform citation no. C-2347185 is 19 March 1976 at Henderson, North Carolina; that the file envelope or "shuck" for the case had on it the notation "LTP file"; that the respondent entered the judgment "dismissed" in the case on 19 July 1976; that the defendant did not enter a plea or otherwise appear in the District Court with regard to the violation; that the respondent entered the judgment "dismissed" in the case on 19 July 1976 outside of open court and when the respondent was not assigned by the Chief District Judge of the District to preside over a session of District Criminal Court in Vance County as provided by law; that the District Attorney or his authorized assistant were not consulted or afforded the opportunity to present evidence in the case in open court as provided by law.

(c) That in the case *State of North Carolina v. Harry Battle Riggan*, Vance County file number 76Cr1322, the defendant was charged with "driving on the wrong side of the road" on 26 February 1976; that the court date appearing on the uniform citation no. 2185664 is 12 March 1976; that the file envelope or "shuck" indicated that the case was continued to 9 April 1976 and the notation "LTP file" appeared thereon; that the respondent entered the judgment "dismissed" in the case on 27 September 1976; that there was not a session of Criminal District Court held in Vance County on 27 September 1976; that the defendant at no time appeared in open court to enter a plea or otherwise attend the

disposition of the case; that the District Attorney or his authorized assistant were not consulted or afforded the opportunity to present evidence for the State.

(d) That the respondent maintained and caused to be maintained in the Vance County Office of the Clerk of Superior Court a "Judge Peoples" file; that the respondent caused certain criminal cases to be removed from the active pending files or docket of the Vance County District Court and instructed employees of the Vance County Clerk's office to include the files in the "Judge Peoples" file; that this action by the respondent resulted in the cases not being calendared and disposed of at an open session of court in the normal course of business in the Vance County District Court as provided by law; that the cases were not disposed of until September 1977 when Chief District Judge Claude W. Allen, Jr., of the Ninth Judicial District ordered the cases calendared for trial; that included in the "Judge Peoples" file in Vance County as late as September 1977 were the following cases:

VANCE COUNTY FILE NUMBER	OFFENSE CHARGED
75 CR 702	*State of North Carolina v. Jeannette Robert Hight* — Driving under the influence, refused breathalyzer 2/2/75
75 CR 4038	*State of North Carolina v. Gregory Todd* — Failing to stop at stop sign 6/27/75
75 CR 5767	*State of North Carolina v. Joseph Gene Boyd* — Driving under the influence, refused breathalyzer 10/2/75
75 CR 5921	*State of North Carolina v. Anthony Reginal Franklin* — Driving under the influence, breathalyzer reading .18%
75 CR 6924	*State of North Carolina v. Bobby Gerrard Barbour* — Driving under the influence, breathalyzer reading .16% 12/4/75

76 CR 433 *State of North Carolina*
v. James Melvin Southerland
Careless and reckless driving 3/12/76

76 CR 1545 *State of North Carolina*
v. Richard Phillip Coorsh
Speeding 66 miles per hour in a 55 mile per hour zone 4/2/76

76 CR 2531 *State of North Carolina*
v. Edward Stevenson
Assault on female 5/16/76

76 CR 2785 *State of North Carolina*
v. Frederick Brazil
No operator's license 6/11/76

76 CR 4436 *State of North Carolina*
v. William Edward Durham
Following another vehicle too closely and without due regard for the speed of vehicles and the traffic and the conditions of the highway 9/21/76

76 CR 5123 *State of North Carolina*
v. Michael Thomas Smith
Speeding 70 miles per hour in a 55 mile per hour zone 11/12/76

76 CR 5190 *State of North Carolina*
v. Edward Thomas Williamson
Driving under the influence, breathalyzer reading .16% 10/24/76

76 CR 5319 *State of North Carolina*
v. Garland Ray Ayscue
Driving under the influence, breathalyzer reading .24% 10/30/76

76 CR 5423 *State of North Carolina*
v. Raymond Joseph Lilley
Driving while operator's license revoked 11/12/76

76 CR 5686 *State of North Carolina*
v. Allen Stotia Brown

Failing to see movement could be made in safety 12/14/76

76 CR 5828 *State of North Carolina*
v. Thadeus John Cannon, Jr.
Driving while operator's license revoked 1/21/77

76 CR 6016 *State of North Carolina*
v. Aquilla Brown, III
Failing to secure a load 1/14/77

77 CR 74 *State of North Carolina*
v. Robert Wayne Morgan
Speed greater than was reasonable under existing conditions 1/7/77

77 CR 173 *State of North Carolina*
v. Flora Walker Hester
Speeding 48 miles per hour in a 35 mile per hour zone 1/21/77

77 CR 635 *State of North Carolina*
v. Juanita DeMent
Speeding 60 miles per hour in a 45 mile per hour zone 3/4/77

77 CR 671 *State of North Carolina*
v. Ramona Jeffries Radford
Speeding 48 miles per hour in a 35 mile per hour zone 3/15/77

77 CR 1269 *State of North Carolina*
v. Kenneth Rawls Stainback
Passing another vehicle improperly 4/8/77

77 CR 1878 *State of North Carolina*
v. Claudette Shoemaker
Possession of a concealed weapon 5/1/77

77 CR 1883 *State of North Carolina*
v. Claudette Shoemaker
Driving under the influence, breathalyzer reading .27% 5/11/77

77 CR 2239 *State of North Carolina*
v. Evelyn Northington
Driving under the influence, breathalyzer reading .19% and failure to yield right of way 5/24/77

77 CR 2240 *State of North Carolina*
v. Evelyn Northington
Driving on the wrong side of highway 5/24/77

77 CR 5097 *State of North Carolina*
v. Thomas Jenkins Moore
Driving under the influence, breathalyzer reading .17% 10/16/77 (The certified record of this case (Ex 2AA) shows this date to be 10/16/76.)

(e) That the respondent instructed employees of the Granville County Office of the Clerk of Superior Court to remove certain cases from the active section of the Granville County Criminal District Court files and place said case files in the inactive section of the Granville County Criminal District Court files; that as a result of the respondent's actions the cases were not calendared and disposed of at an open session of Criminal District Court in the normal course of business as provided by law; that the actions of the respondent resulted in the cases not being disposed of as provided by law until Chief District Judge Claude W. Allen, Jr. of the Ninth Judicial District ordered the cases calendared for trial after receiving notice during September 1977 that the cases had not been properly disposed of; that included in the inactive section of the District Court criminal files in Granville as late as September 1977 were the following cases:

GRANVILLE COUNTY FILE NUMBER		OFFENSE CHARGED
71 CR 4410	*State of North Carolina v. Harold Taylor Cottrell*	Driving under the influence, breathalyzer reading .20% 11/21/71
74 CR 3689	*State of North Carolina v. Virgil Lee Twisdale*	

Speeding 80 miles per hour in a 55 mile per hour zone 8/3/74

74 CR 4025 *State of North Carolina*
v. Jimmy Carl Knight
Speeding 70 miles per hour in a 55 mile per hour zone 8/16/74

74 CR 5227 *State of North Carolina*
v. Allen Ray Moody
Speeding 69 miles per hour in a 55 mile per hour zone 10/8/74

(f) That the respondent instructed certain employees in the Office of the Franklin County Clerk of Superior Court to remove certain criminal cases from the active pending files and instructed that said case files be placed in a "Judge Peoples" manila folder file; that, as a result of this action by the respondent, the cases placed in the "Judge Peoples" file were not calendared and disposed of at an open session of Criminal District Court in Franklin County in the normal course of business as provided by law; that the cases were not disposed of as provided by law until Chief District Judge Claude W. Allen, Jr. of the Ninth Judicial District ordered the cases calendared for trial after receiving notice that the cases existed in the "Judge Peoples" file; that included in the "Judge Peoples" file in Franklin County as late as September 1977 were the following cases:

FRANKLIN COUNTY FILE NUMBER		OFFENSE CHARGED
75 CR 4165	*State of North Carolina v. Harold Thurston Allen*	Driving under the influence, no breathalyzer reading 8/9/75
76 CR 1751	*State of North Carolina v. Linvel Lee Nelson*	Speeding 69 miles per hour in a 55 mile per hour zone 4/4/76
76 CR 1893	*State of North Carolina v. Albert Jackson Ellis, Jr.*	

Speeding 50 miles per hour in a 35 mile per hour zone 4/5/76

76 CR 2115 *State of North Carolina*
v. Eugene Allen Philyaw
Speeding 65 miles per hour in a 55 mile per hour zone 4/9/76

76 CR 2138 *State of North Carolina*
v. Albert Jackson Ellis, Jr.
Speeding 73 miles per hour in a 55 mile per hour zone 4/8/76

76 CR 3579 *State of North Carolina*
v. Kermit H. Merritt
Intent to pass title to a 1966 Ford vehicle which he knew or had reason to believe had been stolen (unlawfully taken)—transfer possession of that vehicle to Danny Joe Lindsey 8/28/75

76 CR 4130 *State of North Carolina*
v. Ollie Jackson Chaplin
Improper passing 8/12/76

76 CR 4736 *State of North Carolina*
v. John Elton Woodlief
Driving under the influence, no breathalyzer reading 9/26/76

76 CR 5447 *State of North Carolina*
v. Juan Edward Yeargan
Speeding 65 miles per hour in a 55 mile per hour zone 10/27/76

76 CR 5685 *State of North Carolina*
v. Arnold Sneed Walker
Following too close 11/3/76

77 CR 995 *State of North Carolina*
v. Jimmy Ray Ikner
Speeding 66 miles per hour in a 55 mile per hour zone 4/12/77

77 CR 1233 *State of North Carolina*
v. Patricia Snipes Thompson
Speeding 68 miles per hour in a 55 mile per hour zone 3/26/77

77 CR 1324 *State of North Carolina*
v. Ronald Travis Hudson
Speeding 69 miles per hour in a 55 mile per hour zone 4/1/77

77 CR 1532 *State of North Carolina*
v. Shaun E. Edwards
Speeding 67 miles per hour in a 55 mile per hour zone 4/18/77

77 CR 1588 *State of North Carolina*
v. Waverly Lee Booker
Speeding 65 miles per hour in a 55 mile per hour zone 4/12/77

77 CR 1631 *State of North Carolina*
v. Dallas Bernard Hawkins
Exceeding safe speed 4/23/77

77 CR 1646 *State of North Carolina*
v. Phillip Dean Pegram
Speeding 70 miles per hour in a 55 mile per hour zone 4/24/77

77 CR 2040 *State of North Carolina*
v. Jackson Wesley
Failing to drive on the right side of highway 5/24/77

(g) That on 12 October 1976 Michael Thomas Smith was charged with speeding 70 mph in a 55 mile per hour zone; that as a favor to Mr. Smith, Aubrey Eugene Lewis contacted the respondent and asked the respondent if there was anything respondent could do about the speeding ticket; that the respondent told Mr. Lewis to bring to him the $27.00 cost of court and he would take care of it; that Mr. Lewis obtained the $27.00 from Mr. Smith and delivered the $27.00 to the respondent; that the respondent removed or instructed an employee of the Vance County Office of the Clerk of Superior Court to remove from the active pending files in Vance Coun-

ty the case *State of North Carolina v. Michael Thomas Smith*, file no. 76Cr5123; that the respondent placed or instructed the case to be placed in a "Judge Peoples" file which was maintained in the Office of the Clerk of the Superior Court; that the file envelope or "shuck" displayed the notation "LTP"; that as a result of this action by the respondent the case was not disposed of in the normal course of business at an open session of the Vance County Criminal District Court until during September 1977 when Chief District Judge Claude W. Allen, Jr., ordered the cases contained in the "LTP" file calendared for trial; that the $27.00 was not returned by the respondent to the defendant Smith until the defendant was subpoenaed for the trial of the case during September 1977.

(h) That Arnold Sneed Walker was charged with "following too close" on 3 November 1976 in Franklin County in the case *State of North Carolina v. Arnold Sneed Walker*, file no. 76Cr5685; that as a favor to defendant Walker, George Wesley Harris, a police officer in the Henderson Police Department and a nephew of the defendant's wife, Emma Harris Walker, received a check for $27.00 for costs of court from Emma Harris Walker; that Mr. Harris cashed the $27.00 check and delivered $27.00 in cash to the respondent, who told Mr. Harris that he would enter a judgment of prayer for judgment continued or "PJC" in the case; that the respondent removed or instructed an employee of the Office of the Clerk of Superior Court of Franklin County to remove the Walker case file from the active pending files of the District Court and placed or instructed the case file to be placed in a special file maintained in the Franklin County Clerk's office; that the respondent did not dispose of the case in an open session of the Franklin County Criminal District Court and, in fact, no judgment was entered in the case until the existence of the special file was brought to the attention of Chief District Judge Claude W. Allen, Jr. and he ordered the cases contained in the file calendared for trial during September 1977; that the $27.00 received by the respondent from Mr. Harris was not returned to Mr. Harris or Mrs. Walker.

(i) That Ronald Travis Hudson was charged with speeding 69 mph. in a 55 mile per hour zone on 1 April 1977 in the case *State of North Carolina v. Ronald Travis Hudson*, Franklin County file no. 77Cr1324; that as a favor to defendant Hudson, Richard B. Davis consulted the respondent as to what could be done about the case; that the respondent informed Mr. Davis that it would be no problem and to bring him, the respondent, the pink copy of the uniform citation and $27.00 costs of court, and he, the respondent, would see that the defendant Hudson was given a prayer for judgment continued or "PJC"; that the defendant Hudson made out a personal check to Mr. Davis in the amount of $27.00 and Mr. Davis cashed the check and delivered the pink copy of the citation and the $27.00 cash to the respondent by leaving an envelope containing the citation and the cash along with a note thanking him for his assistance on the desk of a secretary as instructed by the respondent; that the respondent subsequently informed Mr. Davis that he, the respondent, had received the envelope and its contents and that he would take care of it; that the respondent removed or caused an employee of the Franklin County District Court to remove the case file from the active pending files of the Franklin County District Court and placed or instructed the case file to be placed in a special file folder maintained in the Office of the Clerk of Superior Court of Franklin County; that the respondent did not dispose of the case at an open session of the Franklin County District Court as provided by law and, in fact, no judgment or other disposition was made in the case until Chief District Judge Claude W. Allen, Jr. became aware of the existence of the special file and ordered the cases contained therein calendared for trial during September 1977; that the $27.00 was not returned by the respondent to the defendant Hudson or Mr. Davis.

15. That the findings of fact hereinbefore stated and the conclusions of law and recommendation which follow were concurred in by five (5) or more members of the Judicial Standards Commission.

CONCLUSIONS OF LAW

16. As to the facts hereinbefore stated in paragraphs 14(a) through 14(i), each and every one of them, the Judicial

Standards Commission concludes on the basis of clear and convincing evidence that the actions of the respondent constitute wilful misconduct in office, and, conduct prejudicial to the administration of justice that brings the judicial office into disrepute, and in violation of the Canons of the North Carolina Code of Judicial Conduct.

RECOMMENDATION

17. The Judicial Standards Commission of North Carolina recommends on the basis of hereinbefore stated findings of fact and conclusions of law that the Supreme Court of North Carolina remove the respondent from judicial office and that the respondent receive no retirement compensation and be disqualified from holding further judicial office as set out in North Carolina General Statutes Section 7A-376.

By Order of the Commission, this 13th day of April, 1978.

s / EDWARD B. CLARK
Chairman

(SEAL)

ATTEST:
s / MARVIN B. KOONCE, JR.
Secretary

In due course the Commission filed its "Findings of Fact, Conclusions of Law, and Recommendations" in this Court and thereafter Respondent timely requested a hearing on the recommendations.

At this point we take judicial notice that the records of the North Carolina State Board of Elections show the following:

On 1 February 1978 Linwood Thomas Peoples filed notice of his candidacy for election as the Superior Court judge in the Ninth Judicial District, subject to the Democratic Primary to be held on 2 May 1978. On 5 May 1978 he was certified by the State Board of Elections as the Democratic nominee for that position in the State-wide election to be held on 28 November 1978. There being no Republican or other candidate, on 28 November 1978 he

was certified as the duly elected judge of the Superior Court for the Ninth Judicial District.

Harold D. Coley, Jr., Special Counsel for Judicial Standards Commission.

Bobby W. Rogers and Frank Banzet for respondent.

SHARP, Chief Justice.

We consider first Respondent's contention that his resignation as a District Court Judge on 1 February 1978 deprived the Judicial Standards Commission of jurisdiction over "his person and the subject matter in this cause" as of that date and rendered the question of his removal moot. In support of this contention, Respondent points to the language of N.C. Gen. Stat. § 7A-376 (Cum. Supp. 1977), which reads in pertinent part as follows:

"Upon recommendation of the Commission, the Supreme Court may censure or remove any *justice or judge* for wilful misconduct in office. . . ." (Emphasis added.) It is upon this statute, enacted pursuant to N.C. Const., art. IV, § 17(2) that the jurisdiction of the Commission and this Court depends. Respondent argues (1) that from the time his resignation became effective he was no longer "a justice or judge" within the meaning of the statute, and (2) that since G.S. 7A-376 delimits the jurisdiction of both the Commission and this Court neither now has the power to discipline him. The Commission found no merit in these contentions and denied Respondent's motion to dismiss this proceeding. We affirm its ruling.

[1] It is quite true that "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond those limits is in excess of its jurisdiction." *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E. 2d 782, 785 (1975). When a statute confers power on a court or administrative body to adjudicate cases involving the members of a certain class, a court's attempt to exercise its power over one who is not a member of that class is void for lack of jurisdiction. *See*, e.g., *Askew v. Leonard Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965); *Aylor v. Barnes*, 242 N.C. 223, 87 S.E. 2d 269 (1955).

[2, 3] However, the general rule is that the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked. *Minneapolis & St. Louis Railroad Co. v. Peoria & Pekin Union Railway Co.*, 270 U.S. 580, 70 L.Ed. 743, 46 S.Ct. 402 (1926); *State v. Howell*, 107 Ariz. 300, 486 P. 2d 782 (1971); *Gardner v. Gardner*, 253 S.C. 296, 170 S.E. 2d 372 (1969). Jurisdiction over the person of a defendant or respondent is obtained by service of process upon him, by his voluntary appearance or consent. The jurisdiction of a court or administrative agency over the subject matter of a proceeding is derived from the law which organized the tribunal. Such jurisdiction, therefore, cannot be conferred upon a court by consent, waiver or estoppel. 3 Strong's North Carolina Index 3rd *Courts* § 2.1 (1976); 21 C.J.S. *Courts* § 28 (1940).

Assuming, without deciding, that Respondent is correct in his interpretation of the jurisdictional requirements of G.S. 7A-375, our first inquiry is when did the Commission acquire jurisdiction over the person of Respondent and what was "the state of affairs existing at that time."

On 1 December 1977 the Commission notified Judge Peoples that it had ordered a preliminary investigation of charges that he was guilty of misconduct in office by reason of the manner in which he was handling and disposing of criminal cases. On 30 January 1978—two days before the effective date of his resignation and in strict compliance with its Rule 8, the Commission notified Judge Peoples that formal proceedings had been instituted against him and advised him of his right to file an answer to the charges within 20 days. Along with that notice, Respondent was personally served with a copy of the verified complaint which specified "in ordinary and concise language" the charges against him.

It is apparent from the language of the Commission's Rule 8 that the verified complaint detailing the charges against a respondent and the "notice of formal proceedings" are intended to serve the same function as do the complaint and summons in a civil suit. Under Rule 3 of the Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 3 (1969), a civil action is commenced by the filing of a complaint. Upon the filing of the complaint, Rule 4 requires that summons shall be issued forthwith. Clearly, therefore,

on 30 January 1977, the Commission had jurisdiction of Respondent and the charges against him. Thus, we need not decide what result would have been reached had the complaint been filed after the effective date of Judge People's resignation. The question we must answer is what effect did Respondent's resignation two days later have on the jurisdiction of the Commission.

There is nothing in our law which prevents a judge or other public official from tendering his resignation during the pendency of removal proceedings against him. In *Rockingham County v. Luten Bridge Co.*, 35 F. 2d 301, 306 (4th Cir. 1929), 66 A.L.R. 735, 741 (a case dealing with the effect of the resignation of county commissioners in North Carolina) Judge John J. Parker said, "A public officer . . . has at common law the right to resign his office, provided his resignation is accepted by the proper authority. (Citations omitted.) And, in the absence of statute regulating the matter, his resignation should be tendered to the tribunal or officer having power to appoint his successor." Among the authorities cited for the foregoing statement are *Hoke v. Henderson*, 15 N.C. 1 (1833) and Annot., 19 A.L.R. 39 (1922).

[4] Decisions in the various jurisdictions are not in accord with reference to the right of a public official to resign and whether an acceptance is required. *See generally* 63 Am. Jur. 2d *Public Officers and Employees* §§ 162, 163 (1972); 46 Am. Jur. 2d *Judges* § 17 (1969); Annot., 82 A.L.R. 2d 750, 751 (1962). That issue, however, is not presented here since it is clear that, in his letter dated 20 January 1978, the Governor accepted Respondent's resignation as of 1 February 1978. When a resignation specifies the time at which it will take effect, the resignation is not complete until that date arrives. 46 Am. Jur. 2d, *Judges*, § 17 (1969). Thus, Respondent remained a District Court Judge until 1 February 1978, exercising all the powers of that office.

[6] From the facts outlined above, it is clear that the Judicial Standards Commission acquired jurisdiction of both the Respondent and the charges against him before he left office. The question whether the same result would be reached in a case where the complaint is filed after the effective date of a judge's resignation must await decision in a case which presents that issue.

The question we now consider is whether Respondent's resignation divested the Commission of jurisdiction or rendered

the question of his removal moot. We conclude that the Commission retained jurisdiction and that the question of removal was not rendered moot by the resignation.

[5, 6] Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events. This is true even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance. *See* 20 Am. Jur. 2d *Courts* §§ 142, 148 (1965); 21 C.J.S. *Courts* § 93 (1940). "[O]nce jurisdiction of a court attaches it exists for all time until the cause is fully and completely determined." *Kinross-Wright v. Kinross-Wright*, 248 N.C. 1, 11, 102 S.E. 2d 469, 476 (1958). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. Once a court acquires jurisdiction over an action it retains jurisdiction over that action throughout the proceeding. . . . If the converse of this were true, it would be within the power of the defendant to preserve or destroy jurisdiction of the court at his own whim." *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P. 2d 334, 336-37 (1968). For other cases supporting the foregoing statement of the rule, *see Smith v. Campbell*, 450 F. 2d 829 (9th Cir. 1971); *United States Fidelity & Guaranty Co. v. Millers Mutual Fire Insurance Co. of Texas*, 396 F. 2d 569 (8th Cir. 1968); *Atlantic Corp. v. United States*, 311 F. 2d 907 (1st Cir. 1962); *State v. Howell*, 107 Ariz. 300, 486 P. 2d 782 (1971); *Sampsell v. Superior Court*, 32 Cal. 2d 763, 197 P. 2d 739 (1948); *Collins v. Robbins*, 147 Me. 163, 84 A. 2d 536 (1951); *Jones Drilling Co. v. Woodson*, 509 P. 2d 117 (Okl. 1973); *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 445 P. 2d 334 (1968). Applying these principles to the instant case, it is apparent that both the Commission and this Court retained jurisdiction over the subject matter of this proceeding and the person of the Respondent after his resignation.

It is immaterial that Respondent, by reason of his resignation, was no longer a district court judge at the time the Commission filed its findings of fact and recommendation that he be removed from office with the Supreme Court. Respondent was a judge at the time the Commission filed its complaint against him and, as such he was clearly within its jurisdiction. Under G.S. 7A-376 there is but one disciplinary proceeding. It began when the Commission filed its complaint, and it will end with this

Court's final order. In proceedings authorized by G.S. 7A-376, this Court sits not as an appellate court but rather as a court of original jurisdiction. *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978). "[T]he Commission can neither censure nor remove a judge. It is an administrative agency created as an arm of the court to conduct hearings for the purpose of aiding the Supreme Court in determining whether a judge is unfit or unsuitable. To that end, it is authorized to investigate complaints, hear evidence, find facts, and make a recommendation thereon." *In re Nowell*, 293 N.C. 235, 244, 237 S.E. 2d 246, 252 (1977). *Accord, In re Kelly*, 238 So. 2d 565 (Fla. 1970), *cert. denied* 401 U.S. 962 (1970).

[8] In addition to the jurisdictional objections, which we have overruled, Respondent argues that the issues before the Commission and this Court were rendered moot by his resignation. That a court will not decide a "moot" case is recognized in virtually every American jurisdiction. D. Kates, Jr. and W. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Calif. L. Rev. 1385, 1386 (1974). In federal courts the mootness doctrine is grounded primarily in the "case or controversy" requirement of Article III, Section 2 of the United States Constitution and has been labeled "jurisdictional" by the United States Supreme Court. *Liner v. Jafco, Inc.*, 375 U.S. 301, 11 L.Ed. 2d 347, 84 S.Ct. 391 (1964); *Utilities Commission v. Southern Bell Telephone Co.*, 289 N.C. 286, 289, 221 S.E. 2d 322, 324 (1975), 20 Am. Jur. 2d *Courts* § 81 (1965). In state courts the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769, *cert. denied* 344 U.S. 824 (1952); *Overesch v. Campbell*, 95 Ohio App. 359, 119 N.E. 2d 848 (1953); *Ashmore v. Greater Greenville Sewer District*, 211 S.C. 77, 44 S.E. 2d 88 (1947); 20 Am. Jur. 2d *Courts* § 81 (1965); 62 Calif. L. Rev., *supra* at 1412.

[7] Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law. *Benvenue Parent-Teacher Association v. Nash County Board of Education*, 275 N.C. 675, 170 S.E. 2d 473 (1969); *Crew v. Thompson*, 266 N.C. 476, 146 S.E. 2d 471 (1966); *In re Assignment of*

School Children, 242 N.C. 500, 87 S.E. 2d 911 (1955); *Savage v. Kinston*, 238 N.C. 551, 78 S.E. 2d 318 (1953); 1 Strong's N.C. Index 3rd *Actions* § 3, *Appeal & Error* § 9 (1976).

Unlike the question of jurisdiction, the issue of mootness is not determined solely by examining facts in existence at the commencement of the action. If the issues before a court or administrative body become moot at any time during the course of the proceedings, the usual response should be to dismiss the action. *Allen v. Georgia*, 166 U.S. 138, 41 L.Ed. 949, 17 S.Ct. 525 (1897); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E. 2d 769, *cert. denied* 344 U.S. 824 (1952); 20 Am. Jur. 2d *Courts* § 81 (1965).

While so far as our research can determine the issue has never arisen in a hearing before a body such as our Judicial Standards Commission, the courts of other jurisdictions have considered the effect of a public official's resignation on a proceeding to remove him from office. If the only purpose of the proceeding is to vacate the office, it has been held that the proceeding becomes moot upon the incumbent's resignation. *People ex rel. Hill v. Muehe*, 114 Cal. App. 739, 300 P. 829 (Dist. Ct. App. 1931); *State v. Stine*, 200 Tenn. 561, 292 S.W. 2d 771 (1956); *State ex rel. Wilson v. Bush*, 141 Tenn. 229, 208 S.W. 607 (1919); *Skeen v. Paine*, 32 Utah 295, 90 P. 440 (1907); *Roberts v. Paull*, 50 W. Va. 528, 40 S.E. 470 (1901). *Cf.*, *Hardy v. Albert*, 225 So. 2d 127 (La. App. 1969); *Layle v. Schnipke*, 384 Mich. 638, 186 N.W. 2d 559 (1971); *Meyer v. Strouse*, 422 Pa. 136, 221 A. 2d 191 (1966) (expiration of term of office renders removal proceeding moot).

But where the statute imposes sanctions in addition to ouster, the proceeding may be prosecuted to its conclusion despite the official's resignation. *State v. Rose*, 74 Kan. 262, 86 P. 296, *appeal dismissed*, 203 U.S. 580 (1906); *Hawkins v. Voisine*, 292 Mich. 357, 290 N.W. 827 (1940); *State ex rel. Childs v. Dart*, 57 Minn. 261, 59 N.W. 190 (1894); *State v. Wymore*, 345 Mo. 169, 132 S.W. 2d 979 (1939); *Attorney General ex rel. Robinson v. Johnson*, 63 N.H. 622, 7 A. 381 (1885); *People v. Harris*, 294 N.Y. 424, 63 N.E. 2d 17 (1945). *See also* 63 Am. Jur. 2d *Public Officers and Employees* § 162 (1972); 65 Am. Jur. 2d *Quo Warranto* § 102 (1972); 74 C.J.S. *Quo Warranto* § 23(b)(2) (1951).

In *State v. Rose*, supra, the Attorney General for the State of Kansas brought an action in *quo warranto* in the Supreme Court to oust the defendant as Mayor of Kansas City, on the ground that he had purposely violated the State liquor laws. After the trial was completed, but before the court issued its judgment, the city council accepted defendant's resignation.

Shortly after the judgment of ouster, a special election was called to fill the vacancy in the office of mayor. In defiance of the judgment, defendant ran for the office and was elected to serve the balance of his original term. When Rose was cited for contempt, his defense was that the court lacked the power to exclude him from office since he had voluntarily resigned and surrendered the office prior to judgment.

Noting that the purpose of the proceeding was not only to remove Rose from office but also to disqualify him for the remainder of his term, the court held that the proceeding had not been rendered moot by defendant's resignation and found defendant in contempt. It explained its conclusions as follows:

"The violations of law by the officer are not only public offenses but in committing them he forfeits his right to the office, and this forfeiture may be judicially declared in a *quo warranto* proceeding. The judgment cannot be deemed to be invalid because of the resignation of Rose just before its rendition. The issues were joined, testimony had been taken, and the case was ripe for trial before the resignation, and the defendant could not then, by surrendering the office divest the court of jurisdiction, nor thwart the purposes of the proceeding. The public had an interest in the action, and the judgment to be rendered was of no less consequence to it than to the individual interests of the defendant." 74 Kan. at 266, 86 P. at 297. *See also State v. Wymore*, 345 Mo. 169, 132 S.W. 2d 979 (1939).

The North Carolina courts have never considered the precise issue raised by the cases cited above. But we have considered a similar issue in the context of a license revocation hearing.

In *Elmore v. Lanier*, 270 N.C. 674, 155 S.E. 2d 114 (1967) the Commissioner of Insurance, acting under the authority of G.S. 58-42, notified plaintiff on 25 January 1967 that it was instituting a proceeding to revoke his license to sell insurance. The hearing

was set for February 13th, and at the hearing, plaintiff surrendered his insurance licenses, which expired on March 31. Plaintiff then obtained a preliminary injunction restraining the Commissioner from proceeding further with the hearing to revoke his license. Two days later the Wake Superior Court ordered the injunction dissolved and plaintiff appealed.

On appeal to the Supreme Court, plaintiff argued that his surrender of the licenses and their subsequent expiration rendered the cause moot. In rejecting this contention the Court observed that the proceeding under G.S. 58-42 served purposes in addition to revocation since the adjudication of the agent's wrongdoing would affect the subsequent issuance of a license. "With no adjudication of his wrongdoing, and upon the dismissal of these charges (solely because the petitioner, with whatever motive, reason or hope, has found it expedient to surrender his license), he could have substantial hope of regaining them within a comparatively short time. . . . While the agent in this kind of investigation may be presumed to be guiltless until his improper conduct has been formally proven, we must recognize that he would not be likely to close up his business, surrender his means of livelihood, and move his home unless he had substantial fear of the results of the investigation he is trying so desperately to prevent." 270 N.C. at 679, 155 S.E. 2d at 117.

[8] If G.S. 7A-376 limited the sanctions for wilful misconduct in office to censure or removal, Respondent's resignation would have rendered the proceedings moot. The statute, however, envisions not one but three remedies against a judge who engages in serious misconduct justifying his removal: loss of present office, disqualification from future judicial office, and loss of retirement benefits. Only the first of these was rendered moot by Respondent's resignation.

We must still decide whether Respondent's conduct would have merited his removal from office in order to determine whether these additional sanctions should be imposed. The resolution of that question is in no way affected by his resignation.

However, before discussing the Commission's findings of fact and conclusions, we are constrained to add that it would indeed be a travesty if a judge could avoid the full consequences of his misconduct by resigning from office after removal proceedings

had been brought against him. According to this argument, it would be possible for an involved judge, at any time before the Commission files its findings and recommendations with the Supreme Court, to bring the proceedings against him to a premature close by submitting his resignation to the Governor, who would accept it without knowledge that charges were pending against the judge. We are entirely convinced that the legislature never intended any such result, and that to interpret G.S. 7A-376 according to Respondent's contentions would emasculate the statute and thwart the legislative intent entirely.

In construing a statute the legislative intent is the all-important or controlling factor. " 'Indeed, it is frequently stated in effect that the intention of the legislature constitutes the law.' . . . If a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded." *In re Hardy*, 294 N.C. 90, 95, 240 S.E. 2d 367, 371 (1978). A statute will always be interpreted so as to avoid an absurd consequence, if possible, and a construction which will defeat its purpose will be avoided if that can reasonably be done without violence to the legislative language. *Ballard v. Charlotte*, 235 N.C. 464, 70 S.E. 2d 575 (1952).

We now consider the question whether the evidence adduced before the Commission with reference to Judge Peoples' conduct constitutes wilful misconduct in office, conduct prejudicial to the administration of justice, or both, and, if so, whether he should be removed or censured.

First, we conclude that the Commission's findings of fact are supported by clear and convincing evidence—the quantum of proof required to sustain the findings of the Commission. *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977). We therefore accept the Commission's findings and adopt them as our own. In addition, as bearing upon the truth of the findings, we point to the following facts:

Respondent filed no answer or other denial to the charges alleged against him in the complaint either before or after his special appearance and motion to dismiss were overruled. (It is perhaps noteworthy that when Respondent was notified of the date of the formal hearing, the Commission reminded him that he

had filed no answer to the charges alleged against him in the complaint.) Further, Respondent neither testified nor appeared in person at the hearing. Noting his absence, the Commission's chairman said to his counsel, "Mr. Boyce, we assume that the Respondent will not be present for the hearing?" Mr. Boyce replied, "That is his election, Mr. Chairman."

[9] It is only in criminal cases that the law decrees that the failure of the defendant to testify "shall create no presumption against him." In all other proceedings, it has long been the rule in this State that the failure of a party to take the stand to testify as to facts peculiarly within his knowledge and directly affecting him is "a pregnant circumstance" for the fact finder's consideration. *York v. York*, 212 N.C. 695, 701-702, 194 S.E. 486, 490 (1938). If the party is a competent witness, his failure to go upon the stand "when the case is such as to call for an explanation . . . or the evidence is such as to call for a denial," is a "circumstance against him" and a "proper subject of fair comment." *Cuthrell v. Greene*, 229 N.C. 475, 481-82, 50 S.E. 2d 525, 529 (1948). *See Smith v. Kappas*, 218 N.C. 758, 765, 12 S.E. 2d 693, 698 (1941); *Powell v. Strickland*, 163 N.C. 393, 402, 79 S.E. 872, 876 (1913); *Hudson v. Jordan*, 108 N.C. 10, 12-13, 12 S.E. 1029, 1030 (1891).

Surely no judge but one with a "substantial fear of the results of the investigation" would have made the elections and followed the course which respondent has taken in this case. We paraphrase the comment of Justice Walker with reference to the failure of the propounders of a will to testify in a caveat proceeding as follows: "We are at a loss to conceive why [Respondent] did not take the witness stand to refute the personal charges made against [him] unless [he] knew them to be true and unanswerable, or felt that [he] could not overcome the evidence of their truth offered by [Special Counsel], or did not wish to undergo the ordeal of a severe cross-examination. . . ." *In re Hinton*, 180 N.C. 206, 212-213, 104 S.E. 341, 344 (1920).

Finally we note that Respondent has brought forward on appeal no assignments of error challenging the Commission's findings of fact. Indeed, he took no exceptions to findings 14(b), (c), (g), and (i). As to findings 14(a), (d), (e), (f), and (h) he merely entered a formal objection, making no attempt to point out the basis for any objection. Since any exception which is not made the subject of

an assignment of error, and any assignment which is not brought forward on appeal and discussed in the appellant's brief, is deemed abandoned (App. R. 10(c)), this Court is entitled to assume that the facts found by the Commission are correct and, insofar as the facts are controlling, to determine the appeal in accordance with such findings. 1 Strong's North Carolina Index 3d *Appeal and Error* § 28.1 (1976).

In short summary, Respondent has never denied the charges against him nor contradicted the evidence presented to the Commission. Therefore it is with confidence in the accuracy of the Commission's findings that we proceed to determine whether, upon these findings, Judge Peoples has been guilty of wilful misconduct in office, conduct prejudicial to the administration of justice, or both.

Since 1 January 1973, the effective date of the act establishing the Judicial Standards Commission (1971 N.C. Sess. Laws, Ch. 590) seven cases,[1] including this one, have come to the Supreme Court upon the Commission's recommendation that disciplinary action be taken against a judge for "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" or for both "wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute." In the first five cases the Commission's recommendation was that the respondent be censured, and we viewed these cases in the light of that recommendation. In the fifth case, however, *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978), we concluded that G.S. 7A-376 and -377 empowered this Court, "unfettered in its adjudication by the recommendation of the Commission to make the final judgment whether to censure, remove, remand for further proceedings or dismiss the proceedings." *Id.* at 97-98, 240 S.E. 2d at 373. The opinion emphasized that "in the future the result in each case will be decided upon its own facts." *Id.* Although in the sixth case, *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978), the Commission recommended the removal of the respondent for the reasons stated in the opinion, we declined to remove him. Thus, in each of the six cases

1. *In re Crutchfield*, 289 N.C. 597, 223 S.E. 2d 822 (1975); *In re Edens*, 290 N.C. 299, 226 S.E. 2d 5 (1976); *In re Stuhl*, 292 N.C. 379, 233 S.E. 2d 562 (1977); *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977); *In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978); *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978).

heretofore decided, the judgment of this Court has been that the respondent be censured.

As with every innovative enactment, the interpretation of G.S. 7A-376 and -377 evolves as these provisions are brought to bear upon the facts of a particular case. In the course of arriving at our decisions in the six cases which have come to us from the Commission, the following elementary principles of due process, judicial decorum, and the proper administration of justice have been repeatedly emphasized:

[10] 1. Any disposition of a case by a judge 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. *In re Crutchfield*, 289 N.C. 597, 603, 223 S.E. 2d 822, 826 (1975).

[11] 2. The fact that a judge receives no personal benefit, financial or otherwise, from his improper handling of a case does not preclude his conduct from being prejudicial to the administration of justice. The determinative factors aside from the conduct itself, are the results of the conduct and the impact it might reasonably have upon knowledgeable observers. *Id.*

[12] 3. The trial and disposition of criminal cases is the public's business and ought to be conducted in open court. The public, and especially the parties, are entitled to see and hear what goes on in the court. *Id.*

[13] 4. A criminal prosecution is an adversary proceeding in which the district attorney as an advocate of the State's interest, is entitled to be present and be heard. Any disposition of a criminal case without notice to the district attorney who was prosecuting the docket when the matter was not on the printed calendar for disposition, improperly excluded the district attorney from participating in the disposition. *In re Edens*, 290 N.C. 299, 306, 226 S.E. 2d 5, 9 (1976).

[14] 5. "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." *In re Stuhl*, 292 N.C. 379, 389, 233 S.E. 2d 562, 568 (1977).

In view of the publicity attendant upon this Court's censure of the six judges who have been recommended for discipline by the Judicial Standards Commission (the first censure having occurred on 17 December 1975) and the publication of the Court's opinions in these censure cases, no judge—be he lawyer or laymen, sensitive or insensitive to the proprieties—can justify his disposition of any case out of court. Nor can he justify disposing of a criminal case in court without the knowledge of the prosecuting attorney, for when he does so he purposely violates the duties of his office.

When we apply the principles enunciated and emphasized in the censure cases and the North Carolina Code of Judicial Conduct, 283 N.C. 771 (adopted in September 1973), to Respondent Peoples' conduct over a period of more than four years it appears beyond any reasonable doubt that Judge Peoples has repeatedly been guilty of wilful misconduct in office and conduct prejudicial to the administration of justice. The earliest record evidence of unlawful misuse of the powers of his judicial office by Judge Peoples is found in his handling of the case of Howard Taylor Cottrell, who was charged with driving while under the influence of an intoxicant on 21 November 1971 (breathalyzer reading .20%). This case was "pending" in Judge Peoples' personal file when defendant Cottrell died on 10 July 1974—more than three years after Respondent had caused it to be withdrawn from the active trial docket. It was among the cases which the auditors discovered during the general audit of July 1977.

Witnesses would give no estimate of the turnover in the Judge Peoples personal files, but counsel did elicit the information from the courtroom clerk in Vance County that "over a period of two or three years, cases were disposed of and new ones added." Another said that when the file got "cumbersome" she would urge him "to do something with some of the cases" and he would "from time to time make some disposition of them that would help cut the number back down." It was equally impossible for counsel to obtain any estimate of the number of cases in which Respondent entered judgment out of court and out of term, but it is implicit in the evidence that he did both routinely. The evidence also showed that "from time to time," after Respondent had entered judgment, he would deliver money to the clerk for the defendant's cost and fine. It is undenied that on two occasions

Respondent received money ($27.00) to pay a defendant's court costs for him after Respondent had disposed of his case; that Respondent neglected to dispose of the case and never paid the costs or returned the money to the defendant. In a third such case Respondent returned the money almost a year after receiving it and after another judge had disposed of the case.

[15] It is no part of the business of a judge to receive and handle money to pay a defendant's court costs. A judge may not with propriety handle any financial transaction for a defendant (or any other party) which is incident to a case in which he sits in judgment. *A fortiori*, however, if a judge is indiscreet enough to take money for the purpose of paying a defendant's fine and costs he should forthwith pay it to the Clerk of the Court. Any use or retention of such funds, whether it be inadvertently, forgetfully, or because the judge is short of cash and intends to apply the money eventually to the purpose for which it was received, if not criminal—is wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

[18] To properly appraise Judge Peoples' judicial conduct we need only ask the question, "What would be the quality of justice and the reputation of the courts for dispensing impartial justice, if every judge kept a personal file and exercised the duties of his office like Judge Peoples?" Clearly Judge Peoples has been guilty of wilful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in that: (1) Respondent consistently and improperly precluded the district attorney from participating in the disposition of cases on which he was entitled to be heard in behalf of the State, and removed the disposition of cases from public view in open court by transacting the court's business in secrecy. (2) Respondent dismissed each of the three cases specified in the Commission's findings of fact No. 14(a), (b), (c) without a trial, in the absence of the defendant, without the knowledge of the district attorney, and on a day when the cases were not calendared for trial. (3) Respondent maintained a special file in the counties of Vance, Granville, and Franklin, as more fully set out in the Commission's findings of fact 14(d), (e), (f). He caused the clerk to remove certain cases from the active criminal docket and to be held in the files until he directed otherwise. In consequence

these cases were not tried speedily or calendared and disposed of in open court in the normal course of business in the district courts of the respective counties. (4) From time to time Respondent paid to the clerk money which he had collected from the defendants in cases which he disposed of in their absence; that in the two cases specified in the Commission's findings of fact 14(h) and (i), Respondent received $27.00 from each of two defendants for the purpose of paying his fine and costs when Respondent disposed of his case; that Respondent never "took care of the case," never paid the fine and costs and never returned the money; that in a third such case, he returned the $27.00 after keeping it eleven months.

The question we must now consider is whether Respondent should be censured or removed in accordance with the recommendation of the Commission. As Justice Branch pointed out in writing the opinion of the Court in *In re Martin*, 295 N.C. 291, 245 S.E. 2d 766 (1978), "[W]e have not previously adopted precise guidelines or standards for our determination of whether a judge or justice should be censured or whether he should be removed. Such strict guidelines should not be adopted since each case should be decided upon its own facts. *In re Hardy, supra.* Certainly where a judge's misconduct involves personal financial gain, moral turpitude or corruption, he should be removed from office. Further, if a judge knowingly and wilfully persists in indiscretions and misconduct which this Court has declared to be, or which under the circumstances he should know to be, acts which constitute wilful misconduct in office and conduct prejudicial to the administration of justice which brings the judicial office into disrepute, he should be removed from office. Unquestionably, any act by a judge or justice which is prejudicial to the administration of justice and brings the judicial office into disrepute warrants censure." *Id.* at 305-306, 245 S.E. 2d at 774-75.

[16, 17] We have heretofore attempted to define wilful misconduct and conduct prejudicial to the administration of justice in general terms. *See In re Nowell, supra* at 248, 237 S.E. 2d at 255, and *In re Edens*, 290 N.C. 299, 305-306, 226 S.E. 2d 5, 9 (1976). Like fraud, however, these terms are "so multiform" as to admit of no precise rules or definition. *Garrett v. Garrett*, 229 N.C. 290, 296, 49 S.E. 2d 643, 647 (1948). It suffices now to say that conduct prejudicial to the administration of justice, unless knowingly and

persistently repeated, is not per se as serious and reprehensible as wilful misconduct in office, which is a constitutional ground for impeachment and disqualification for public office. N. C. Const., art. IV, § 4, art. VI, § 8. Although we have not previously focused on this issue, we believe that a more careful distinction should henceforth be made between "wilful misconduct in office" and "conduct prejudicial to the administration of justice." A judge should be removed from office and disqualified from holding further judicial office only for the more serious offense of wilful misconduct in office.

A comparison of Judge Peoples' misconduct in the handling of cases over a period of years with the misconduct censured in *In re Crutchfield*, *In re Edens*, *In re Stuhl*, *In re Nowell*, *In re Hardy*, and *In re Martin* reveals some similarity, but it also reveals a vast difference in the number of cases each of those judges mishandled and the time during which his misconduct persisted. Judge Peoples' special files, which had certainly been maintained for more than three years and probably as long as seven years, contained 49 cases on the day the auditors discovered the files. Respondent's custom of rendering and entering judgments out of court and in the absence of both the defendant and the district attorney had become well-enough known to his friends and their acquaintances, so that they did not hesitate to seek his aid when confronted by a traffic ticket for speeding, a warrant for driving drunk, or any infraction by which their drivers license was threatened by either revocation or "points." Respondent's willingness to assist them with a "prayer for judgment continued" upon the payment of $27.00 for the fine and costs, or perhaps a dismissal in "a hard case," would surely cause the knowledgeable observer "to believe that Respondent was more interested in obtaining some personal advantage from his disposition of these cases in this manner than deciding them on their merits." Further, this is the first case we have considered in which there was any evidence that any judge had received money for costs or fines and had failed to apply it to the purpose for which the money had been received.

[18] We are therefore forced to the conclusion that Judge Peoples' repeated and purposeful misconduct and persistent indiscretions constitute wilful misconduct in office and require that he be officially removed from office.

[19] Finally, we consider Respondent's contention that the provisions of G.S. 7A-376 which bar a judge who has been removed for misconduct from future judicial office are not authorized by Article IV, Section 17 (2) or by any other provision of the Constitution. We disagree.

Article IV, Section 17(2) of the North Carolina Constitution directs the General Assembly to "prescribe a procedure, in addition to impeachment and address . . . for the . . . censure and removal of a justice or judge of the General Court of Justice for wilful misconduct in office."

As the language of the amendment indicates, the purpose of the provision is not so much to change the consequences of removal as it is to provide a "*procedure in addition* to impeachment and address" which will accomplish the goals which formerly could be accomplished only through the cumbersome and antiquated machinery of impeachment. It "neither specifies a tribunal nor directs the creation of an authority for this purpose. It merely commands the legislature, in its discretion, to provide a new remedy as an adjunct to the cumbersome, ancient and impractical remedy of impeachment." *In re Martin*, 295 N.C. 291, 299, 245 S.E. 2d 766, 771 (1978).

In order to ascertain the meaning of this amendment to the Constitution, it is appropriate to consider it *in pari materia* with the other sections of our Constitution which it was intended to supplement. *Williamson v. City of High Point*, 213 N.C. 96, 195 S.E. 90 (1938); *Parvin v. Board of Commissioners*, 177 N.C. 508, 99 S.E. 432 (1919).

N. C. Const., art. IV, § 1 vests the judicial power of the State in the General Court of Justice and in a "Court for the Trial of Impeachments." Under Article IV, Section 4, the House of Representatives has the power of impeaching and the Senate serves as the "Court for The Trial of Impeachments." This constitutional provision does not specify the consequences which follow conviction but it does state that they "shall not extend beyond removal and disqualification to hold office." It adds, however, that a person who has been removed by impeachment is still "liable to indictment and punishment according to law."

In addition to impeachment, the Constitution provides for the removal of judicial officers "for mental or physicial incapacity by joint resolution of two-thirds of all the members of each house of the General Assembly." N. C. Const., art. IV, § 17(1). This process, which is termed "address," has been a part of our Constitution since 1835. When a justice or judge is removed for incapacity, this section imposes no sanction other than removal from office.

The removal of a judge or justice from office by either impeachment or address requires a two-thirds vote and places the legislature in the awkward position of sitting as a trier of fact, a role for which the courts and not the General Assembly are best suited. As a result, the machinery for impeachment and address has been seldom used. No judge has been removed by impeachment in this State pursuant to the Constitution of 1868. *See* North Carolina Courts Commission, Report of the Courts Commission to the General Assembly (1971); W. Clark, History of the Supreme Court of North Carolina, 177 N.C. 617, 619 (1919). The joint resolution procedure, while limited to disability cases, is even less effective. It apparently has never been used in North Carolina. Report of the Courts Commission, *supra* at 20.

Recognizing the need for a better method of removal, the General Assembly, following the lead of many of our sister states, submitted Article IV, Section 17(2) as a constitutional amendment authorizing an "[a]dditional *method* of removal of Judges." (Emphasis added.) This amendment was approved by the people in an election held on November 7, 1972.

The sections of the Constitution providing for the removal of judges by impeachment or joint resolution make a careful distinction between judges removed for misconduct and those removed for "mental or physical incapacity." In following the constitutional mandate to "prescribe a procedure in addition to impeachment and address," the legislature made the same distinction in G.S. 7A-376. When a judge is removed for "mental or physical incapacity" upon the recommendation of the Judicial Standards Commission, the remedy allowed by statute is limited to removal from office. On the other hand, when a judge is removed for reasons other than incapacity, G.S. 7A-376 (like the impeachment provision it was intended to supplement), provides for both removal

and disqualification from future judicial office. A proceeding instituted by the Judicial Standards Commission, like a removal proceeding under Article IV, § 4, is neither civil nor criminal in nature. *In re Nowell*, 293 N.C. 235, 241, 237 S.E. 2d 246, 250 (1977). A judge removed by impeachment or by the Supreme Court pursuant to the recommendation of the Commission may still be prosecuted in a criminal court.

In addition to the sanctions which follow removal by impeachment (loss of office and disqualification to hold further judicial office), G.S. 7A-376 imposes an additional sanction, the loss of retirement benefits.

[20] The constitutional source for this remedy does not lie in the impeachment provisions of Article IV, Section 4, but in Section 8 of that same Article, which gives the General Assembly the power to "provide by general law for the retirement of Justices and Judges." Under this power the General Assembly may condition retirement benefits upon good conduct in office. Thus it acted well within its constitutional authority when it provided in G.S. 7A-376, that a judge who is removed from office for cause other than mental or physical incapacity shall receive no retirement compensation. This does not mean, of course, that he forfeits his right to recover the contributions which he had paid into the fund. G.S. 135-62 (1974).

Respondent states correctly that the scope of removal proceedings under G.S. 7A-376 cannot be broader than the constitutional amendment which authorized the General Assembly to set up a procedure for the removal and censure of judges. He then asserts that in providing for both disqualification to hold future judicial office and loss of retirement benefits under G.S. 7A-376 the General Assembly exceeded the authority granted it by Article IV, Section 17(2) of the Constitution since that provision speaks only of the "censure and removal of a Justice or Judge."

As we have already noted, this amendment must be read in connection with the impeachment provisions of Article IV, which it was intended to supplement. These provisions clearly provide for the disqualification of a judge who has been removed for misconduct. Nevertheless, we will address Respondent's argument.

Questions of constitutional construction are in the main governed by the same general principles which control the meaning of all written instruments. *Perry v. Stancil*, 237 N.C. 442, 75 S.E. 2d 512 (1953). The fundamental principle of constitutional construction must be to give effect to the intent of the framers and of the people adopting it. *State v. Emery*, 224 N.C. 581, 31 S.E. 2d 858 (1944); *Reade v. City of Durham*, 173 N.C. 668, 92 S.E. 712 (1917). Where possible amendments to the Constitution should be given a practical interpretation which will carry out the plainly manifested purpose of those who created them. 16 Am. Jur. 2d *Constitutional Law* § 65 (1964).

In ascertaining the intent of the framers, the Court should look at "conditions as they then existed and the purpose sought to be accomplished. Inquiry should be directed to the old law, the mischief, and the remedy. The Court should place itself as nearly as possible in the position of the men who framed the instrument." *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E. 2d 512, 514 (1953).

In our view the driving force behind the creation of the Judicial Standards Commission was the need for a workable alternative to the cumbersome machinery of impeachment. *See* North Carolina Courts Commission, Report of the Courts Commission to the General Assembly (1971). Disqualification from office has long accompanied removal for misconduct under the impeachment provisions of both the state and federal constitutions. *See, e.g.*, N.C. Const. of 1835, Art. 3, § 1. We do not believe that the legislature misconstrued the spirit of the amendment when it attached this same consequence to removal proceedings under G.S. 7A-376. The drafters of the impeachment provisions of the Constitution recognized that the removal of a public official for wilful misconduct in office without disqualifying him from future office might well be a futile gesture. In the absence of such a provision a judge who had been removed for wilful misconduct in office could not only run for election to fill out the term from which he had been removed but also—as here—seek higher judicial office. Such an event would obviously thwart the purpose of the removal proceedings, which is to protect the public from unfit public officials.

The "mischief" to be cured by Article IV, Section 17(2) was the *inefficiency* of removal proceedings under the impeachment and address provisions of our Constitution, not the remedies.

This view is supported by the interpretation placed upon Article IV, Section 17(2) by the legislature which framed the amendment. Both G.S. 7A-376 and the constitutional amendment authorizing this legislation were conceived and ratified together. Both bills were enacted by the General Assembly within three days of each other in June 1971. 1971 N.C. Sess. Laws, ch. 560, 590. The statute by its terms was to become effective on January 1, 1973 provided the voters of the State approved the amendment to Article IV, Section 17 of the Constitution. 1971 N.C. Sess. Laws, ch. 560, § 3.

Clearly the legislature believed that the disqualification provisions of the statute were authorized by the terms of the constitutional amendment, for no purpose would be served by passing a constitutional amendment which was not as broad as the statute it was intended to implement.

This legislative construction, while not conclusive, should be given considerable weight. *Wilson v. City of High Point*, 238 N.C. 14, 76 S.E. 2d 546 (1953); *Purser v. Ledbetter*, 227 N.C. 1, 40 S.E. 2d 702 (1946); *Reade v. City of Durham*, 173 N.C. 668, 92 S.E. 712 (1917); *Chadbourn Sash, Door & Blind Co. v. Parker*, 153 N.C. 130, 69 S.E. 1 (1910). This is particularly true where, as in this case, the statute construing the Constitution was enacted by the very legislature which conceived and submitted the constitutional amendment.

As this Court said when faced with a similar situation in *Trustees of the University of North Carolina v. McIver*, 72 N.C. 76, 83 (1875):

"[W]e find that the very legislative body which adopted this amendment and was conversant with its meaning, immediately upon its ratification, passed the act we are now construing, and provided therein for the election of trustees as they were elected before the war. Thus the very legislative body which drafted the constitutional amendment, gave a legislative construction of the meaning of its terms. This interpretation . . . is entitled to peculiar respect."

[19] We hold that N.C. Const., art. IV, § 17(2) authorizes the General Assembly to disqualify from holding further judicial of-

fice a justice or judge who has been removed for causes other than mental or physical disability.

As an alternative ground for our holding that the North Carolina Constitution authorizes the General Assembly to prescribe disqualification from office as a consequence of removal under G.S. 7A-376, we note the language of Article VI, Section 8 of the Constitution, which provides as follows:

"Sec. 8. *Disqualifications for office.* The following persons shall be disqualified for office:

"First, any person who shall deny the being of Almighty God.

"Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.

"Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or *any person who has been adjudged guilty of corruption or malpractice in any office*, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law." (Emphasis added.)

N.C. Const., art. VI, § 8 has a long and complicated history. *See generally* Coates, *Punishment for Crime in North Carolina*, 17 N.C.L. Rev. 205, 206-208 (1939). It made its first appearance in the Constitution of 1868, which provided in pertinent part as follows:

"Sec. 5. The following classes of persons shall be disqualified for office: First, All persons who shall deny the being of Almighty God. Second, All persons who shall have been *convicted* of treason, perjury or of any other infamous crime . . . or of corruption, or malpractice in office." (Emphasis added.) N.C. Const. of 1868, art. VI, § 5.

The Constitution of 1868 likewise prohibited any person who engaged in dueling from holding office. N.C. Const. of 1868, art. XIV, § 2. Conviction as a prerequisite to disqualification under this section was not required.

In 1902 the disqualification provision of the Constitution was amended to include not only persons convicted of crimes but also those who "confessed their guilt on indictment pending, and whether sentenced or not, or under judgment suspended, of any treason or felony . . . or of corruption or malpractice in office." N.C. Const. of 1876, art. VI, § 8 (1902), 1900 Laws of N.C., ch. 2 §§ 8, 9.

In the few cases which have considered the issue, the courts have agreed that the term "convicted," when used in a provision making "conviction" of a crime a cause of disqualification to hold office, means conviction in a criminal court of law. *State ex rel. White v. Mills*, 99 Conn. 217, 121 A. 561 (1923) (term "convicted" used in city charter); *Lovely v. Cockrell*, 237 Ky. 547, 35 S.W. 2d 891 (1931) (statute); *Coco v. Jones*, 154 La. 124, 97 So. 337 (1923) (constitutional provision); *State v. Henderson*, 166 Miss. 530, 146 So. 456 (1933) (constitutional provision); Annot., 71 A.L.R. 2d 593, 595 (1960); 63 Am. Jur. 2d *Public Officers and Employees* § 196 (1972).

The present language of Article VI, Section 8, was introduced as part of a major revision of the North Carolina Constitution in 1971. That revision extended the bar against office holding to persons found guilty of committing a felony against the United States or another state and substituted the phrase "adjudged guilty" for the term "convicted." N.C. Const., art. VI, § 8; 1969 N.C. Sess. Laws, ch. 1258. *See also* Report of the N.C. State Constitution Study Commission (1968).

In its present form, this provision of our Constitution disqualifies from office "any person who has been adjudged guilty of corruption or malpractice in any office." The word *adjudged* means "to decide or rule upon as a judge or with judicial or quasi-judicial powers." Webster's Third New International Dictionary (1961). The word *guilty* connotes evil, intentional wrongdoing and refers to conscious and culpable acts; it does not necessarily mean or require criminal conviction or the finding of a jury. 39 C.J.S. *Guilty*, p. 448 (1976). Certainly these definitions are broad enough to encompass an adjudication by this Court, pursuant to the provisions of G.S. 7A-376, that a judge is guilty of wilful misconduct in office.

We conclude that the substitution of the term "adjudged guilty" for the term "convicted" permits the General Assembly to prescribe proceedings in addition to criminal trials in which an adjudication of guilt will result in disqualification from office. Pursuant to that authorization, the legislature enacted G.S. 7A-376, barring a judge from future judicial office when he has been removed by this Court for wilful misconduct in office. Since disqualification is a serious penalty it can be constitutionally imposed only when the adjudication of guilt meets the fundamental requirements of due process.

An adjudication of guilt under the provisions of G.S. 7A-376 meets the requirements of due process. The judge's misconduct must be proved by "clear and convincing evidence." *In re Nowell*, 293 N.C. 235, 237 S.E. 2d 246 (1977).

Under rules adopted by the Judicial Standards Commission, a judge is entitled to notice of the charges against him and must be personally served with process. Rules of the Judicial Standards Commission, Rule 8. The judge must be given the "opportunity to defend against the charges by introduction of evidence, representation by counsel, and examination and cross-examination of witnesses." Rules of the Judicial Standards Commission, Rule 13. He also has the right to issue subpoenas for the attendance of witnesses or the production of documents. Rule 13, supra.

[19] We hold that an adjudication of "wilful misconduct in office" by this Court in a proceeding instituted by the Judicial Standards Commission in which the judge or justice involved has been accorded due process of law and his guilt established by "clear and convincing evidence," is equivalent to an adjudication of guilt of "malpractice in any office" as used in N.C. Const., art. VI, § 8. We conclude, therefore, that the legislature acted within its power when it made disqualification from judicial office a consequence of removal for wilful misconduct under G.S. 7A-376.

For the reasons enunciated in this opinion it is ordered by the Supreme Court of North Carolina, in conference on 29 December 1978, that Respondent Linwood Taylor Peoples be and he is hereby officially removed from office as a judge in the General Court of Justice, District Court Division, Ninth Judicial District, for the wilful misconduct in office specified in the find-

ings of fact made by the North Carolina Judicial Standards Commission, which findings the Court has adopted as its own.

In consequence of his removal, Respondent is disqualified from holding further judicial office and is, therefore, ineligible to take the oath of office as the resident Superior Court Judge of the Ninth Judicial District, the office to which he was elected on 7 November 1978 and certified by the State Board of Elections on 28 November 1978. For the same reason he is ineligible for retirement benefits.

STATE OF NORTH CAROLINA v. HUGH LEE VAUGHN

No. 57

(Filed 29 December 1978)

1. **Criminal Law § 21.1— no probable cause hearing—no grounds for dismissing indictment**

The trial court did not err in denying defendant's motion to dismiss the indictment on the ground that no probable cause hearing was held prior to indictment.

2. **Grand Jury § 3— composition of grand jury—method of disqualification of grand jurors**

Defendant's contention that his indictment should be quashed on the ground that the grand jury which indicted him was improperly constituted due to improper procedures used in drawing up the final jury list from which members of the grand jury were selected is without merit, since defendant's evidence that the jury commission did not always make proper inquiry before disqualifying certain individuals but instead simply took the sheriff on his word that such persons were disqualified did not make out a prima facie case for defendant's claim that qualified jurors were unlawfully excluded from the list; there was no evidence that the sheriff was unlawuflly delegated the responsibility, and given the final say, of determining the jury list but instead that he simply assisted the commission with the recommendations regarding those persons he thought disqualified for service; and even if defendant had shown that certain qualified persons were improperly disqualified, dismissal of the indictment would not be required absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. The trial judge was not required to make findings of fact in denying defendant's motion to quash in the absence of evidence that any qualified person was excluded from jury service and in the absence of contradictory and conflicting evidence as to the material facts.

3. Criminal Law § 91; Constitutional Law § 55— motion for speedy trial—failure to show defendant proceeding under Detainer Act—trial within 180 days not required.

Defendant's contention that the indictment against him should have been dismissed with prejudice pursuant to G.S. 15A-761, Articles III(a) and V(c), because the State failed to bring him to trial within 180 days after his motion for speedy trial is without merit since defendant's speedy trial motion did not comply with the provisions of G.S. 15A-761, Article III(a), and there was nothing in the motion to put the proper authorities on notice that defendant was proceeding under the provisions of the Detainer Act.

4. Constitutional Law § 55; Criminal Law § 91— continuance to obtain witnesses--waiver of right to trial within 120 days

By requesting a continuance for the purpose of procuring witnesses who were confined in prisons in S. C., defendant waived his right to be tried within 120 days under G.S. 15A-761, Article IV(c).

5. Constitutional Law § 53— speedy trial—delay caused by defendant—no denial of speedy trial

Defendant who was serving a life sentence in S. C. was not denied his right to a speedy trial where the length of the delay between indictment and trial was sixteen months; the delay from the time defendant was delivered to N. C. and the date of the trial was due solely to defendant's motion for continuance, based on his inability to obtain witnesses from S. C.; from the date of the indictment to the time defendant was delivered to N. C., defendant was imprisoned in S. C. and soon after defendant moved for a speedy trial, the State acted to have him brought to N. C.; because defendant's imprisonment in S. C. would have continued irrespective of any action which N. C. authorities might have taken to bring him to trial, his right to employment and his social standing in the community were not adversely affected by the delay; and the delay did not cause loss of witnesses favorable to defendant's defense.

6. Criminal Law § 169.2— objection sustained--evidence stricken—defendant not entitled to new trial

Where an SBI agent stated upon cross-examination by defense counsel that the place of defendant's imprisonment was a place "where chronic or incorrigible inmates are kept," and the trial court immediately, upon defendant's objection, struck such testimony from the jury's consideration, defendant was not entitled to a new trial, since defendant made no motion for a mistrial based on this matter; defendant opened the door for the testimony that was given; and defendant, when he took the stand, testified of his own volition to evidence of a similar nature.

7. Criminal Law § 85.1— specific act of truthfulness—evidence inadmissible

Defendant's contention that his testimony concerning his plea in a murder trial in S. C. was relevant to prove his capacity for truthfulness is without merit, since a party may not show specific acts of his good conduct or truthfulness as evidence of his good character or capacity for truthfulness.

8. **Criminal Law § 102.5— defendant's eligibility for parole in another state— question relevant**

In a prosecution for first degree murder where defendant claimed that he confessed to a murder which he did not commit simply because he did not want to spend the rest of his life in the allegedly intolerable conditions of another state's prison unit, the prosecutor's question regarding defendant's eligibility for parole within two years was relevant to the issue of defendant's motives for confessing that crime.

Justice BRITT took no part in the consideration or decision of this case.

APPEAL by defendant from *Seay, J.*, at the 10 April 1978 Session of CABARRUS Superior Court.

Defendant was tried and convicted for the first degree murder of Clyde Goodnight and for armed robbery. Judgment was arrested on the armed robbery charge, and from a sentence of life imprisonment on the murder charge defendant appealed.

On 7 May 1970 Clyde Goodnight, seventy-two years old, was murdered in his home in the Odell Community in Cabarrus County. His body was found by his niece when she returned to the house from her place of employment about 6:00 p.m. on that date. The deceased's hands and feet were taped and he had been shot once behind the left ear. The house was generally in a state of disarray. A gold watch belonging to deceased and an undisclosed amount of money were missing.

Defendant is a forty-one-year-old inmate in the South Carolina prison system, serving a sentence of life imprisonment plus twelve years for murder and armed robbery in South Carolina. He has been in the South Carolina prison from June 1970 until the present. (After this trial in Cabarrus County defendant was returned to South Carolina where he remains in prison.) In October 1976 defendant and one Danny R. Harrison, another inmate in the South Carolina prison, wrote a letter to the North Carolina State Bureau of Investigation in Raleigh, purportedly confessing to a murder committed in North Carolina "in or about" April 1970. The letter gave several details of the crime. Some were correct statements as to the physical evidence found at the scene of the murder, while other statements set out in the letter were not correct. The writers expressed that their purpose was to get out of the Maximum Security Center in Columbia, South Carolina, and to stand trial in North Carolina so that they

might stay in North Carolina. Upon investigation by the S.B.I. it was found that Harrison was in custody in Florence, South Carolina, on 7 May 1970 and could not have participated in the Goodnight murder.

On 1 November 1976 State Bureau of Investigation Agent Jack Richardson talked with the defendant. At that time defendant described the scene of the Goodnight murder and again admitted committing the crime. He stated that he and Harrison left Greenville, South Carolina, and were traveling north on I-85 looking for a business to rob. They turned off I-85 and saw a two-story white frame house with a circular drive in front. At that time they were driving a Ford truck which belonged to one Bobby Scott. (Bobby Scott's fingerprint was later found on a metal box in the Goodnight residence.) They stopped in front of the house about noon on that day and went to the front door. A gray-haired man about sixty years old met them at the door. They forced their way in and taped the man's hands, but defendant could not remember if they taped his legs. They then took $150 to $200 from the victim's pocketbook. Defendant then started searching the house. He went through all the drawers looking for money, and found an old gold watch which he took but later threw away. Defendant said that he put a set of golf clubs, which he intended to take, at the head of the stairs, but that he later decided to leave the clubs there. (These golf clubs were found at the head of the stairs after the murder.) Defendant further admitted that as they were leaving the house he leaned down and shot deceased in the left temple with a .22-caliber pistol. After his confession, defendant later told Agent Richardson that the statements he had given on 1 November were correct, except for the statement that Danny Harrison was with him.

Defendant testified in his own behalf and denied committing the crimes for which he was charged. He testified that he and Danny Harrison had written the letter stating that they had committed the murder, but that they did so in order that they might escape when brought to North Carolina for trial. If they were unable to escape, they wanted to plead guilty and build time in North Carolina rather than stay in the Maximum Security Center in South Carolina. Defendant further testified that he obtained the details of the murder and robbery of Mr. Goodnight from various inmates in the prison. He stated that he was serving time

in South Carolina for a robbery and murder which he in fact committed. Of these prior crimes, defendant said: "I shot and killed a lady, robbing her. I killed her with a .38 pistol. I shot her in the head. . . . She was very old."

Defendant also introduced the depositions of Roger Hawkins and Danny Harrison. These witnesses corroborated defendant by testifying that the letter to the North Carolina authorities was written for the purpose of coming to North Carolina for an opportunity to escape, and that defendant had learned the details of the robbery and murder from various prison inmates.

Further evidence pertinent to decision will be set out in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Donald W. Stephens for the State.

Hartsell, Hartsell & Mills by W. Erwin Spainhour for defendant appellant.

MOORE, Justice.

[1] Defendant first insists that the trial court erred in denying his motion to dismiss the indictment, pursuant to G.S. 15A-606, on the ground that no probable cause hearing was held prior to indictment. This same contention was made in *State v. Lester*, 294 N.C. 220, 240 S.E. 2d 391 (1978), and was answered contrary to defendant's position in this case. There, the Court quoted with approval from the Official Commentary to G.S. 15A-611, as follows:

> "In view of the preexisting jurisdictional law and the fairly clear legislative intent . . . it seems certain that no probable-cause hearing may be held in district court once the superior court has gained jurisdiction through the return of a true bill of indictment."

The Court then continued:

> "We find the logic of this Comment persuasive and therefore hold that G.S. 15A-606(a) requires a probable cause hearing only in those situations in which no indictment has been returned by a grand jury."

In present case indictments were returned on 3 January 1977. At that time defendant was serving time in South Carolina

for another murder committed in that state. No probable cause hearing was necessary. This assignment is overruled.

Next, defendant contends that the trial court erred in denying defendant's motion to quash the indictments on the grounds that the jury commission selected prospective grand jury members in a method contrary to law, and in failing to make findings of fact and conclusions of law in denying said motion.

Since 1 October 1967, each county in North Carolina has had a jury commission of three members. G.S. 9-1. G.S. 9-2 specifies the manner in which the jury commission is to prepare a list of prospective jurors. Defendant does not contend that the jury commission did not follow a systematic selection procedure in drawing up a tentative jury list, in violation of G.S. 9-2. Instead, he contends that G.S. 9-3 was not followed in the selection of names for a tentative jury list.

G.S. 9-3 describes those persons entitled to serve as jurors as follows:

> "All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county, who have not served as jurors during the preceding two years, who are 18 years of age or over, who are physically and mentally competent, who have not been convicted of a felony or pleaded guilty or nolo contendere to an indictment charging a felony (or if convicted of a felony or having pleaded guilty or nolo contendere to an indictment charging a felony have had their citizenship restored pursuant to law), and who have not been adjudged non compos mentis. Persons not qualified under this section are subject to challenge for cause."

G.S. 15A-622(a) provides that the mode of selecting and empaneling grand jurors is governed by Chapter 15A, Article 31, and by Chapter 9 of the General Statutes. G.S. 15A-1211 requires a trial judge to decide all challenges to the panel and all questions concerning the competency of the jurors. G.S. 15A-1211 also provides that a challenge to the panel may be made only on the ground that the jurors were not selected or drawn according to law.

Defendant insists that persons who were qualified under G.S. 9-3 were unlawfully excluded by the jury commission. In order to reach a determination of this issue we must look to the evidence

elicited at the hearing on defendant's motion to quash. John Robinson, Chairman of the Jury Commission of Cabarrus County, testified that in November 1975 the jury commission drew up a tentative jury list by extracting every tenth name from tax listing books and every seventh name from voter registration lists. He said that, from this resulting list of several thousand names, the jury commission checked each name with death certificates from the register of deeds and removed names of deceased persons from the lists. He also testified that the commission consulted various people to determine those persons on the raw list who no longer resided in the county; the post office was frequently consulted in this matter. Mr. Robinson then testified that the sheriff of Cabarrus County had assisted him on occasion in making a determination of those persons on the list who were disqualified under G.S. 9-3 from jury service by virtue of their felonies or pleas of *nolo contendere.* The sheriff would also help him determine those persons who were physically or mentally incompetent, based on his knowledge of persons he had transported to Dix Hospital. The chairman further testified that two deputy sheriffs who acted as the chiefs of police of Concord and Kannapolis had also helped him in this matter at times in the past. These men would go through the cards selected by the systematic procedure and would put a red check by the name of those persons they felt disqualified. The chairman said that he was present when such names were checked, and that in most instances he would inquire why the names had been checked. Regarding those checked for reasons of having committed a felony, the commissioner said that he did not make further inquiry to see if such persons had in fact been convicted of a felony. He further testified that, regarding those names that had been checked, he often assumed, without inquiry, that such persons should be disqualified.

Defendant then introduced a document sent by the jury commission to the register of deeds, stating that the jury commission and the Cabarrus County Sheriff's Department had "checked the raw lists to remove persons deceased, or known to be disqualified under the statutes, and deemed to be *undesirable.*" (Emphasis added.) On cross-examination by the State, the chairman testified that, by "undesirable," he meant those who were mentally incompetent, guilty of felonies, or "persons who were incompetent

for a number of reasons." He said that the sheriff never told him that he had checked a name because he did not like the person.

The sheriff of Cabarrus County testified that he was not sure whether he assisted Mr. Robinson in November 1975, but that he had done so in the past. He said that he had never checked off a name for any other reason except where he knew that a person was a felon, someone he had taken to the State hospital, someone who had moved out of the county, or one whom he knew to be too old or crippled to serve. He testified that the sheriff's department was merely recommending to the jury commission persons they thought unfit, and that the final decision always rested with the commission. The chiefs of police of Concord and Kannapolis, both deputy sheriffs, testified that they did not participate in the compilation of the jury list in November 1975.

[2] After the conclusion of the hearing defendant moved to quash the indictment on grounds that the grand jury which indicted him was improperly constituted due to improper procedures used in November 1975 in drawing up the final jury list from which members of the grand jury were selected. The trial judge denied his motion without making findings of fact. Defendant now argues that the trial court erred in denying his motion, that he put on sufficient evidence to show that G.S. 9-3 had been violated in that persons qualified to serve as jurors had been excluded, and that, due to a violation of G.S. 9-3, he is entitled to have his conviction reversed and the indictment against him dismissed.

Defendant's argument is without merit. To begin with, defendant has not presented evidence which would tend to make out a *prima facie* case for his claim that qualified jurors were unlawfully excluded from the list. *Cf. State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Though testimony by the chairman of the jury commission would indicate that, in certain instances, the commission did not make proper inquiry before disqualifying certain individuals, but instead simply took the sheriff on his word that such persons were disqualified, there is no evidence which would indicate that persons qualified to serve under G.S. 9-3 were disqualified from the list. *See State v. Yoes* and *Hale v. State*, 271 N.C. 616, 157 S.E. 2d 386 (1967). Furthermore, there is absolutely no evidence here that the sheriff was unlawfully delegated the responsibility, and given the final say, of determining the jury

list. All the evidence shows that the sheriff was called in simply to assist the commission with his recommendations regarding those persons he thought disqualified for service. Such procedure would be entirely proper under the statutes. The fact that the commission may have, improperly, failed to inquire of the sheriff the reasons for his recommendations of disqualification does not, by itself, merit a dismissal of this indictment.

Furthermore, even if there had been a showing that certain qualified persons were improperly disqualified, this would not require a dismissal of the indictment absent a showing of corrupt intent or systematic discrimination in the compilation of the list, or a showing of the presence upon the grand jury itself of a member not qualified to serve. *State v. Yoes, et al., supra; State v. Perry,* 122 N.C. 1018, 29 S.E. 384 (1898); *State v. Haywood,* 73 N.C. 437 (1875); *cf. State v. Hardy, supra.* This Court has held on numerous occasions that, in the absence of statutory language indicating that preparation of jury lists shall be void if the directions of the act be not strictly observed, a mere showing of a violation of the statutory procedures will not merit the quashing of an indictment. *See State v. Yoes, et al.,* and cases cited therein. The fact that these cases were decided prior to the various 1967 amendments to Chapter 9, Article 1, does not vitiate the force of this prior law, for absent from such amendments is the language requiring dismissal unless strict observance is shown. Therefore, we hold that in order to justify a dismissal of an indictment on grounds that statutory procedures were violated in the compilation of the jury list, a party must show either corrupt intent, *State v. Yoes, et al., supra,* discrimination, *State v. Hardy, supra,* or irregularities which affect the actions of the jurors actually drawn and summoned, *State v. Wilcox,* 104 N.C. 847, 10 S.E. 453 (1889). In present case the defendant has offered no evidence tending to show that the allegedly improper statutory procedures prejudiced him in any manner. This assignment is therefore without merit.

Defendant further contends, however, that the trial judge erred in failing to make findings of fact and conclusions of law in denying his motion to quash. In the absence of evidence that any qualified person was excluded from jury service, and in the absence of contradictory and conflicting evidence as to the material facts, the judge is not required to make findings. As

stated in *State v. Hardy, supra.*, "[T]he judge is only required to make findings when the evidence is contradictory and conflicting as to material facts. . . ." There is no conflict of evidence as to material facts in the present case. The testimony indicates that the statutory procedure for the selection of jurors prescribed in Chapter 9 of the General Statutes was followed. This assignment is therefore overruled.

Under his third and fourth assignments defendant argues that the trial court erred in denying defendant's motion to dismiss the indictment pursuant to G.S. 15A-761, Article V(c) of Article 38, the Interstate Agreement on Detainers.

Prior to his extradition to this State, the defendant was serving a life sentence in the State of South Carolina for murder and armed robbery. On 3 January 1977 a grand jury in Cabarrus County returned indictments alleging murder and armed robbery against the defendant. On 29 March 1977, while in prison in Columbia, South Carolina, defendant filed a petition for a speedy trial. A detainer had not yet been filed against defendant at the time of this petition. On 21 April 1977, this petition was presented to Judge Rousseau, presiding in the Superior Court for Cabarrus County. Judge Rousseau did not rule on the petition for reason that the court lacked jurisdiction because defendant was not within this State. On 16 May 1977, the district attorney of the Nineteenth Judicial District filed a detainer and a "Request for Temporary Custody" pursuant to G.S. 15A-761. Defendant was not delivered to this State by South Carolina officials until 10 December 1977, and the defendant's trial began on 10 April 1978.

[3] The defendant first argues that the indictment against him should have been dismissed with prejudice pursuant to G.S. 15A-761, Articles III(a) and V(c), because the State failed to bring him to trial within 180 days after his motion for a speedy trial of 29 March 1977. A reading of defendant's petition for a speedy trial reveals that defendant's petition does not comply with the requirements of G.S. 15A-761, Article III(a). His petition does not contain "written notice of the place of his imprisonment," nor is his request "accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the

prisoner, and any decisions of the State parole agency relating to the prisoner." G.S. 15A-761, Article III(a). Defendant's argument that the prosecutor had knowledge of the place of his imprisonment is irrelevant to the fact that the bare motion for a speedy trial, filed without any of the accompanying information required by G.S. 15A-761, Article III(a), was insufficient to put the prosecutor on notice that the defendant was availing himself of the benefits of the provision and that the prosecutor would be required to put him to trial within 180 days.

As the Court said in *State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978), in passing on a similar type claim, "The record before us does not show compliance by the defendant with the procedures so outlined in the above quoted provisions of this Act. . . ." There is nothing in the record which would even indicate that defendant was proceeding under the provisions of the Detainer Act at the time he filed his motion for a speedy trial. A petition for a speedy trial will not be considered as a request for a final disposition under G.S. 15A-761, Article III, unless the prisoner complies with the terms of that provision in order to put the appropriate authorities on notice that he is proceeding thereunder. This assignment is overruled.

[4] Defendant further argues that he is entitled to a dismissal of the indictment with prejudice under G.S. 15A-761, Article V(c) due to the prosecutor's failure to satisfy the requirement of G.S. 15A-761, Article IV(c), which provides that a prisoner delivered to State officials for trial pursuant to a response for temporary custody must be put to trial within 120 days of the arrival of the prisoner in the receiving state. The defendant arrived in Cabarrus County on 10 December 1977, and went to trial on 10 April 1978, 121 days after the defendant was brought into North Carolina. Defendant insists that the statute is to be strictly construed and that he is entitled to have the charges against him dropped with prejudice.

Defendant was initially scheduled for trial on 3 January 1978. Three weeks prior to this date, on 14 December 1977, defendant moved that the court require the attendance of the three material witnesses. When the State of South Carolina refused to deliver the witnesses, defendant, on 26 December 1977, moved for a continuance until the out-of-state witnesses could be present at

trial. Though no order appears in the record granting this motion, it is clear that defendant's motion was allowed, for defendant was not brought to trial on 3 January 1978. On 9 February 1978 the superior court issued a second request for the witnesses. Defendant later moved to depose the witnesses in South Carolina, and on 14 March 1978 this motion was granted. Depositions were taken from the witnesses while they were in prison, and their depositions were introduced into evidence at trial.

In denying defendant's motion to dismiss under G.S. 15A-761, the trial court found that the State had no part in the delay in trial of the defendant, and that such delay was due to defendant's own motions for continuance, made for the purpose of procuring witnesses. Defendant does not contend that the State of North Carolina caused the delay, but claims that said delay was caused by the State of South Carolina in its refusal to allow three witnesses, confined in South Carolina prisons, to come to this State to testify. He asks whether he is required to waive his fundamental right to present witnesses in his defense to avoid waiver of his right to a trial within the period specified in Article IV of the Detainer Act. Article IV(c) of the Act, which provides for the 120-day limit, says "but for good cause shown in open court . . . the court having jurisdiction of the matter may grant any necessary or reasonable continuance."

From the record it is clear that defendant's request for a continuance was allowed, and that the delay in trial was due solely to defendant's inability to obtain these out-of-state witnesses. The delay of 121 days was "for good cause shown," namely, defendant's own motion for continuance due to his inability to obtain witnesses. By requesting this continuance defendant waived his right to be tried within 120 days under this provision. This assignment is overruled.

[5] Under his fifth assignment defendant argues that the trial court erred in denying his motion to dismiss the indictment, said motion being based on the allegation that he was denied his right to a speedy trial under the Sixth and Fourteenth Amendments.

Whether a defendant has been denied the right to a speedy trial is a matter to be determined by the trial judge in light of the circumstances of each case. *State v. Spencer*, 281 N.C. 121, 187 S.E. 2d 779 (1972). The criteria for determining whether such

right has been denied have been set forth by the United States Supreme Court in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972). There, the Court said:

> ". . . The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed.
>
> "A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.
>
> * * *
>
> "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of a speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." 407 U.S. at 530, 533.

This Court has held on several occasions that persons confined for unrelated crimes are entitled to the benefits of the constitutional right to a speedy trial, just as is any other individual. *See State v. McQueen*, 295 N.C. 96, 244 S.E. 2d 414 (1978); *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978); *State v. Johnson*, 275 N.C. 264, 167 S.E. 2d 274 (1969). In *State v. McKoy, supra*, the Court held that a delay of twenty-two months was excessive where a locally imprisoned defendant had repeatedly requested that he be brought to trial, and the prosecution could offer no reason for ten months of that period other than the fact that the defendant was imprisoned. Though defendant could show but minimal prejudice, the Court held that the prosecution's willful delay in the face of defendant's repeated requests for trial required a dismissal of the charges against him.

More recently, in *State v. McQueen, supra*, the Court held that a delay of almost five years was not excessive where a defendant was imprisoned for a separate murder in another state's prison, when a third state had a separate detainer filed on defendant which had priority over this State's detainer, and where there was no evidence of purposeful delay by State officials and no evidence of loss of witnesses or prejudice to the defendant's standing in the community.

Defendant insists that the delay in his case is like that in *McKoy*, and that he is entitled to release. A review of the facts reveals that his situation is more like that of the *McQueen* case. The crimes in this case were committed in May 1970. Defendant fled the State immediately thereafter, and State officials had no suspects until October 1976 when defendant, serving a life sentence for a separate and intervening murder in South Carolina, wrote S.B.I. officials that he had committed the 1970 murder and robbery. State officials immediately investigated, obtained a separate confession from defendant and an indictment was returned against him a few weeks later on 3 January 1977. At the end of March 1977 defendant filed a motion for a speedy trial. On 16 May 1977 the district attorney of Cabarrus County filed a detainer and request for temporary custody against defendant. On 10 December 1977 South Carolina delivered defendant to the State of North Carolina for trial, and the State was ready to try defendant on 3 January 1978. Defendant, however, on 28 December, moved for a continuance in order to obtain witnesses or their depositions. After said depositions were obtained, defendant was promptly put to trial on 10 April 1978.

The length of the delay between indictment and trial was sixteen months. The delay from December 1977 to the date of trial in April 1978 was due solely to defendant's motion for continuance, based on his inability to obtain witnesses from South Carolina. From January to December 1977 defendant was imprisoned in another state pursuant to a prior conviction in the courts of that state. As the Court said in *State v. McQueen, supra*, ". . . no action which the authorities [of this State] could have taken with reference to the present matter could have terminated that imprisonment." The State did take steps, in May 1977, by their filing of a request for temporary custody, to have defendant delivered to this State for trial. This request was not

honored by the State of South Carolina until December 1977. Soon after defendant moved for a speedy trial in March 1977 the State acted to have him brought to this State for trial. Since he was imprisoned and his confinement would have continued irrespective of any action which Cabarrus County authorities might have taken to bring him to trial, it does not appear that his right to employment or his social standing in the community was adversely affected by the delay. Defendant was not eligible for parole in South Carolina for over three years from the time of indictment; thus, the outstanding indictment could have had no effect on his possible release from prison. Finally, the delay did not cause loss of witnesses favorable to defendant's defense; in fact, trial was delayed over four months so that defendant would have the opportunity to obtain such witnesses.

Defendant has shown no purposeful delay by the State of North Carolina in bringing him to trial. Nor has he shown any prejudice whatever resulting from said delay. The length of the delay is not inordinate, given the fact that defendant was serving a life sentence in another state's prison system. Weighing these factors against the fact that defendant asserted his right to a speedy trial on a single occasion, it appears that defendant's right to a speedy trial has not been violated. This assignment is overruled.

[6] At trial, while counsel for defendant was cross-examining State's witness Richardson, an S.B.I. agent, regarding the place of defendant's imprisonment, the following transpired:

> "Q. Describe the Maximum Security Center. What is that? Is that the name of the whole prison or is it something—
>
> A. No, sir.
>
> Q. What is it?
>
> A. It's a place where chronic or incorrigible inmates are kept."

Defendant moved to strike this answer on grounds that it was unresponsive, and the trial judge sustained his objection, instructing the jury to strike the answer from their recollection of the evidence. The defendant now contends that the prejudicial ef-

fect of this answer could not be nullified by the court's instruction, and that he is entitled to a new trial.

We first note that defendant made no motion for a mistrial based on this matter. Secondly, the defendant opened the door for an answer not to his liking. The question is ambiguous, and clearly the answer is responsive to one interpretation of the question. Finally, the defendant, when he took the stand, testified of his own volition to evidence of a similar nature. This assignment is without merit.

[7] On direct examination of the defendant, his counsel asked him what plea he had entered in a murder trial in South Carolina. The defendant answered "guilty," and the prosecutor objected and entered motion to strike. The trial judge instructed the jury not to consider the answer. Defendant contends that evidence of his former plea was relevant to prove his capacity for truthfulness. A party may not show specific acts of his good conduct or truthfulness as evidence of his good character or capacity for truthfulness. 1 Stansbury, North Carolina Evidence § 111 (Brandis rev. 1973). The trial court did not therefore err in excluding this testimony.

[8] Defendant finally argues that the prosecutor's question to defendant whether he would be eligible for parole in South Carolina in two years so prejudiced him as to deprive him of a fair trial, even though defendant's objection to the question was sustained. In *State v. Rhodes*, 275 N.C. 584, 169 S.E. 2d 846 (1969), the Court noted that any reference by the judge or prosecuting attorney to the possibility of a parole in the case *sub judice* will constitute prejudicial error. Such testimony, irrelevant to a defendant's guilt, can only encourage a verdict of guilty. *State v. Rhodes, supra.* However, this rule does not apply to circumstances, such as these, where the question concerns parole for a prior crime for which defendant is presently imprisoned, and the defendant himself has, by his own evidence, opened the door to such testimony. Defendant testified that the reason he had confessed to the crimes in this case was not because he had in fact committed the crimes but because he had an insatiable desire to get out of the Maximum Security Center in South Carolina, either by means of a transfer to a prison unit in this State or by means of an escape attempt during the act of transfer. Defendant then

went on to testify regarding the intolerable physical conditions of his place of imprisonment.

Given the rather unusual explanation upon which the defendant based his defense—that he confessed to a murder which he did not commit simply because he did not want to spend the rest of his life in the allegedly intolerable conditions of another state's prison unit—we believe that the prosecutor's question regarding his eligibility for parole within two years was relevant to the issue of defendant's motives for confessing that crime. By attempting to show that defendant was eligible for parole within a short time, the prosecutor clearly hoped to prove the unreasonableness of defendant's testimony that he had confessed to crimes involving one and possiblly two life sentences solely in order to get out of the South Carolina prison. Hence, we believe that in this case the prejudicial effect of the question was outweighed by its relevancy to the defendant's alleged motives for confessing to the crime. Given the additional fact that the trial judge, acting within his discretion, sustained defendant's objection to the question, we cannot perceive how this question could have unduly prejudiced the defendant or improperly influenced the jury verdict. This assignment is overruled.

We have made a careful examination of the entire record and find no prejudicial error.

No error.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. LARRY GREEN

No. 32

(Filed 29 December 1978)

1. Criminal Law § 66.20— identification testimony—no pretrial identification procedures—findings not required

The trial court was not required to make formal findings of fact and conclusions of law regarding the independence and reliability of an assault

victim's in-court identification since there were no pretrial identification procedures and therefore no relevant facts upon which to base a finding of the identification's independent origins.

2. **Criminal Law § 66.18— identification testimony—no pretrial identification procedures—voir dire not required**

Though a voir dire is not required to determine the admissibility of identification testimony where no pretrial identification procedures have been conducted, it would be the better practice to conduct a voir dire, prior to the admission of the testimony, where there has been a specific objection that the identification testimony is inherently unreliable or incredible, and, if a voir dire is held, then the sole determination for the trial judge is whether or not the witness had a reasonable possibility of observation sufficient to permit subsequent identification.

3. **Criminal Law § 66.1— identification testimony—opportunity for observation**

In a prosecution for burglary, assault with intent to rape and assault with a deadly weapon, the trial court properly overruled defendant's motion to suppress the victim's identification testimony where the evidence on voir dire tended to show that the alleged assault took place in the victim's apartment; when defendant first opened the apartment door in his efforts to escape, the victim saw his lighted profile, and on his second opening of the door she saw his full face; the light was on in the hall outside the apartment and lit up the doorway as the man opened the door; and defendant was but a few feet from the victim at the time she saw his face.

4. **Criminal Law § 106.3; Burglary and Unlawful Breakings § 5.11; Assault and Battery § 14.5— burglary—assault with deadly weapon**

In a prosecution for burglary, assault with intent to rape and assault with a deadly weapon, defendant's contention that nonsuit should have been allowed because the victim's identification testimony was inherently incredible and because no other evidence was found at the scene of the crime which would point to defendant's guilt is without merit, since the court found on voir dire that the victim's identification testimony was not inherently incredible; the State established by ample evidence that a crime had been committed; the victim's competent identification testimony was sufficient to take to the jury the question whether the defendant was the perpetrator of the crime; and the absence of physical evidence corroborating proper identification testimony did not warrant nonsuit.

5. **Criminal Law § 89.1— character of witness's associate—question improper—no prejudice**

Though the trial court erred in permitting the prosecutor to ask an alibi witness two questions concerning the character of the witness's associate, defendant was not prejudiced since the witness in answering the questions disavowed any knowledge of her associate's use of drugs; the prosecutor did not further inquire into the matter or attempt to badger the witness; and there was no indication that the questions were unfounded or asked in bad faith.

6. Criminal Law § 89.9— impeachment—prior inconsistent statement—extrinsic evidence admissible

The State could properly introduce extrinsic testimony concerning an alibi witness's prior inconsistent statement with respect to his waking and sleeping hours and defendant's whereabouts where such statement conflicted with the subject matter of his testimony at trial.

Justice BRITT took no part in the consideration or decision of this case.

APPEAL by defendant from *Browning, J.*, at the 9 January 1978 Criminal Session of NEW HANOVER Superior Court.

Defendant was tried and convicted of first degree burglary, assault with intent to commit rape and assault with a deadly weapon inflicting serious bodily injury. From a sentence of life imprisonment on the burglary charge and a concurrent sentence of five years on the assault charges, defendant appealed.

Motion to bypass the Court of Appeals on the assault charges was allowed.

The State's evidence tends to show that in the early morning hours of 11 August 1978 the apartment of Juanita Brown was broken into. Ms. Brown was awakened when she felt a man kneeling beside her bed. The man held a knife to her throat, and told her not to move and to do what he said or he would kill her. He ordered her to remove her nightgown and she complied. He then took off his pants and attempted to insert his penis into her vagina. She grabbed the assailant's knife and her hand was severely cut during the ensuing struggle. The assailant then jumped up and ran from her bedroom to the front door of the apartment. When he tried to open the door of the apartment, a chain latch caught the door, and, by means of a light shining in from the hall, the prosecuting witness was able to identify her assailant as defendant, a janitor at the courthouse in New Hanover County where the prosecuting witness also worked. After he removed the chain latch, the assailant left the apartment.

The defendant testified in his own behalf, and denied the commission of the crimes. He offered further evidence tending to establish an alibi. Other facts pertinent to the decision of this case will be set out in the opinion.

Attorney General Rufus L. Edmisten by Associate Attorney Thomas F. Moffitt for the State.

Roy C. Bain for defendant appellant.

MOORE, Justice.

At trial, the victim, Juanita Brown, was asked whether she was able to see her assailant when he first opened the door in his attempt to escape. A general objection was entered and a *voir dire* held, in the absence of the jury, on her identification testimony. On *voir dire* Ms. Brown testified that when the assailant first opened the door she saw his profile and then recognized him as the janitor at the courthouse, where she too worked. The second time the man opened the door she saw his entire face. Ms. Brown then identified defendant as the man who had attempted to rape her. On cross-examination she testified that she did not tell officers who the assailant was until she got to the hospital some forty-five minutes after officers first arrived at her apartment. Ms. Brown further testified on cross-examination that she had but a split second to view her assailant's face.

Officer F. G. Saxton testified that, on his arrival at Ms. Brown's apartment, she gave him a general description of her assailant. She did not tell him who the assailant was, but when he first saw her "she was emotionally upset and had some pain." At the hospital she told him that her assailant was the janitor who worked at the sheriff's department. Detective Cecil Gurganious and attorney Peter Grear testified that Ms. Brown told them at the hospital that she was almost certain that the man who broke into her apartment was a custodian around the courthouse. At the conclusion of this evidence the trial judge denied defendant's motion to suppress Ms. Brown's identification testimony, and, though expressing doubt that findings were required, said that findings of fact would be placed in the record prior to the end of trial. For purposes of the record, findings of fact and conclusions of law were made sometime after verdict and judgment were entered. The facts found by the trial judge are substantially similar to those set out above. The trial judge concluded that Ms. Brown had ample opportunity to view her assailant, that her identification testimony was a matter of fact for the jury to assess, and

that none of the defendant's constitutional rights were violated by admission of her identification testimony.

The defendant argues that the trial court erred in failing to make findings of fact and conclusions of law prior to his denial of defendant's motion to suppress the identification testimony, and further argues that, as a matter of law, there was not ample evidence elicited on *voir dire* to sustain Ms. Brown's identification of the defendant. Defendant contends that admission of the identification testimony constitutes a violation of standards set forth in *Neil v. Biggers*, 409 U.S. 188, 34 L.Ed. 2d 401, 93 S.Ct. 375 (1972).

[1] The five factors set forth in *Biggers, supra*, and in *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), for the assessment of the reliability of identification testimony were intended to apply to those cases where there has been a showing that a pretrial identification procedure, conducted by State officials, is in some manner impermissibly suggestive. *Biggers* mandates that, if there is a showing of an impermissibly suggestive pretrial identification procedure, there must be a determination, in accordance with the factors listed therein, whether the witness's identification of the defendant at trial will be reliable and of an origin independent of the suggestive pretrial procedure. *See also Manson v. Brathwaite*, 432 U.S. 98, 53 L.Ed. 2d 140, 97 S.Ct. 2243 (1977); *Simmons v. United States*, 390 U.S. 377, 19 L.Ed. 2d 1247, 88 S.Ct. 967 (1968); *Stovall v. Denno*, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967 (1967). If, however, there is a finding that the pretrial identification procedure was not impermissibly suggestive, then the court's inquiry is at an end, *State v. Headen*, 295 N.C. 437, 245 S.E. 2d 706 (1978), and the credibility of the identification evidence is for the jury to weigh. *Cf. Manson v. Brathwaite, supra*, 432 U.S. at 116. From this it follows that where, as here, there has been no pretrial identification procedure at all, there can be no requirement of a judicial determination of the independence and reliability of the in-court identification, for there has been no pretrial procedure upon which the in-court identification could depend. It further follows that, in the absence of pretrial identification procedures, formal findings of fact and conclusions of law regarding the independence and reliability of the identification are not required, for there are no relevant facts upon which to base a finding of the identification's independent origins. Hence, the trial

judge in present case was not required to make formal findings of fact and conclusions of law following *voir dire*. *Accord, State v. Cox, Ward and Gary*, 281 N.C. 275, 188 S.E. 2d 356 (1972).

Defendant's claim that Ms. Brown's in-court identification is not supported by the evidence elicited on *voir dire* is not therefore a *Biggers* type claim, but rather is a claim that her testimony in *inherently* unreliable and incredible. The credibility of a witness's identification testimony is a matter for the jury's determination, *State v. Orr*, 260 N.C. 177, 132 S.E. 2d 334 (1963); *State v. Bowman*, 232 N.C. 374, 61 S.E. 2d 107 (1950), and only in rare instances will credibility be a matter for the court's determination. In *State v. Miller*, 270 N.C. 726, 154 S.E. 2d 902 (1967), the Court held, in assessing defendant's motion for nonsuit, that the rule providing for jury assessment of the credibility and weight of evidence "does not apply . . . where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible. . . ." In that case the only evidence pointing to defendant's guilt was a State witness's identification of him at trial, based on his observation of a man he saw at the scene of the crime from a distance of 286 feet. Due to this great distance, the fact that the crime occurred at night and defendant was a total stranger to the "eyewitness," and the fact that the witness's description of the man differed from the defendant's actual appearance, the Court ruled that nonsuit should have been allowed.

The *Miller* case concerned the trial judge's assessment, in passing on a motion for nonsuit, of inherently incredible evidence already admitted at trial. In *State v. Cox*, 289 N.C. 414, 222 S.E. 2d 246 (1976); *State v. Herndon*, 292 N.C. 424, 233 S.E. 2d 557 (1977); and *State v. Wilson*, 293 N.C. 47, 235 S.E. 2d 219 (1977), the Court extended the *Miller* test to apply to instances where the defendant challenges the admissibility of identification evidence on grounds that it is inherently incredible. In all these cases the Court held the identification testimony admissible on grounds that there was "a reasonable possibility of observation sufficient to permit subsequent identification." *State v. Wilson*, 293 at 52, quoting from *State v. Miller, supra*.

[2] In each of the above cited cases, a *voir dire* was held on defendant's motion to suppress such evidence. This Court has held, in *State v. Cox, Ward and Gary, supra*, that it is not error

for the trial judge to deny a *voir dire* on a witness's identification testimony when there has been no pretrial identification procedure. *See also State v. Alston*, 293 N.C. 553, 238 S.E. 2d 505 (1977). In *Cox* only a general objection to the identification testimony was entered. Though a *voir dire* is not required to determine the admissibility of identification testimony where no pretrial identification procedures have been conducted, we note that it would be the better practice to conduct a *voir dire*, prior to the admission of the testimony, when there has been a *specific* objection that the identification testimony is inherently unreliable or incredible. If a *voir dire* is held then the sole determination for the trial judge is whether or not the witness had "'. . . 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 or her identification testimony is for the jury. *State v. Cox, supra*, [289 N.C. 414, 222 S.E. 2d 246 (1976)]; *State v. Humphrey*, 261 N.C. 511, 135 S.E. 2d 214 (1964)." *State v. Wilson, supra*, 293 N.C. at 52. Only if there is a finding that the identification testimony "is inherently incredible because of the undisputed facts . . . as to the physical conditions under which the alleged observation occurred," *State v. Miller, supra*, should defendant's motion to suppress be allowed.

[3] In present case it is apparent from Ms. Brown's testimony on *voir dire* that she had a reasonable opportunity to observe her assailant. When he first opened the door in his efforts to escape she saw his lighted profile, and on his second opening of the door she saw his full face. The light was on in the hall outside the apartment and lit up the doorway as the man opened the door. Finally, her assailant was but a few feet from her at the time she saw his face. The physical conditions of the situation were thus favorable for observation, and there is nothing inherently incredible about observation being made under these circumstances. This being the case, the trial judge correctly overruled defendant's motion to suppress and allowed this testimony to be assessed and weighed by the jury.

[4] Defendant next assigns as error the trial court's refusal of his motion for nonsuit. His contention that nonsuit should have been allowed is based on his claim, considered and found to be without merit, that Ms. Brown's identification testimony was in-

herently incredible, and on the fact that no other evidence was found at the scene of the crime which would point to defendant's guilt. Defendant does not contest ample State's evidence that a crime has been committed. The *corpus delicti* being established, it suffices to say that Ms. Brown's competent identification testimony was sufficient to take to the jury the question whether the defendant was the perpetrator of the crime. The absence of physical evidence corroborating proper identification testimony does not warrant nonsuit. This assignment is overruled.

[5] At trial Cynthia Jones testified as an alibi witness for defendant. She testified that on the night of the crime she was at the apartment of Delores Hamlet, and that she left the apartment at 3:20 a.m. to go visit another apartment. She met defendant and he walked with her. They returned to Delores's apartment at 4:20 a.m. On cross-examination the prosecutor asked the witness:

> "Q. Did you know at that time that she [Delores Hamlet] had been convicted of the use of heroin through a syringe and a needle?
>
> OBJECTION.
>
> A. No. I didn't know nothing about her. She just invited me to a party. That's all I know.
>
> THE COURT: OVERRULED.
>
> * * *
>
> Q. Did you know that Delores Hamlet had been arrested recently for possession of a pound of marijuana?
>
> OBJECTION.
>
> A. No I didn't know her. I didn't know anything about her.
>
> THE COURT: OVERRULED."

Delores Hamlet was not a witness at trial. It is apparent that the prosecutor was attempting to impeach the witness by virtue of her association with one who used and perhaps dealt in illegal drugs. Defendant argues that such cross-examination was improper and prejudicial to his case.

Under the English common law, the rule regarding impeachment of witnesses by proof of misconduct was very broad, providing that "*any* question tending to discredit" might be asked. *See* Lord Lovat's Trial, 18 How. St. Tr. 651 (1746). Under this tradition of cross-examination counsel was permitted to inquire into the associations of the witness for purpose of impeachment. *See* 3A Wigmore, Evidence §§ 983-986 (Chadbourn rev.); McCormick, Evidence § 42 (2d ed.); Phipson, Evidence § 1548 (11 ed. 1970). The English rule permitting any question relevant to the witness's character (*see* Wigmore, *id.* § 983, at 842 ff.), is not accepted today by the various jurisdictions in this country, most of which permit only some more limited form of inquiry into a witness's character and prior misconduct. In this jurisdiction it is recognized that a witness's character may be impeached by eliciting on cross-examination specific incidents of the witness's life tending to reflect upon his integrity or general moral character. 1 Stansbury, N.C. Evidence §§ 43, 111 (Brandis rev. 1973). Thus, specific acts of misconduct may be brought out on cross-examination of a witness, whether he be a criminal defendant or an ordinary witness. *See State v. Curry*, 288 N.C. 660, 220 S.E. 2d 545 (1975); *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975); *State v. Gurley*, 283 N.C. 541, 196 S.E. 2d 725 (1973); *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972); *State v. Colson*, 194 N.C. 206, 139 S.E. 230 (1927). Such questions must be asked in good faith and be based on information, *State v. Bell*, 249 N.C. 379, 106 S.E. 2d 495 (1959), and are subject to the witness's privilege against self-incrimination if asserted, *State v. Davidson*, 67 N.C. 119 (1872), as well as the discretion of the trial judge, *State v. Miller*, 288 N.C. 582, 220 S.E. 2d 326 (1975). *See* 1 Stansbury, *supra*, § 111, pp. 341-42. The rule is, however, limited to specific acts of prior misconduct, and is not so broad as to permit impeachment by means of pointing to prior misconduct by a witness's associates. The nexus between a witness's credibility and the character of his acquaintances is too attenuated and the subject matter is so collateral and so subject to abuse that cross-examination regarding such matters should not be permitted.

Accordingly, the trial court's failure to sustain defendant's objections constitutes error. The error was not, however, prejudicial. Only two questions concerning the character of the witness's associate were asked, and the witness answered both

questions in the negative, disavowing any knowledge of her associate's use of drugs. The prosecutor did not further inquire into the matter or attempt to badger the witness, and there is no indication that the questions were unfounded or asked in bad faith. Since the witness denied knowledge of the collateral matters and there is no indication of the prosecutor's bad faith, the questions were rendered harmless. *See State v. Spaulding*, 288 N.C. 397, 219 S.E. 2d 178 (1975); *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969). This assignment is overruled.

[6] Defense witness Bruce Ray testified that he lived and worked with defendant and that on 10 August he and defendant left work at midnight. They went to his mother's home and stayed fifteen or twenty minutes and then went to their apartment. Defendant left to get some cigarettes but returned after a short while. Later, defendant went out again and was gone about half an hour, returning about 2:00 a.m. Thereafter, defendant again left to visit a friend and returned about 4:00 a.m. The two of them then watched TV until about 5:00 a.m., at which time they went to bed. Ray further testified that he woke up at 7:00 a.m. and that defendant was still in bed. There was no blood on the floor and he noticed nothing different in the house. On cross-examination Ray denied that he told Detective Gurganious that on the night in question he went to bed about 1:00 a.m. and did not wake up until 6:00 a.m., at which time he saw defendant in bed. When Ray completed his testimony, Detective Gurganious was called as a witness. On cross-examination Gurganious testified that Ray's testimony at trial was different from the statement he made on the day of the crime. On that date Ray told Gurganious that he went to sleep on the couch about 1:00 a.m. and did not awake until 6:00 a.m., at which time defendant was in bed. Defendant contends that Ray's testimony regarding his sleeping hours was a collateral matter, that the State was bound by his answers, and that the testimony of Detective Gurganious was for that reason incompetent.

A witness may be cross-examined by confronting him with prior statements inconsistent with any part of his testimony, but where such questions concern matters collateral to the issues, the witness's answers on cross-examination are conclusive, and the party who draws out such answers will not be permitted to contradict them by other testimony. *State v. Mack*, 282 N.C. 334, 193

S.E. 2d 71 (1972); *State v. Long*, 280 N.C. 633, 187 S.E. 2d 47 (1972); 1 Stansbury, N.C. Evidence § 46 (Brandis rev. 1973). If the statements relate to a matter which is "pertinent and material to the pending enquiry," *Jones v. Jones*, 80 N.C. 246 (1879), or which respects "the subject matter in regard to which he is examined," *State v. Patterson*, 24 N.C. 346 (1842), they may be proved by other witnesses without first calling them to the attention of the main witness on cross-examination. *State v. Patterson, supra*; 1 Stansbury, *supra*, § 48. If the matters inquired about are collateral, but tend "to connect him directly with the cause or the parties" or show his bias toward either, the inquirer is not bound by the witness's answer and may prove the matter by other witnesses, but not before he has confronted the witness with his prior statement so that he may have an opportunity to admit, deny or explain it. Stansbury, *id.*; *State v. Long, supra*. Finally, with respect to all other collateral matters, the cross-examiner is bound by the witness's answer and may not contradict it by extrinsic evidence. Stansbury, id.; *State v. Poolos*, 241 N.C. 382, 85 S.E. 2d 342 (1955).

In *State v. Long, supra*, the Court set forth the following standard: "The proper test for determining what is material and what is collateral is whether the evidence offered in contradiction would be admissible if tendered for some purpose other than mere contradiction; or in the case of prior inconsistent statements, whether evidence of the facts stated would be so admissible." Defendant argues that evidence of Bruce Ray's prior statement, namely, that he went to sleep at 1:00 a.m. and did not awake until 6:00 a.m., does not meet this test, and that the statement was therefore collateral and not provable.

Though the *Long* definition of materiality is not broad enough to encompass the witness's statement, there can be little doubt that the witness's alibi testimony was itself material, for, if taken as true, it would tend to exonerate defendant from the crimes. Thus, this Court long ago recognized that, if the prior statement concerns "the subject-matter in regard to which he is examined," then extrinsic testimony of that inconsistent statement may be admitted to impeach the witness, *State v. Patterson, supra*, so long as, we might add, the subject matter of the witness's testimony is itself material to an issue in the case. Accordingly, in *State v. Wellmon*, 222 N.C. 215, 22 S.E. 2d 437 (1942),

the Court held that an alibi witness can be impeached by extrinsic testimony of his prior inconsistent statements. There the Court said: ". . . The testimony of the impeaching witnesses . . . respected the *main subject matter* in regard to which such witnesses were examined, namely, the whereabouts of the defendant at the time the offense is alleged to have been committed. This testimony went to the very heart of the case, since the defendant's defense was that of an alibi, and could, in no view of the case, be construed to be only collateral." (Emphasis added.) *See also State v. Lewis*, 177 N.C. 555, 98 S.E. 309 (1919), where the Court held that extrinsic testimony of inconsistent statements is admissible to impeach an alibi witness's testimony. Hence, it is clear that in this case the State could introduce extrinsic testimony of Bruce Ray's prior inconsistent statement where such statement conflicted with the subject matter of his testimony at trial. This assignment is overruled.

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

No error.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. THOMAS ALEXANDER LOVE

No. 106

(Filed 29 December 1978)

1. **Extradition § 1 — alleged violation of New York extradition statute — motion to dismiss**

The trial court properly denied defendant's motion to dismiss made on the ground that New York officials violated a New York extradition statute by detaining him in that state beyond the period provided by New York law, since the Uniform Criminal Extradition Act contains no provision requiring dismissal of an underlying indictment where technical procedures are not complied with, and the courts of North Carolina are not the place for defendant to assert his alleged rights under New York law.

2. Constitutional Law § 53— speedy trial—thirteen months between indictment and trial—defendant fighting extradition

Defendant was not denied his constitutional right to a speedy trial for murder by a delay of thirteen months between his indictment and trial where defendant fled the State immediately after the crime on 21 October 1976, gave himself up to New York police in January 1977, and, due to actions by his own counsel and officials of the State of New York, was not returned to this State until August 1977; counsel was appointed for him and he stood trial on 9 February 1978; defendant did not request a speedy trial; and defendant offered no evidence that the delay caused any sort of prejudice to his case.

3. Criminal Law § 80— admission of police investigative report

The trial court did not err in admitting a police officer's investigative report where the report contained nothing more than other evidence properly elicited at trial, nothing in the report implicated defendant, and the report amounted to evidence corroborating the officer's statements at trial.

4. Criminal Law § 69— competency of police radio dispatches

A proper foundation was laid for testimony by two officers concerning police radio dispatches advising them to be on the lookout for a described automobile where the first officer identified the sender and stated that he recognized the sender's voice, and the second officer identified the sender as a police dispatcher and the communication revealed that the speaker had knowledge of facts which only would be within the ken of police officials. Furthermore, testimony as to the radio dispatches was competent where it was not offered to prove the truth of the matter asserted but was offered to corroborate an officer's testimony and to impeach defendant's testimony.

5. Criminal Law §§ 73.2, 87.4— testimony on redirect—explanation of testimony on cross-examination—no hearsay

An officer's testimony on redirect that he did not serve a warrant on defendant in New York until a certain date because he had information that defendant had refused to waive extradition and that he would be told when he could come to New York to get defendant was not hearsay, since it was not introduced to prove the truth of the matters asserted but to prove the officer's reasons for his conduct, and was competent to explain testimony brought out by defense counsel on cross-examination of the officer.

6. Criminal Law § 48— evidence of refusal to waive rights—incompetency—harmless error

Miranda v. Arizona, 384 U.S. 436, did not render inadmissible testimony that defendant, while in custody, had refused to waive his constitutional rights where there was no evidence that a specific incriminating accusation was leveled at defendant at the time of his assertion of his rights which defendant, by his silence, might be taken to have admitted. However, the admission of evidence that defendant asserted his right to remain silent was error because the evidence lacked probative value, but such error was harmless in light of the amount of competent evidence showing defendant's guilt.

7. **Homicide § 18— premeditation and deliberation—circumstances to consider**

Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted.

8. **Homicide § 21.5— first degree murder—sufficiency of evidence**

The State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder where it tended to show that defendant, armed with a pistol, trailed deceased for several blocks, then pulled up beside deceased's car and, without provocation, shot into the car at least two or three times, killing deceased, and that defendant then rapidly drove away and left the State of North Carolina.

9. **Criminal Law §§ 102.5, 128.2— improper question by prosecutor—motion for mistrial**

In this first degree murder prosecution, the trial court did not err in the denial of defendant's motion for mistrial when the prosecutor asked defendant whether the daughter of the woman with whom defendant had been living hadn't alleged that defendant was the father of her child where the court sustained defendant's objection and instructed the jury not to consider the prosecutor's question.

APPEAL by defendant from *Stevens, J.*, at the February 1978 Criminal Session of WILSON Superior Court.

Defendant was tried and convicted for the first degree murder of Donald Mack Crowell. From a sentence of life imprisonment he appealed.

The evidence for the State tends to show that defendant had lived with Catherine Mitchell off and on since 1970, and that they had three children. The deceased, Catherine's son by a former husband, objected to the relationship between his mother and defendant, and on one occasion, some four or five years previously, he and defendant had engaged in a fight. Since that time deceased and defendant had apparently been on good terms. Defendant and Catherine lived in Baltimore, Maryland, for a number of years, but she returned to live with her sister in Wilson. Thereafter, she and defendant were together at various times. On 21 October 1976 defendant was in Wilson, driving a new four-door burgandy car with a Maryland license plate, the number of which she noted. She and defendant for some time had quarreled over the custody of their children. On the day of the

shooting, October 26, defendant called Catherine and told her that if she wanted the children, she would have to come and get them. Since defendant had previously shown her a pistol which he carried, she was afraid to go; so, she asked him to bring the children to her. While she was talking to defendant, her son Donald, the deceased, took the phone and told defendant to leave his mother alone. He then slammed the phone down. After this telephone conversation, Catherine was riding with deceased to the bus station, when defendant, driving the four-door burgandy car, drove up beside them on a narrow, curving street. Defendant fired two or more shots into their car, killing Donald Mack Crowell. After the shooting, defendant left the State. He surrendered to officers in New York in January 1977 and was returned to North Carolina for trial on 9 August 1977.

Defendant testified in his own behalf and denied that he shot deceased or that he was in North Carolina on the date in question. He testified that he was in Virginia on that date and was driving a borrowed Mercedes Benz.

Other facts necessary to the disposition of defendant's assignments of error will be set out in the opinion.

Attorney General Rufus L. Edmisten by Assistant Attorney General Joan H. Byers for the State.

Robert A. Farris for defendant appellant.

MOORE, Justice.

[1] Defendant first argues that the trial court erred in denying defendant's motion to dismiss. The ground for his motion was his allegation that New York officials violated a certain New York extradition statute, § 570.24 of the Criminal Procedure Laws of New York, by detaining him in that state beyond the period provided for by New York law. Defendant further argues that his detention in New York from 13 January 1977 until 9 August 1977 resulted in a violation of his constitutional right to a speedy trial.

G.S. 15A-730 of Article 37 of Chapter 15A of the General Statutes, the Uniform Criminal Extradition Act, is identical with the New York statute cited by defendant. The Uniform Act contains no provision requiring dismissal of an underlying indictment

where technical procedures are not complied with. The courts of this State are not the place for defendant to assert his alleged rights under New York law. If he felt that there had been a violation of New York law, he should have sued for his release in New York courts prior to his extradition. The reasons for his not doing so are evident from the record. While being held in New York defendant was represented by a New York attorney who worked to help defendant avoid extradition to the State of North Carolina.

[2] Defendant's allegation that he has been denied his constitutional right to a speedy trial is equally groundless. He fled the State immediately after the crime. In January 1977 he gave himself up to New York police, and an indictment was issued by the grand jury of Wilson County. He remained in custody in New York until 8 August, when he was returned to this State for trial. Counsel was appointed for him and he stood trial on 9 February 1978. Considering the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L.Ed. 2d 101, 92 S.Ct. 2182 (1972), and *State v. McKoy*, 294 N.C. 134, 240 S.E. 2d 383 (1978), for determining whether one's right to a speedy trial has been afforded him, it is evident that defendant was not denied his right to a speedy trial. The length of the delay between indictment and trial, thirteen months, is not inordinate, given the reasons for the delay: that defendant fled the State immediately after the crime and, due to actions by his own counsel and officials of the State of New York, was not returned to this State until August 1977. Defendant did not request a speedy trial and thus did not assert his right prior to trial. Finally, defendant has offered no evidence that the delay caused *any* sort of prejudice to his case. This assignment is therefore overruled.

[3] Under his second assignment defendant contends that the trial court erred in several instances in admitting allegedly improper evidence over defendant's objections. Defendant first contends that it was error for the court to admit into evidence the investigation report drawn up by Officer Smith shortly after the crime. A reading of the report indicates that it contains nothing more than other evidence properly elicited at trial, namely, that the victim, while accompanied by his mother, was killed by shots fired from another vehicle. Nothing in the report implicates

defendant. The report is entirely innocuous, and, technically, amounts to evidence corroborating Officer Smith's statements at trial.

[4] Next, defendant argues that the trial court erred in admitting testimony by Officer Moore that on the day of the crime he received from Officer Smith a radio dispatch to be on the lookout for a burgandy automobile with Maryland license plates. Defendant further argues that the court erred in admitting testimony by Deputy Gee of Lunenburg County, Virginia, that a few days after the crime he received a radio call from South Hill, Virginia, relaying a dispatch to be on the lookout for a 1976 maroon or burgandy Granada, license DHG-178. Deputy Gee said that he later spotted the car and gave chase. The driver, a black male, six feet tall, stopped the car on a dead end road and escaped. Gee said that defendant's mother lived less than five miles from this area. Defendant argues that the admission of the testimony concerning the radio dispatch was inadmissible hearsay, prejudicial to his case. We disagree.

As in the case of telephone conversations, a foundation must be laid for the admission of testimony concerning the content of the transmitted message. *See State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978). *See also Everette v. Lumber Co.*, 250 N.C. 688, 110 S.E. 2d 288 (1959). The identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence. *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975); McCormick on Evidence, § 226 (2d ed. 1972). In instant case, both witnesses were able to identify the source of the message. Officer Moore identified the sender as Officer Smith, and said that he recognized the voice of Officer Smith. Officer Gee identified the sender as a dispatcher in South Hill, Virginia. Though he did not testify that he was familiar with the sender's voice, the communication received reveals that the speaker had knowledge of facts which only would be within the ken of police officials. *Cf. United States v. LoBue*, 180 F. Supp. 955 (S.D.N.Y. 1960).

The foundation for this testimony having been laid, its admissibility depends on a further showing that it was not offered to prove the truth of the matter asserted, or else comes within some exception to the hearsay rule. In *State v. Connley, supra*,

this Court held that police radio transmissions are admissible as substantive evidence by analogy with the exception to the hearsay rule permitting evidence of written entries made in the regular course of business. *See also* McCormick on Evidence, § 307 (2d ed. 1972). *Cf. State v. Cawthorne*, 290 N.C. 639, 227 S.E. 2d 528 (1976). The *Connley* rule is not, however, needed to justify the admission of the testimony in this case, for such testimony was not offered to prove the truth of the matter asserted.

Testimony by Officer Moore concerning the message he received from Officer Smith was not offered for hearsay purposes, but was offered for the purpose of corroborating Officer Smith's testimony that he put on the radio a description of the vehicle involved in the crime, said description being taken from Mrs. Mitchell. Since Officer Smith did not testify regarding what that description was, Officer Moore's testimony is not directly corroborative, and its admission was therefore technically erroneous. However, such error was harmless since both eyewitnesses to the crime testified that the fleeing automobile involved in the crime was a maroon or burgandy Ford Granada.

Deputy Gee's testimony regarding the radio message was likewise not offered for substantive purposes, but was offered to impeach defendant's testimony that he went to Baltimore on October 26, stayed there a week, and then went to New York. Testimony by Officer Gee concerning the radio message was offered to prove his motive for giving chase to a car identical to that involved in the crime. Though the automobile involved did not belong to defendant, said testimony of the chase and the radio message providing reason for the chase was admissible for impeachment purposes since defendant testified that he did not have possession of the car, and it was shown that defendant's mother lived within five miles of the spot where the car was abandoned. This assignment is therefore without merit.

[5] Under this same assignment defendant argues that the trial court erred in allowing Officer Moore to testify on redirect examination that the reason he did not serve a warrant on defendant in New York until 8 August 1977 was that he had information from New York that the defendant had refused to waive extradition, and that the officer would be told when he could come to New York to get the defendant. Defendant insists that such

testimony was inadmissible hearsay, that the testimony forced the defendant to take the stand to explain the circumstances of his extradition, and that the testimony was offered solely to prejudice the jury against defendant. This assignment is manifestly without merit, for prior to the testimony, on cross-examination of the witness, defense counsel put to the same witness the following questions:

"Q. You say that you did not serve the warrant until August 8, 1977?

A. That's right.

Q. But, you knew as soon as the defendant found you were looking for him that he went to the police station in New York City and you were advised of that fact, weren't you, that was in January?

A. I have information relating to that."

It is obvious that on redirect examination the witness was simply called upon to more fully explain that which defense counsel had willingly brought out on cross-examination. On redirect examination a party may re-examine his witness in order to remove any obscurity or uncertainty that may have been caused by the cross-examination. "The object is to clarify the subject matter of the direct examination and new matter elicited on cross-examination. . . ." 1 Stansbury, N.C. Evidence, § 36 (Brandis rev. 1973). And, evidence explanatory of testimony brought out on cross-examination is admissible on redirect although it might not have been proper in the first instance. *Johnson v. Massengill*, 280 N.C. 376, 186 S.E. 2d 168 (1972); *State v. Warren*, 227 N.C. 380, 42 S.E. 2d 350 (1947); *State v. Orrell*, 75 N.C. 317 (1876). As for defendant's argument that the same testimony is inadmissible hearsay, this is also without merit. The testimony was not introduced to prove the truth of the matters asserted, but to prove the officer's reasons for his subsequent conduct, a matter put in issue by defendant on cross-examination. *See State v. Dilliard*, 223 N.C. 446, 27 S.E. 2d 85 (1943).

[6] Defendant's final argument under this assignment is that the trial court erred in allowing the State to introduce evidence that the defendant, while in custody, had refused to waive the constitutional rights set forth in *Miranda v. Arizona*, 384 U.S. 436, 16

L.Ed. 2d 694, 86 S.Ct. 1602 (1966). Defendant contends that such evidence was used by the prosecution solely to prejudice the defendant. He argues, correctly, that whenever an accused has been taken into custody and officers are present, evidence of an admission by silence is banned, at least as substantive evidence. *See* 2 Stansbury, N.C. Evidence, § 179, p. 54 (Brandis rev. 1973). In *Miranda v. Arizona, supra*, 384 U.S. 468, n. 37, the Court said: "[I]t is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege *in the face of accusation*." (Emphasis added.) This Court has held accordingly on various occasions. *See State v. Castor*, 285 N.C. 286, 204 S.E. 2d 848 (1974); *State v. Fuller*, 270 N.C. 710, 155 S.E. 2d 286 (1967). *See also State v. McCall*, 286 N.C. 472, 212 S.E. 2d 132 (1975).

A look at the facts of this case reveals, however, that the above cited cases are inapplicable. Officer Moore's testimony regarding defendant's refusal to waive his rights was given in the course of other testimony concerning a prior inconsistent statement made by defendant. There was no evidence that a specific incriminating accusation was leveled at defendant at the time of his assertion of his rights. Where, as here, there is evidence that defendant simply asserted his rights, but no evidence that he remained silent (because he had asserted his rights) in the face of a specific incriminating accusation, the *Miranda* rule does not apply, for there has been no accusation made which the defendant, by his silence, might be taken to have admitted. *See State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975).

Admission of this testimony was, nonetheless, error. As the United States Supreme Court held in *United States v. Hale*, 422 U.S. 171, 45 L.Ed. 2d 99, 95 S.Ct. 2133 (1975), and as this Court held in *State v. Williams, supra*, where a defendant testifies in a criminal case, impeachment evidence that, while in custody, he made no statement about the events which transpired at the time of the crime is inadmissible, for it is not sufficiently probative of an inconsistency with his in-court testimony to warrant admission. Therefore, we hold that admission of evidence that a defendant asserted his rights to remain silent is error due to such evidence's lack of probative value. However, though it was error for the trial court to permit Officer Moore to testify concerning

defendant's assertion of his constitutional rights, this impeachment evidence was of such insignificant import when compared with the competent evidence showing defendant's guilt that its admission was harmless. *See State v. Williams, supra.* This assignment is overruled.

[7] Defendant next alleges that the trial judge erred in overruling his motion for nonsuit in that the State failed to show malice, premeditation and deliberation. Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. *State v. Hill*, 294 N.C. 320, 240 S.E. 2d 794 (1978); *State v. Davis*, 289 N.C. 500, 223 S.E. 2d 296 (1976); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). Malice is defined as ". . . not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification. [Citation omitted.]" *State v. Benson*, 183 N.C. 795, 799, 111 S.E. 869, 871 (1922). *See State v. Constance*, 293 N.C. 581, 238 S.E. 2d 294 (1977); *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Premeditation may be defined as thought before hand for some length of time. "Deliberation means . . . an intention to kill, executed by the defendant in a cool state of blood, in furtherance of a fixed design . . . or to accomplish some unlawful purpose. . . ." *State v. Benson, supra. See State v. Hill*, supra; *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961). Ordinarily, premeditation and deliberation are not susceptible of proof by direct evidence, and therefore must usually be proved by circumstantial evidence. Among the circumstances to be considered in determining whether a killing is done with premeditation and deliberation are: (1) the want of provocation on the part of deceased; (2) the conduct of defendant before and after the killing; (3) the vicious and brutal manner of the killing; and (4) the number of blows inflicted. *State v. Hill, supra*; *State v. Sparks*, 285 N.C. 631, 207 S.E. 2d 712 (1974); *State v. Perry*, 276 N.C. 339, 172 S.E. 2d 541 (1970).

Where, as here, there is a motion for judgment as of nonsuit, the evidence is to be considered in the light most favorable to the State and the State is entitled to every reasonable inference of fact deducible from the evidence. *State v. Hill, supra*; *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975); *State v. McNeil*, 280 N.C. 159, 185 S.E. 2d 156 (1971). If there is substantial

evidence, whether direct, circumstantial, or both, to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made out and nonsuit should be denied. *State v. Hill, supra*; *State v. McKinney, supra*; *State v. Cook*, 273 N.C. 377, 160 S.E. 2d 49 (1968).

[8] In present case there is evidence that tends to show that defendant, armed with a pistol, trailed deceased for several blocks, then pulled up beside him and, without provocation, shot into the car at least two or three times, killing deceased. Then, without stopping, defendant rapidly drove away and left the State of North Carolina. In our opinion, when taken in the light most favorable to the State, this evidence was sufficient to permit the jury to reasonably infer that defendant, with malice, after premeditation and deliberation, formed a fixed purpose to kill the deceased and thereafter accomplished that purpose. We hold, therefore, that the State's evidence was sufficient to be submitted to the jury on the charge of first degree murder. *See State v. Hill, supra*; *State v. Perry, supra*; *State v. Faust, supra.*

[9] Defendant next insists that the court erred in denying defendant's motion for a mistrial. This motion was based on the following incident which occurred during the trial: On cross-examination defendant testified that Evon Crowell, Catherine's daughter, lived in the house with them, became pregnant and had a son named Michael. The prosecutor then asked: "And didn't Evon allege that that was your child?" Counsel for defendant objected and moved to strike, and for a mistrial. The court stated: "Well, the motion is allowed to strike. Do not consider any of that, ladies and gentlemen of the jury." Defendant contends, however, that by the question the prosecutor accused defendant of fathering a child by a young woman who, for all practical purposes, was his stepdaughter, that there was no basis in the evidence for this question and that defendant was thereby effectively denied a fair trial.

Motions for a mistrial in non-capital cases are addressed to the discretion of the trial judge and his ruling thereon will not be disturbed absent a showing of gross abuse of discretion. *State v. McLean*, 294 N.C. 623, 242 S.E. 2d 814 (1978); *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972). [Note: For statutes relative to mistrial effective 1 July 1978, *see* G.S. 15A-1061-1065.]

In *State v. Self*, 280 N.C. 665, 187 S.E. 2d 93 (1972), defendant was asked an improper question. Defendant objected and the objection was sustained. Defendant then moved to strike and the court instructed the jury not to consider the question. Counsel for defendant argued that a mistrial should have been granted on grounds that the question was highly prejudicial and improper insofar as the question left an impression on the jury which could not be erased by the court's instruction. In that case we held "that the court's prompt action in sustaining defendant's objection to the question . . . coupled with the court's specific instruction to the jury not to consider the question but to strike it from their mind, was sufficient to remove any possibility of error."

In *State v. Moore*, 276 N.C. 142, 149, 171 S.E. 2d 453, 458 (1970), Justice Sharp (now Chief Justice), quoted with approval from *State v. Ray*, 212 N.C. 725, 729, 194 S.E. 482, 484 (1938):

> " '[O]ur system for the administration of justice through trial by jury is based upon the assumption that the trial jurors are men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so. *Wilson v. Mfg. Co.*, 120 N.C. 94, 26 S.E. 629.' "

The record in present case shows no abuse of discretion by the trial court. Consequently, this assignment is without merit.

After a full and careful review of the record, we conclude that defendant has had a trial free from prejudicial error.

No error.

JOAN B. CARROLL v. McNEILL INDUSTRIES, INC.

No. 95

(Filed 29 December 1978)

1. Accounts § 2— account stated—showing required

To establish an account stated claimant must show: (1) a calculation of the balance due; (2) submission of a statement to the party to be charged; (3) acknowledgment of the correctness of the statement by that party; and (4) a promise, express or implied, by the party charged to pay the balance due.

2. Accounts § 2— account stated—failure to show promise to pay

It would be difficult to imply a promise to pay a balance due and, therefore, to find an account stated from the mere acknowledgment of the party to be charged of the correctness of an accountant's audit slip when the slip itself clearly stated "This is not a request for payment."

3. Accounts § 2— account stated—original debt conditional

Even if claimant established an account stated, the party to be charged would nevertheless be entitled to show that the debt forming the basis for the account was conditional; therefore summary judgment for claimant here was improper when the showing for the party to be charged was to the effect that the original debt was conditional.

4. Accounts § 2; Evidence § 32.2— account stated—parol evidence—no inconsistency with written statement

In an action to collect liquidating dividends on stock plaintiff owned in defendant corporation where defendant claimed by way of set-off that plaintiff owed it $3000 and claimed acknowledgment of the debt by plaintiff's signing of an audit slip, plaintiff's testimony concerning what the defendant's vice president and treasurer said to her about the audit slip was not violative of the parol evidence rule since plaintiff's testimony was not inconsistent with the substance of the audit slip.

ON petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 10, 245 S.E. 2d 204 (1978), which affirmed judgment on a jury verdict in favor of plaintiff entered by *Phillips, J.*, at the 23 May 1977 Session of GASTON District Court.

Harris and Bumgardner, by Jacqueline O'Neil Schultz and Don H. Bumgardner, Attorneys for plaintiff appellee.

James, McElroy & Diehl, by James H. Abrams, Jr., Attorneys for defendant appellant.

EXUM, Justice.

Defendant McNeill Industries, Inc.'s appeal presents two questions. The first is whether the trial court erred in denying defendant's motion for summary judgment on its counterclaim. The second is whether certain of plaintiff's testimony was admitted into evidence in violation of the parol evidence rule. We hold that the answer to both is "No," and we affirm the decision of the Court of Appeals.

Plaintiff Joan B. Carroll instituted this action on 5 September 1975 to collect liquidating dividends on stock she owned in defend-

ant corporation. Defendant did not contest her entitlement to these dividends but claimed by way of set-off that plaintiff owed it $3000. Plaintiff denied this debt.

Defendant moved for summary judgment on its counterclaim on 11 May 1976. This motion was heard and denied just prior to trial in this action on 25 May 1977. Although there is some confusion in the record on this point, it seems both parties stipulated to these facts at the hearing on this motion: (1) plaintiff owned and operated as sole proprietor Joan's Kitchen; (2) Joan's Kitchen had received from defendant $3000, none of which had been repaid; (3) the books and records of Joan's Kitchen carried this amount as payable to defendant; and (4) plaintiff signed the following audit slip addressed to her:

"Dear Sirs:

According to our records, the balance receivable from you as of 12/29/74 was $3,000.00. If this agrees with your records, please sign this confirmation form in the space provided below; if it does not agree with your records, do not sign below but explain and sign on the reverse side. In either case, please return this form directly to our auditors, Haskins & Sells, 2000 Jefferson First Union Plaza, Charlotte, North Carolina 28282, for their use in connection with an examination of our accounts. A stamped and addressed envelope is enclosed for your reply.

McNeill Industries, Inc.

SIGN HERE if above is correct. (If incorrect, do not sign here but explain and sign on reverse side.)

THIS IS NOT A REQUEST FOR PAYMENT."

Defendant argues that its loaning the money coupled with plaintiff's signature on the audit slip constituted an account stated. Defendant further contends it was entitled to summary judgment on its counterclaim because plaintiff presented no evidence that raised a genuine issue of material fact on the question of her debt to defendant.

Plaintiff attempted to meet defendant's claim in two ways. First, she raised the following defense in her reply to defendant's counterclaim:

> "1. That the defendant, by and through its executive officers, tendered to the plaintiff the sum of $3,000.00 as contribution to plaintiff's company so that the plaintiff's company could operate to the benefit of the defendant's employees.
>
> 2. That plaintiff was told by executives of the defendant that this money would never have to be repaid if the business owned by the plaintiff could not operate at a profit.
>
> 3. That based on the assurances and statements of the defendant and its executives, the plaintiff relied upon said promises and kept open the business.
>
> 4. That plaintiff's business was not profitable and went out of business and that no money was ever demanded by the defendant from the plaintiff until such time as the time [the defendant was] liquidated.
>
> 5. That the defendant, by and through his executives, at that point in time attempted to collect the money in order to clear their account so that a liquidation of the assets of the company could be made.
>
> 6. That the plaintiff in no way owes the defendant any amount of money and that if any amount of money is owed the defendant, it should be from the executives of said company individually."

Second, in her reply to a request for an admission that she had signed the audit slip, plaintiff said:

> "Plaintiff admits that she signed the document attached as Exhibit "A" as set out in Request Number Six of the defendant's Request for Admissions, but shows further that this was not the admission of a loan or any amount owed but that only the records of the McNeill Industries, Inc. show that $3000.00 was outstanding."

Plaintiff's reply in essence raises the defense that there was a condition precedent to any obligation she had to repay $3000 to

defendant. This condition was that she make a profit in the business she was operating.

On defendant's motion for summary judgment, defendant made no showing regarding the profitability of plaintiff's business. At trial plaintiff testified essentially in accordance with her allegations. The jury apparently accepted her version of the transaction and returned a verdict in her favor.

Defendant could have prevailed on its motion for summary judgment nevertheless if (1) defendant established the existence of an account stated and (2) as a matter of law the existence of a condition precedent to an obligation to repay is not a defense in an action on account stated.

[1] The basic rules on accounts stated are as set out in *Little v. Shores*, 220 N.C. 429, 431, 17 S.E. 2d 503, 504 (1941):

> "An account becomes stated and binding on both parties if after examination the part[y] sought to be charged unqualifiedly approves of it and expresses his intention to pay it. . . . The same result obtains where one of the parties calculates the balance due and submits his statement of account to the other who expressly admits its correctness or acknowledges its receipt and promises to pay the balance shown to be due. . . ."

An account stated is by nature a new contract to pay the amount due based on the acceptance of or failure to object to an account rendered. *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962); *Savage v. Currin*, 207 N.C. 222, 176 S.E. 569 (1934).

[1, 2] Applying these rules to the case at hand, defendant had to show in order to establish an account stated: (1) a calculation of the balance due; (2) submission of a statement to plaintiff; (3) acknowledgment of the correctness of that statement by plaintiff; and (4) a promise, express or implied, by plaintiff to pay the balance due. The submission and signing of the audit slip clearly sufficed to show the first three elements. Whether it shows the fourth element is questionable. In signing the audit slip plaintiff merely agreed that both her books and defendant's books showed a receivable in defendant's favor of $3000. The audit slip stated clearly: "THIS IS NOT A REQUEST FOR PAYMENT." Under these cir-

cumstances, we would have difficulty implying a promise on the part of plaintiff to pay defendant $3000.

[3] Even if defendant established an account stated, it would not have been entitled to summary judgment on its counterclaim because plaintiff was entitled to raise and did raise as a defense the existence of a condition precedent to her obligation to repay. The principle is well established that "[a]n account stated cannot be made to create a liability where none had previously existed." *Reconstruction Finance Corp. v. Commercial Union of America Corp.*, 123 F. Supp. 748, 756 (S.D.N.Y. 1954); *accord, Martin v. Stoltenborg*, 273 Ala. 456, 142 So. 2d 257 (1962); *Edwards v. Hoevet*, 185 Or. 284, 200 P. 2d 955 (1948); *Hemenover v. Lynip*, 107 Cal. App. 356, 290 P. 1089 (1930). The reason for this rule in cases where, as here, only a mere arithmetical computation of the amount due is involved is as follows:

> "A mutual accounting and the striking of a balance due are always accompanied by the debtor's promise to pay that balance and by the creditor's promise to accept it as full satisfaction. These promises, if not express, are reasonably to be inferred. If the accounting is accurate and the balance found is arithmetically correct, each party is promising exactly that which he is already legally bound to perform. Such a promise is ordinarily said to be insufficient as a consideration for a return promise. Nevertheless, the debtor's new promise, express or implied, may properly be described as a contract, even though there is no sufficient consideration given for it by the promisee—no bargained-for equivalent given in exchange. It is a promise to pay a pre-existing debt. . . . [T]he existing debt forms a sufficient basis for an enforceable new promise; and this is true even though the past debt has been barred by the statute of limitations. The past debt, however, is a sufficient basis only so far as it in fact existed; the new promise is enforceable only so far as it is co-extensive with that debt." 6 Corbin on Contracts § 1307, at 244 (1962).

This principle has direct application to these facts. Plaintiff claims her liability to defendant was conditional. Defendant asks us to make her liability absolute by refusing to recognize the possible existence of a condition as a defense to a suit on account stated. This is not the law. Plaintiff can be bound by an account stated

only to the extent of her pre-existing debt. She alleges that the pre-existing debt was conditional. Her acquiesence in the arithmetical correctness of the account cannot in and of itself make her liability absolute. Defendant's first assignment of error is overruled.

[4] Defendant next assigns as error the admission of certain of plaintiff's testimony which it claims was in violation of the parol evidence rule. Defendant's exception and assigment of error relate solely to the following testimony:

> "Q. And what did he [Jack Parrish, defendant's Vice President and Treasurer] say to you about it?
>
> A. He said, 'Joan, will you please sign that note for the auditors.' And I said, 'What note?' He said the one that you received through the mail. And I said, 'Jack, if I've got one, I don't even know anything about it.' I said, 'I will have to talk to my husband, Ken, and ask him if there was anything.' We got the second notice, because my husband throwed the first notice away. We got the second notice then, and Jack said that it was a note stating to the Company that they had let me have $3,000, and therefore I signed it.
>
> MR. ABRAMS: Move to strike that testimony, Your Honor, as violating . . .
>
> COURT: Overruled.
>
> EXCEPTION NO. 2"

This testimony does not come into conflict with the parol evidence rule. We have no quarrel with defendant's general statement of the rule: "[I]n the absence of fraud or mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new or different contract from the one evidenced by the writing, is incompetent." *Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E. 2d 239, 242 (1953). The testimony of which defendant complains, however, is in no way at variance with the audit slip—the writing it supposedly contradicts. Plaintiff testified, "Jack stated that it was a note stating to the company that they had let me have $3000." The audit slip stated that, "Ac-

cording to our records, the balance receivable from you as of 12/29/74 was $3,000.00." This does not amount to the required showing of inconsistency to invoke the parol evidence rule.

Defendant's second assignment of error is overruled.

The decision of the Court of Appeals is

Affirmed.

THOMAS O'GRADY, JAMES R. PRIDEMORE, PETER MacQUEEN, III, AND MARY G. MacQUEEN, PLAINTIFFS v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, DEFENDANT AND THIRD PARTY PLAINTIFF AND BANK OF NORTH CAROLINA, N.A. DEFENDANT v. JACK F. STEWART AND WAYNE C. HUDDLESTON, THIRD PARTY DEFENDANTS

No. 25

(Filed 29 December 1978)

1. **Bills and Notes § 19— rescission of unconditional guaranty—evidence of condition—parol evidence improperly excluded**

In an action to rescind an unconditional guaranty, the trial court erred in excluding parol evidence of a condition precedent to plaintiffs' liability on the ground that plaintiffs did not expressly communicate the alleged condition to defendant, and plaintiffs established a prima facie case for the invalidity of the guaranty agreement where the evidence tended to show that defendant requested that one plaintiff fill out a guaranty form to secure a note; plaintiff did not fill in the names of the primary obligors, but left that to defendant; the parties expressly agreed that the guaranty would conform to the note; the guaranty was to secure the obligation of those principally liable on the note; by requesting that the wife of one of the makers sign the note along with the other makers, defendant led plaintiffs to believe that she was a maker on the note; that the wife was a maker on the note was clear from the face of the instrument, as she had signed it on the bottom righthand corner among the signatures of the makers; defendant's own actions put it on notice as to plaintiffs' intentions regarding those whose obligations the guaranty was to secure; having such notice, defendant had the duty to include the wife among the primary obligors of the guaranty form; and defendant failed to do this, contrary to the parties' general agreement and the plaintiffs' implicit authorization stemming from this agreement.

2. **Guaranty § 1— omission of obligor on note from guaranty form—agreement by guarantor—question of fact**

In an action to rescind a guaranty agreement, a question of fact existed and was not resolved by the trial court as to whether one plaintiff implicitly

agreed to and authorized the omission from the guaranty agreement of a primary obligor on the note which the guaranty was to secure where plaintiff contended that he never saw the guaranty agreement, which he had signed in blank, after it had been filled out, but an employee of defendant testified that he inserted the obligors' names on the guaranty form in the presence of plaintiff.

3. Principal and Agent § 5.2— power of attorney—note signed without authority—principal not liable

A person signing a note under power of attorney did not have authority to do so and his principal was not liable on the note merely by virtue of the agent's signature where the agent's power was limited to transactions concerning property in Robeson County alone; the uncontested evidence showed that the note in question was signed to procure funds for properties in S.C. and Rocky Mount as well as in Robeson County; and defendant could not claim that the principal was liable by virtue of the agent's apparent authority, as the agent's authority was in writing and defendant was deemed to have notice of the nature and extent of such authority.

4. Guaranty § 1— joint debts of obligors covered—individual debts not covered

Defendant's contention that a guaranty executed by two plaintiffs covered not only the joint debts of the three men listed as primary obligors, but also applied to the individual debt of any one of those primary obligors was without merit, since the guaranty agreement itself contained no specific provision stipulating or clearly indicating that the guaranty extended to the individual debts of each person listed as an obligor; the guaranty explicitly provided that the three men denominated "primary obligors" should be "hereinafter collectively termed 'Customer' "; and "Customer" was used throughout the instrument in the singular.

5. Guaranty § 1; Principal and Agent § 6— agent's action without authority—ratification—question of fact—effect of ratification on guaranty

A question of fact existed as to whether a principal ratified his agent's unauthorized signature on a note by taking control of proceeds of the loan in question with knowledge of the source of those proceeds and with knowledge that his agent had signed his name to the note; if the principal did ratify his agent's signature, then there were three makers of the note who were jointly and severally liable, and plaintiffs could be held liable on their guaranty which applied to the collective debts of those three makers. G.S. 25-3-404(2).

6. Uniform Commercial Code § 36.1— letter of credit—existence of condition—communication of condition

A question of fact existed as to whether a condition of one plaintiff's issuing a letter of credit would be the liability of two named persons on the principal debt, and a question of fact existed as to whether the alleged condition regarding the applicability of the letter of credit was communicated to defendant bank.

7. Uniform Commercial Code § 36.1— guaranty letter of credit—description

A guaranty letter of credit is a term used to describe a transaction in which a letter of credit is used to accomplish the ends of a contract of guaran-

ty or suretyship, and in such transactions the letter functions to secure performance of an obligation.

8. Uniform Commercial Code § 36.1— letter of credit—requirements

To be a letter of credit an instrument must satisfy the requirements of G.S. 25-5-103(1)(a), and, in addition, must be in writing and signed by the issuer; no consideration between customer and issuer is necessary.

9. Uniform Commercial Code § 36.1— letter of credit—independent of underlying contract—duty to honor documents thereunder—exceptions

Since a letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by Article 5 of the Uniform Commercial Code as being independent of the underlying contract between the customer and the beneficiary, and the only exceptions to the issuer's duty to honor documents which on their fact comply with the terms of the credit are: (1) the failure of certain documents to conform to certain specified warranties, (2) the presentment of forged or "fraudulent" documents, and (3) "fraud in the transaction." G.S. 25-5-114(2).

10. Uniform Commercial Code § 36.1— letter of credit—conditions for injunction against honor

An injunction should issue to enjoin payment of a draft on a letter of credit only in those instances where there is some action by the beneficiary which vitiates the transaction between the beneficiary and the issuer, and, since the transaction between the beneficiary and the issuer is one consisting of an exchange of documents, only some defect in these documents would justify an injunction against honor.

11. Unform Commercial Code § 36.1— letter of credit—exception to duty to honor—fraud in the transaction

"Fraud in the transaction" under G.S. 25-5-114(2), providing for the exceptions to the issuer's duty to honor documents which on their face comply with a letter of credit, refers to the beneficiary's accompanying his draft with documents or declarations which have absolutely no basis in the facts of the underlying performance; since the documents in this case, a note and notice of default, did reflect the nature of the underlying performance and default, there were no grounds for a claim of fraud in the transaction.

12. Uniform Commercial Code § 36.1— letter of credit—exception to duty to honor—fraudulent document defined

A fraudulent document within the meaning of G.S. 25-5-114(2) is presumably one that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered.

13. Uniform Commercial Code § 36.1— letter of credit—presentment of fraudulent documents

The knowing and intentional attachment of a guaranty letter of credit, as collateral security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing

bank for purposes of honor of the letter of credit, would amount to a presentment of fraudulent documents under G.S. 25-5-114(2).

14. Uniform Commercial Code § 36.1 — letter of credit — condition — question of fact as to whether notice given — presentment of fraudulent documents

In an action to rescind an irrevocable letter of credit, if the trial court finds on retrial that an agent gave notice of one plaintiff's condition for issuing the letter of credit in the presence of bank officials, that such notice was directed to bank officials, and that bank officials had knowledge of this condition, then the presentment of the note and notice of default to defendant bank for purposes of drafting on the letter of credit would be a presentment of fraudulent documents, and plaintiff would be entitled to a permanent injunction and cancellation of the letter of credit.

15. Bills and Notes § 20 — agent signing note on behalf of principal and himself — liability

Contention by one plaintiff that his signing of a note was conditioned on the comakers' liability on that note, and since the comakers were not liable, the note could not be binding on him either is without merit, since plaintiff alone signed the note in question both for himself and in his capacity as agent for the comakers; plaintiff's allegation that he was not bound on the note because the wife of a comaker was not made a party cannot be sustained for the reason that he, signing the note in the presence of bank officials with full knowledge that she was not listed as a principal on the note, did not insist that she be made a party to the note; plaintiff cannot secure release from liability by virtue of the fact that a comaker's signature on the note was not binding on the comaker, since plaintiff himself affixed the comaker's signature to the note under the impression that he had authority to do so; and plaintiff was liable on his signature of his own name on the note.

Justice BRITT took no part in the consideration or decision of this case.

ON plaintiffs' petition for discretionary review of the decision of the Court of Appeals, reported in 35 N.C. App. 315, 241 S.E. 2d 375, which affirmed judgment entered by *James, J.*, at the 23 August 1976 Session of NEW HANOVER Superior Court, dismissing plaintiffs' action and granting First Union National Bank judgment against plaintiffs on its counterclaim.

This action was filed on 11 August 1975 by Thomas O'Grady to rescind an irrevocable commercial letter of credit in the amount of $26,000, by plaintiffs Peter MacQueen, III, and Mary G. MacQueen to rescind as unconditional guaranty of $7,500, and by plaintiff James R. Pridemore to rescind his execution of a negotiable note of 9 April 1975, all on grounds that defendant First Union National Bank (First Union) had relieved Jack and Flora Stewart of their liability on a debt upon which Pridemore

was primarily liable and for which O'Grady and the MacQueens had provided collateral security. The Bank of North Carolina, N.A., issuer of the letter of credit sought to be rescinded, was also made a defendant. The defendant First Union answered and counterclaimed for judgment against plaintiff O'Grady upon the letter of credit; against plaintiffs Peter and Mary MacQueen upon their guaranty; and against plaintiff Pridemore upon his liability on the note. The letter of credit and guaranty represented collateral security for a loan in the principal amount of $45,000. First Union also filed a third-party complaint against Jack F. Stewart and Wayne C. Huddleston, both of whom had entry of default and judgment by default entered against them.

At the call of the case, all of the parties, by consent, waived a trial by jury, and the case was heard by the trial judge. The evidence presented tended to show that Jack Stewart, Wayne Huddleston, and James R. Pridemore were developers of motels in Rocky Mount and Rowland, North Carolina, and in Florence, South Carolina. The men were in need of construction funds, and requested the defendant First Union to make a loan of $45,000 to them. The defendant bank agreed to do as much upon its receiving proper security for the loan. The negotiations relating to the loan culminated in the initial signing of a note, dated 3 April 1975, by Jack Stewart, Flora Stewart, James Pridemore, and Wayne C. Huddleston through his attorney in fact, Pridemore. Jack Stewart, Pridemore, and Huddleston were shown on this note as primary obligors. The loan proceeds were not disbursed as a result of the signing of the 3 April 1975 note, as the requested collateral security for the note had not been received by the defendant bank.

Thereafter, plaintiff O'Grady caused the Bank of North Carolina, N.A., to issue a letter of credit in favor of First Union in the amount of $26,000, and plaintiffs MacQueen executed and delivered to First Union their guaranty in the amount of $7,500. On 9 April 1975, plaintiff Pridemore went to First Union offices in Rocky Mount to obtain the proceeds from the loan. The 3 April note was a three-year note, and bank officials discovered that the letter of credit only extended for one year. Thus, a new note was prepared containing a one-year repayment provision. The new note, dated 9 April 1975, was executed by Jack F. Stewart, Wayne C. Huddleston, and James R. Pridemore as primary

obligors, and was signed by James R. Pridemore personally, and by Wayne C. Huddleston and Jack Stewart through their attorney in fact, Pridemore. First Union thereupon disbursed the loan proceeds of $45,000 to Pridemore by means of its check made payable to Stewart, Pridemore, and Huddleston. Said check was negotiated by Pridemore by his endorsements in the same manner, personally and through his powers of attorney, as he had executed the 9 April note.

Sometime later, after but two payments had been made on the note, the principals defaulted. Plaintiffs then instituted this action, seeking cancellation of the various instruments. In addition, plaintiff O'Grady applied for and was granted a preliminary injunction, enjoining Bank of North Carolina from honoring First Union's draft on the letter of credit.

At the close of plaintiffs' evidence defendant First Union moved, pursuant to G.S. 1A-1, Rule 50, for entry of directed verdict against each of the plaintiffs, dismissing their complaint on grounds that they had shown no right to relief. Defendant further moved for directed verdict in its favor for judgment on its counterclaims against each of the plaintiffs, on grounds that plaintiffs' liabilities had been established by their own pleadings and evidence. These motions were denied and defendant presented evidence. At the conclusion of this evidence, the defendant renewed its motions for directed verdicts against the plaintiffs and for entry of a directed verdict in defendant's favor on its counterclaims. The trial judge, after finding that there were no factual disputes as to the matters of law raised by the pleadings and the evidence, concluded that plaintiffs had no right to the relief requested, and ordered their complaint dismissed. The trial judge further found that the undisputed facts of the case entitled defendant to judgment in its favor on its counterclaims against Mr. Pridemore, Mr. and Mrs. MacQueen and Mr. O'Grady. Plaintiffs appealed and the Court of Appeals affirmed.

Crossley & Johnson by Robert White Johnson for plaintiff appellants.

Parker, Rice & Myles by Charles E. Rice, III for First Union National Bank of North Carolina, defendant appellee.

MOORE, Justice.

The case was tried in the absence of a jury. A Rule 50(a) motion for directed verdict is appropriate only to a case tried before a jury. In non-jury trials Rule 41(b), Involuntary Dismissal, provides for a procedure whereby, at the close of the plaintiff's evidence, the judge can give judgment against the plaintiff, not only because his proof has failed to make out a case (as is permitted under Rule 50), but also on the basis of facts as the judge may then determine them. *See Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973). In *Helms v. Rea, supra*, Justice Sharp (now Chief Justice) noted that if the trial judge defers ruling on a Rule 41(b) motion until the close of all the evidence, there would be little point for counsel to renew the motion, for at that stage of a non-jury trial the judge must, pursuant to Rule 52, determine the facts in any event. Whether the trial judge decides the case on a motion for dismissal or at the close of all the evidence, he must, as required by Rule 52, separately make findings of fact, state his conclusions of law, and enter judgment accordingly. *See Helms v. Rea*, 282 N.C. at 619. *See also Hinson v. Jefferson*, 287 N.C. 422, 215 S.E. 2d 102 (1975); Wright, Law of Federal Courts, sec. 96, at pp. 477-78 (1976). Though the trial judge in present case ruled under Rule 50, we will consider his findings and judgment as an adjudication on the merits under Rule 52.

The trial judge failed to make findings of fact as required by Rule 52. Instead, in his conclusions, he ruled that "there are no factual disputes as to the matters and issues of law raised by the pleadings and evidence in this case." In light of certain conflicting evidence in the record, this ruling was erroneous. Due to the trial court's failure to find facts concerning this conflicting evidence, and because of its failure to admit and weigh other evidence sought to be introduced by the plaintiffs, a new trial will be required.

Under their first assignment of error plaintiffs O'Grady and MacQueen argue that the trial court erred in refusing to allow the plaintiffs to testify that the collateral security which they furnished was contingent upon Jack and Flora Stewart's being liable on the debt. The plaintiff, O'Grady, would have testified, if permitted, that he ordered the letter of credit issued only on condition that the Stewarts remain liable on the note. Plaintiffs Mac-

Queen would have testified, if permitted, that they executed the guaranty agreement on the same condition. The Court of Appeals upheld the trial court's rulings on grounds that parol evidence will be admitted to prove a condition precedent only when such condition is communicated to the obligee of the contract, and that, since the evidence shows that O'Grady and the MacQueens did not expressly communicate the alleged condition to defendant First Union, the trial court properly excluded plaintiffs' testimony.

The opinion by the Court of Appeals correctly and succinctly summarizes the law concerning the admissibility of parol evidence to prove the existence of prior conditions which would render an executed written contract inoperative or unenforceable due to failure of occurrences of conditions precedent. *See Lane v. Coe*, 262 N.C. 8, 136 S.E. 2d 269 (1964); *Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E. 2d 517 (1960); *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E. 2d 116 (1946); *Overall Co. v. Hollister Co.*, 186 N.C. 208, 119 S.E. 1 (1923); Wigmore on Evidence, § 2410 (3d Ed.); Stansbury, North Carolina Evidence § 257 (Brandis rev. 1973). We must, however, take issue with the Court of Appeals' application of that law to the facts of this case.

We first consider the document entitled "Unconditional Guaranty" signed by Peter and Mary MacQueen. According to the uncontested evidence, Peter MacQueen was present on 3 April at the signing of the note of that date. He witnessed the signatures of Jack and Flora Stewart, James Pridemore, and Wayne Huddleston to the note. It was agreed that MacQueen would guarantee the note of 3 April to the extent of $7,500, and bank officials gave him a guaranty form, instructing him to sign it and return it to the Wilmington office. On 8 April both MacQueen and his wife signed the document and filled in the amount of $7,500. They left the section at the top of the form, headed "Primary Obligor(s)," blank. This document was then delivered to Robert Helms at First Union in Wilmington. Mr. Helms testified that in the MacQueens' presence he wrote in the names "Jack F. Stewart, James R. Pridemore, Wayne C. Huddleston." The MacQueens testified that the names of the primary obligors were not inserted in their presence, and that, based on their observations of the four people signing the note on 3 April, they intended to guarantee a loan to those four people only. Mr. MacQueen,

however, admitted that he had not expressly told anyone at First Union that he would guarantee a loan only to the four people signing the note of 3 April.

The MacQueen guaranty is a continuing guaranty of payment. A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself liable in the first instance for such payment or performance. *Cowan v. Roberts*, 134 N.C. 415, 46 S.E. 979 (1904). A guaranty of payment, as opposed to a guaranty of collection, is an absolute promise to pay the debt of another at maturity if not paid by the principal debtor. *Investment Properties v. Norburn*, 281 N.C. 191, 188 S.E. 2d 342 (1972). The right to sue upon an absolute guaranty of payment arises immediately upon the failure of the principal debtor to pay at maturity. *Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. 2d 413 (1955). Whereas a guaranty which covers a single debt is specific, a guaranty which covers a series of extensions of credit or a succession of transactions is continuing. *Novelty Co. v. Andrews*, 188 N.C. 59, 123 S.E. 314 (1924). *See* Simpson on Suretyship, § 6 (1950); Lee, N.C. Law of Suretyship, § 2 (5th Ed. 1977).

Though a special law of guaranty has developed to answer specific problems inherent in these sorts of agreements, contracts of guaranty are subject to the more general law of contract when not otherwise provided. The signing of a blank or incomplete guaranty form is a matter controlled by the law of contract.

Plaintiffs MacQueen argue that the guaranty agreement signed by them is not binding because Mrs. Stewart's name is not included among the guaranty's "primary obligors," those persons whose debts the agreement guaranteed. They further argue that, if the guaranty is valid, then it cannot be applied to cover a default on the note of 9 April, since Jack Stewart is not liable on that note due to plaintiff Pridemore's unauthorized signature. Defendant First Union argues that the guaranty is valid, for it was never expressly told that Mrs. Stewart had to be listed as a primary obligor on the guaranty. First Union further argues that the guaranty applies to the note of 9 April even though Mrs. Stewart did not sign, and even though Jack Stewart may not be liable on that note (which it does not admit), for the guaranty, by

its terms, applies to both the collective and individual debts of the primary obligors.

[1] We deal first with the question of the validity of the guaranty agreement. It is clear that a valid contract may be signed in blank and substantial terms filled in at a later date at the direction of the signer. On the other hand, it has been held that, where no delegation of authority is conferred to supply a defect, a signature to an incomplete paper or contract does not bind the signer without further assent on his part to a party's completion of the instrument. *Richards v. Day*, 137 N.Y. 183, 33 N.E. 146; *Campbell v. WABC Towing Corp.*, 356 N.Y.S. 2d 455, 78 Misc. 2d 671. *Cf. Bank v. Corbett*, 271 N.C. 444, 156 S.E. 2d 835 (1967). Furthermore, when there has been a delegation of authority to complete essential terms of an instrument pursuant to an understanding regarding those terms, a party's completion of terms that is contrary to the signer's authorization is not, between the parties, binding on the signer. *See Regal Music Co. v. Hirsch*, 183 N.Y.S. 2d 474, 16 Misc. 2d 365; *Reilley Bros. v. Thompson*, 127 Neb. 683, 256 N.W. 642; *C.I.T. Corporation v. Glennan*, 137 C.A. 636, 31 P. 2d 430. *See also* 17 Am. Jur. 2d, Contracts § 73. (*Cf. Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E. 2d 115 (1971), where a different rule applies to the signing of blank instruments when the rights of third parties are involved.) These rules follow from the more general principle of contract that, in order that there may be a valid and enforceable contract between parties, there must be a meeting of the minds of the contracting parties upon all essential terms and conditions of the contract. *See Horton v. Refining Company*, 255 N.C. 675, 122 S.E. 2d 716 (1961); *Elks v. Insurance Co.*, 159 N.C. 619, 75 S.E. 808 (1912).

In present case Mr. MacQueen, if permitted, would have testified that a condition of his executing a conditional letter of endorsement was that Jack and Flora Stewart remain liable on the note, or loan, of 3 April. Mr. MacQueen did testify that he intended to guarantee the joint debt of all those who signed the note of 3 April in his presence, including Mrs. Stewart. At trial he stated:

> "As to whether I told anybody at First Union National Bank, specifically Randy Evans or Lloyd Davis, the commercial loan officers, that I would guarantee a loan only to these

four people—Jack Stewart and his wife, Flora, James Pridemore and Wayne Huddleston, I say indirectly, yes, because they had already signed the note. As to whether I directly and specifically said that, I say it was never mentioned. They just said you have to have a guaranty of $7,500.00 for this note—for this note of April the 3rd."

Though Mrs. Stewart's name was not typed in at the top of the 3 April note, it was MacQueen's impression that she was a maker on the instrument since he "saw Mrs. Stewart sign it on the blank where a maker signs the note."

Testimony by bank officials indicates that the MacQueen guaranty was intended to guarantee the note of 3 April. Roland Evans of First Union testified, "It was not intended or never discussed that these [the guaranty and the O'Grady letter of credit] would secure any other note. *They were to conform to that particular transaction*, to secure a $45,000.00 loan to the three men." (Emphasis added.) Evans further testified that "the collateral securities [including the guaranty] . . . were to secure payment on this note [of 3 April], which payment would be made after we had secured it." Bank officials further admitted that Mr. MacQueen was present at the 3 April signing, and that "he saw the note also after it had been signed." They gave him the guaranty form on 3 April, and though "he received no instructions to sign it in blank," it was admitted that "the purpose of this was to secure the loan that was being made—that was part of the transaction. Plaintiff's Exhibit 'A' [a schedule of collateral security, including the MacQueen guaranty, attached to the note of 3 April] was to be . . . a part of the transaction." Finally, bank officials admitted that, though they initially intended to have but the three men sign the note as makers, nonetheless, at the 3 April negotiations and signing, "we did request his wife [Mrs. Stewart] to sign the note. . . . She did sign it at our request. . . ."

From this evidence it appears that (1) both parties to the guaranty agreement intended that contract to secure the note of 3 April, and they intended it "to conform to that particular transaction"; (2) Mr. MacQueen intended that Mrs. Stewart be made a primary obligor on the guaranty agreement since he thought she had signed as a maker on the 3 April note; and (3) bank officials did not initially intend that Mrs. Stewart be a maker on the note,

but nonetheless had her sign the note with the other makers on 3 April in MacQueen's presence. Their intentions regarding her status at the time they had her sign the note are not clear.

Since both parties intended that the guaranty secure the note of 3 April, and conform to that transaction, it would follow that there was an understanding between the parties that the guaranty would secure payment by those persons who were principally liable on the note of 3 April. Since the MacQueens signed the guaranty form in blank and delivered it to bank officials to fill in the names of those whose debts the guaranty was to secure, from the principles of contract set out above, the bank had the duty to fill in as primary obligors those parties who were makers on the note of 3 April, as was generally agreed on by the parties. There is, as noted above, some discrepancy between the parties' subjective impressions as to just who the makers of the note were. Though testimony by First Union officials is not clear, we will assume that they did not think that Mrs. Stewart was primarily liable on the note, and for this reason omitted her name from the guaranty form. In that Mrs. Stewart's status on the note is a question of law rather than fact, it is clear that the validity of the guaranty agreement will hinge on the legal question as to whether she signed the note in the capacity of a maker. Since the parties were generally agreed that the guaranty form would secure the obligations of those principally liable on the 3 April note, the minds of the parties did meet upon a proposition sufficiently definite to be enforced against both parties. *Cf. Elks v. Insurance Co., supra.* A unilateral mistake by either MacQueen or First Union regarding the legal effect of Mrs. Stewart's signing the note would not excuse either party from his respective obligations.

The note of 3 April indicates that Flora Stewart affixed her signature and seal to the bottom righthand corner of the instrument, among the signatures of the makers of the note. Her name was not, however, typed in at the top as a "borrower-debtor." G.S. 25-3-402 says that unless an instrument clearly indicates that a signature is made in some other capacity, such signature will be deemed an endorsement. The Official Comment to that provision says that a signature in the righthand corner of an instrument indicates an intent to sign as a maker of a note. Though there have been suggestions to the contrary (*see* 2 Bender's Uniform Com-

mercial Code Service, Commercial Paper § 2.07[3]), we hold that, by signing the note at a place regularly provided for makers of a note, Mrs. Stewart thereby became a maker of the note rather than an endorser. Her signature at this place, plus the fact that the terms of the note itself refer to the "undersigned" as "debtor," dispels any ambiguity which might render her an endorser under G.S. 25-3-402. Other courts have held likewise. *See Bankers Trust of South Carolina v. Culbertson*, 268 S.C. 564, 235 S.E. 2d 130; *Kerr v. DeKalb County Bank*, 135 Ga. App. 154, 217 S.E. 2d 434. This holding accords with prior law in this State. *See Bank v. Jonas*, 212 N.C. 394, 193 S.E. 265 (1937). Having signed the note as maker, it is clear that, under G.S. 25-3-118(e), Mrs. Stewart was jointly and severally liable with the other makers of the note, and thus was a principal party to the agreement.

Since Mrs. Stewart was, as a matter of law, a maker on the note of 3 April, under the principles of contract law set forth above, the MacQueens have established a *prima facie* case for the invalidity of the guaranty agreement. By virtue of First Union's request that Mr. MacQueen fill out a guaranty form to secure the note of 3 April, and the parties' express agreement that the guaranty would conform to that note, the parties were agreed, and the MacQueens were led to believe, that the guaranty was to secure the obligation of those principally liable on the note. By requesting that Mrs. Stewart sign the note along with the other makers. First Union led Mr. MacQueen to believe that Mrs. Stewart was a maker on the note. That Mrs. Stewart was a maker on the note is clear from the face of the instrument. These matters being established, it is clear that First Union's own actions put them on notice as to the MacQueens' intentions regarding those whose obligations the guaranty was to secure. Having such notice, the bank had the duty to include Mrs. Stewart among the "primary obligors" of the guaranty form. The record indicates that they failed to do this, contrary to the parties' general agreement and the MacQueens' implicit authorization stemming from this agreement. Nothing else appearing, the guaranty agreement would be invalid, and the trial court's conclusions of law would not be supported by the evidence.

[2] There is a factual dispute which prevents us from reaching a final determination of this issue, the resolution of which will require a factual determination on retrial. At trial Mr. MacQueen

testified that he submitted the incomplete guaranty form to Robert Helms of First Union, and that he did not know who filled in the names of the obligors. Mr. MacQueen further said that he has "never seen the guaranty filled out." Robert Helms testified that he inserted the obligors' names on the form, and that he did so in Mr. MacQueen's presence. If it is found that the names of the obligors were not supplied on the form in Mr. MacQueen's presence, then the MacQueens would not be bound by that agreement. If, however, the trial court finds that these three names were inserted in MacQueen's presence, and that MacQueen acknowledged the presence of but three obligors on the guaranty form, then Mr. MacQueen would be bound by the guaranty if certain other conditions are satisifed which will be discussed below. By acknowledging the presence of the three obligors on the guaranty, Mr. MacQueen would have implicitly agreed to and authorized the omission of Mrs. Stewart, a primary obligor on the note of 3 April.

If there is a finding that MacQueen acknowledged the omission of Mrs. Stewart's name from the guaranty form, the MacQueens' liability on that guaranty would be further conditioned by the questions whether Mr. Stewart is liable on the note of 9 April, and whether the MacQueen guaranty could be applied to the note of 9 April even if Mr. Stewart is not liable on that note.

[3] The plaintiffs contend that Mr. Stewart is not liable on the note of 9 April for reason that Jack Pridemore did not have the authority to sign that note. A reading of the power of attorney conferred on Pridemore by Mr. Stewart confirms their contention. This power was limited to transactions concerning property in Robeson County alone, and the uncontested evidence shows that the note of 9 April was signed to procure funds for properties in South Carolina and Rocky Mount, North Carolina, as well as in Robeson County.

Defendant First Union cannot avail itself of the argument that Mr. Stewart is liable by virtue of Pridemore's apparent authority. If the act of an agent is one which requires authority in writing (such as a power of attorney, under G.S. 47-115.1), those dealing with him are charged with notice of that fact and of any limitation or restriction on the agent contained in such written authority, for the principal is bound only to the extent of that

authority. *See Thompson v. Power Co.*, 154 N.C. 13, 69 S.E. 756 (1910). In such instances the doctrine of apparent authority does not apply, for a third party is deemed to have notice of the nature and extent of the agent's authority. *See Investment Properties v. Allen*, 283 N.C. 277, 196 S.E. 2d 262 (1973); *Commercial Solvents v. Johnson*, 235 N.C. 237, 69 S.E. 2d 716 (1952); *Texas Co. v. Stone*, 232 N.C. 489, 61 S.E. 2d 348 (1950). In present case defendant First Union had both actual and constructive notice of the scope of Pridemore's authority. Mr. Stewart is not, therefore, liable on the note of 9 April merely by virtue of Pridemore's unauthorized signature.

[4] Defendants contend that, even if Stewart is not liable on the note by virtue of Pridemore's signature, and even though Mrs. Stewart's name was omitted from the guaranty, the MacQueen guaranty can still be applied to satisfy the note of 9 April. First Union argues that the guaranty covers not only the joint debts of the three men listed as primary obligors, but also applies to the individual debt of any one of those primary obligors. Therefore, even if Stewart were not liable, the MacQueen guaranty would apply to the debt of Pridemore and Huddleston under the note of 9 April. An assessment of this argument's validity requires that we examine the specific terms of the MacQueen guaranty.

The form of guaranty in present case lists under the heading "Primary Obligor(s)" the three names "Jack F. Stewart, James R. Pridemore, Wayne C. Huddleston." Under the heading "Guarantor(s)" are listed the names "Peter MacQueen III, Mary G. MacQueen." The form thereafter provides:

> "WHEREAS, the above PRIMARY OBLIGOR(S) (hereinafter collectively termed 'Customer') desire(s) to obtain extensions of credit . . . and otherwise to deal with FIRST UNION NATIONAL BANK OF NORTH CAROLINA (hereinafter termed 'FUNB'); and
>
> "WHEREAS, FUNB is unwilling to extend or continue to extend credit to . . . and otherwise to deal with Customer; unless it receives an unconditional and continuing, joint and several guaranty from the above identified, undersigned GUARANTOR(S) (hereinafter collectively termed 'Guarantor'), covering all 'Obligations of Customer,' as hereinafter defined."

The form then provides that the guarantor, jointly and severally "hereby absolutely and unconditionally guarantees to FUNB and its successors and assigns the due and punctual payment of all liabilities and obligations of said customer to FUNB . . . as and when the same become due and payable. . . ." The document then lists a plethora of comments and waivers concerning the nature and extent of this guaranty. There is, however, no specific provision within the agreement which specifically stipulates or clearly indicates that the guaranty extends to the individual debts of each person listed as an obligor. In fact, the instrument explicitly provides that the three men denominated "primary obligors" shall be "hereinafter collectively termed 'Customer'." Provisions thereafter refer to "all Obligations of Customer," and the guarantors agree to guarantee "all liabilities and obligations of said Customer." "Customer" is throughout the instrument referred to in the singular. Given the rule of construction that the terms of a written contract are to be construed most strongly against the party who drafted the instrument, *see Jones v. Realty Co.*, 226 N.C. 303, 37 S.E. 2d 906 (1946), 17 Am. Jur. 2d, Contracts § 276, and the similar rule that the liability of a guarantor is not to be enlarged beyond the strict terms of the contract, *see Shoe Co. v. Peacock*, 150 N.C. 545, 64 S.E. 437 (1909), we read the terms of the guaranty agreement such that it extends only to the joint and several debts of the three individuals listed as obligors. The guaranty would not, therefore, extend to cover the individual debts of one of the obligors or the joint and several debts of but two of the obligors.

Since Stewart is not liable on the note of 9 April by virtue of Pridemore's unauthorized signature, it would appear that, under principles of the law of contract, the MacQueen guaranty, by its terms, cannot be extended to guarantee that note. This proposition is consonant with the law of suretyship and guaranty. Simpson, in his treatise on Suretyship, *supra*, § 54, says of forged and unauthorized signatures: "[W]here one coprincipal forges the other principal's name, and a surety guarantees the supposed obligation of both principals, otherwise than by endorsing their negotiable note, such surety is not liable to the creditor." As was said in *Green v. Kindy*, 43 Mich. 279, 5 N.W. 297: ". . . Unlike an endorser upon a negotiable instrument, he [the surety or guarantor] does not warrant the previous signatures to be genuine, and

if it afterwards appears that his principals did not sign and were not bound, he cannot be held, as he entered into no such obligation. His responsibility cannot thus be enlarged, nor can a new contract obligation be created against him."

The reasons behind this rule are similar to those underlying the rule that the creditor's release of a principal debtor will discharge a surety (*see Lumber Co. v. Buchanan*, 192 N.C. 771, 136 S.E. 129 (1926); *Evans v. Raper*, 74 N.C. 639 (1876); *Draughan v. Bunting*, 31 N.C. 10 (1848)), and the doctrine that a material alteration of a contract between principal and creditor will discharge a surety (*see Fleming v. Barden*, 127 N.C. 214, 37 S.E. 219 (1900); *Hinton v. Greenleaf*, 113 N.C. 6, 18 S.E. 56 (1893); Simpson, *supra*, § 72; Lee, *supra*, § 42). The omittance or release of a principal destroys a surety's rights of subrogation against that principal. Furthermore, as this Court said in *Evans v. Raper*, *supra*, the surety or guarantor "has contracted to guarantee a specific agreement, and if a new agreement be substituted without his assent, his contract is at an end." 74 N.C. at 643. By the terms of their guaranty, the MacQueens agreed to guarantee the joint debts of Stewart, Pridemore and Huddleston. They did not guarantee the performance of a contract under which Huddleston and Pridemore only were liable. First Union cannot, therefore, apply the guaranty to the note of 9 April unless Stewart is in some manner liable thereon.

[5] Though Pridemore was not authorized to sign the note of 9 April for Mr. Stewart, there is evidence in the record which tends to show that Stewart took control of bank accounts containing certain of the proceeds from the note. G.S. 25-3-404(2) says, "Any unauthorized signature may be ratified for all purposes of this article. . . ." The Official Comment to this provision notes that a retention of benefits, with knowledge of his unauthorized signature, by one whose name was signed without authorization may be found to be a ratification. Other courts have so held. *See Thermo Contracting Corp. v. Bank of N.J.*, 69 N.J. 352, 354 A. 2d 291; *Citizens Valley Bank v. Mandrones Mining Co.*, 257 Or. 260, 478 P. 2d 409. This provision is consonant with prior law in this State. *See Bank v. Grove*, 202 N.C. 143, 162 S.E. 204 (1932); *Sugg v. Credit Corporation*, 196 N.C. 97, 144 S.E. 554 (1928). *See also Trust Co. v. Gill, State Treasurer*, 286 N.C. 342, 211 S.E. 2d 327 (1975). If Mr. Stewart took control of the proceeds of the loan

with knowledge of the source of those proceeds and with knowledge that James Pridemore had signed Stewart's name to the note of 9 April, Stewart must be held to have ratified Pridemore's unauthorized signature. Absent a finding of facts, we cannot reach a final determination of this issue. If facts are found to this effect, this would entail the joint and several liability of Stewart, Pridemore and Huddleston on the note of 9 April. Since the MacQueen guaranty applies to the collective debts of these three individuals, MacQueen would then be liable to the extent of $7,500 to First Union (unless it is found that the MacQueen guaranty is not binding, in accordance with the directions set forth above).

We next consider plaintiff O'Grady's appeal. Pursuant to the agreement of the parties to the note of 3 April, Thomas O'Grady, on or about 9 April 1975, had the Bank of North Carolina issue an instrument entitled "Commercial Letter of Credit." That instrument reads in part as follows:

"Issued in favor of First Union National Bank

* * *

We hereby establish an irrevocable Letter of Credit in your favor for the account of Thomas O'Grady for the aggregate amount of Twenty-six Thousand Dollars ($26,000.00) available by your draft at site on the Bank of North Carolina, accompanied documents specified below:

Certified and true photostatic copy of each instrument causing this establishment of credit to Thomas O'Grady to be called upon.

We hereby agree with the bona fide holders that all drafts, under their compliance with terms of this credit, shall be duly honored on presentation and delivery of the documents specified to the drawee and drawn and presented for negotiations on or before April 9, 1976.

BANK OF NORTH CAROLINA, N.A.
by: s/ W. K. WHITMIRE
Vice President"

[6] The record indicates that Thomas O'Grady was not present at the initial negotiations and signing of the note of 3 April. Mr. O'Grady testified that he had no communication with First Union officials and that he had told no one in First Union that a condition of his issuing the letter of credit would be the liability of Mr. and Mrs. Stewart on the principal debt. James Pridemore, however, testified that at the 3 April meeting with bank officials:

> ". . . Mrs. Stewart executed the note on that day. The question came up and Mr. O'Grady had made this a condition. . . . The question was raised as to whether Mrs. Stewart was signing it, and he [Mr. Stewart] quickly said she would be happy to sign it, and she did, and I stated this was a condition of Mr. O'Grady's. . . ."

Bank officials testified that no mention of any condition was made in connection with the O'Grady letter of credit serving as collateral security on the note of 3 April. Mr. Evans of First Union did, however, testify, "We did request his wife [Mrs. Stewart] to sign the note. . . ." From the record it is clear that this letter of credit was listed as collateral on the schedule attached to the note of 3 April. This note was cancelled on 9 April, and the letter of credit was once again listed as collateral on the schedule attached to the note of 9 April, the note from which Mrs. Stewart's signature was omitted.

Due to the trial court's failure to find facts, we cannot determine whether a condition regarding the applicability of the letter of credit was communicated to First Union. There is conflicting evidence on this point. Bank officials testified that no such condition was communicated by anyone. Pridemore's testimony would tend to indicate that a condition was communicated by him, as O'Grady's agent, though it is not clear from the record whether this condition was communicated to bank officials or to Stewart alone. The question for our determination is, assuming that Pridemore did direct his comment on O'Grady's condition to bank officials, whether this fact would justify the sustaining of the injunction against Bank of North Carolina and cancellation of the letter of credit.

[7] The type of letter of credit before us has been termed a "guaranty" letter of credit. *See* Verkuil, "Bank Solvency and Guaranty Letters of Credit," 25 Stan. L. Rev. 716 (1973). *See also*

Note, "Guaranty Letters of Credit: Problems and Possibilities," 16 Ariz. L. Rev. 822 (1974). The term is used to describe a transaction in which a letter of credit is used to accomplish the ends of a contract of guaranty or suretyship. In such transactions the letter functions to secure performance of an obligation. This differs from a more traditional use of a letter of credit in transactions for the sale of goods, where the issuing bank makes itself primarily liable to the seller of goods, paying the seller on his presentation of a draft accompanied by various sorts of shipping documents. *Cf.* Verkuil, *supra*, p. 718 ff. Article 5 of the Uniform Commercial Code makes no distinction between these different uses of the letter of credit. Its provisions are intended to apply regardless of the nature of the transaction underlying the letter.

[**8**] G.S. 25-5-103(1)(a) defines a "letter of credit" as "an engagement by a bank or other person made at the request of a customer . . . that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. . . ." ("Customer" is defined as "a buyer or other person who causes an issuer to issue a credit," and "issuer" is defined as "a bank or other person issuing a credit." *See* G.S. 25-5-103(1)(g) and (c).) To be a letter of credit an instrument must satisfy the requirements of G.S. 25-5-103(1)(a), and, in addition, must be in writing and signed by the issuer. G.S. 25-5-104(1). If a letter is issued by a bank and does not require a documentary draft or documentary demand for payment or, although requiring neither of these, is issued by a person other than a bank and does not require that the draft or demand be accompanied by a document of title, then the letter must "conspicuously state that it is a letter of credit." G.S. 25-5-102(1)(c). *See* White and Summers, Uniform Commercial Code, sec. 18-4 (1972). These are the sole formal requirements for the formation of a valid letter of credit. No consideration between customer and issuer is necessary. *See* G.S. 25-5-105. The document issued by the Bank of North Carolina satisfies these formal requirements.

The sole condition of honor specified in the letter of credit before us is that First Union submit certified and true copies "of each instrument causing this establishment of credit to Thomas O'Grady to be called upon." This condition seems to require a "documentary draft," or "documentary demand for payment," defined in G.S. 25-5-103(1)(b) as "one honor of which is conditioned

upon the presentation of a document or documents." "Document" is broadly defined under this section as "any paper including document of title, security, invoice, certificate, notice of default and the like." The sole condition of honor specified in the O'Grady letter is, presumably, accompanying any draft with the note listing the O'Grady letter as collateral and notice of default by those primarily liable on that note.

[9] Since the letter of credit is essentially a contract between the issuer and the beneficiary, it is recognized by Article 5 as being independent of the underlying contract between the customer and the beneficiary. *See* Official Comment to G.S. 25-5-114; *Venizelos, S.A. v. Chase Manhatten Bank*, 294 F. Supp. 246, 248 (S.D.N.Y. 1968), *rev'd on other grounds*, 425 F. 2d 461. G.S. 25-5-114(1) imposes on the issuer a duty to honor drafts where there has been compliance with the terms of the credit. *Courtaulds N. America, Inc. v. North Carolina National Bank*, 387 F. Supp. 92 (M.D.N.C. 1975), *rev'd on other grounds*, 528 F. 2d 802. That statute says: "An issuer must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary. . . ." *See also Intraworld Industries, Inc. v. Girard Trust Bank*, 461 Pa. 343, 336 A. 2d 316; *O'Meara Co. v. National Park Bank*, 239 N.Y. 386, 146 N.E. 636.

The only exceptions to the issuer's duty to honor documents which on their face comply with the terms of the credit are those listed under G.S. 25-5-114(2). These exceptions are: (1) the failure of certain documents to conform to certain specified warranties, (2) the presentment of forged or "fraudulent" documents, and (3) "fraud in the transaction." G.S. 25-5-114(2)(a) holds that even these exceptions do not excuse the issuer from honor of a draft presented by one who is in the position of a holder in due course. A reason given for the issuer's stringent duty to honor in spite of alleged infirmities in the underlying contract is that one of the basic purposes of the letter of credit is to eliminate the risk to the beneficiary that the customer will refuse or halt payment because of alleged deficiencies in the beneficiary's performance. *See* White and Summers, *supra*, sec. 18-6, p. 616.

[10] The power of a court of appropriate jurisdiction to enjoin honor of a draft when one of the G.S. 25-5-114(2) exceptions is

shown is expressly recognized in section (2)(b) of that provision. Given the independence of the issuer's obligation to the beneficiary, and the commercial purposes which this independent obligation serves, it would appear that an injunction should issue to enjoin payment of a draft only in those instances where there is some action by the beneficiary which vitiates the transaction between the beneficiary and the issuer. *Cf. Intraworld Industries, Inc. v. Girard Trust Bank, supra.* Since the transaction between the beneficiary and the issuer is one consisting of an exchange of documents, only some defect in these documents would justify an injunction against honor. G.S. 25-5-114(2) speaks to those defects in documents which are not apparent on the face of the documents, and permits dishonor or the issue of an injunction only in situations where the documents presented are themselves the product of some sort of fraud. Accordingly, the beneficiary's fraud on the customer in the inducement of their separate contract would not justify dishonor or an injunction, nor would a breach of warranty or defect in the quality of the goods delivered pursuant to the underlying contract, for these defects are not of the sort which relate to the contract between the issuer and beneficiary. *Cf. Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 259 N.W. 2d 310; *Bossier Bank & Trust Co. v. Union Planters Nat. Bank*, 550 F. 2d 1077 (6th Cir. 1977). White and Summers, *supra*, sec. 18-6, pp. 625-26.

[11] That the exceptions to honor stated in G.S. 25-5-114(2) concern merely the genuineness of the documents presented for honor is evident from its terms, and from various courts' interpretations of "fraud in the transaction." The phrase "fraud in the transaction" is a codification of the law of a New York case, *Sztejn v. Schroder Banking Corp.*, 177 Misc. 719, 31 N.Y.S. 2d 631. In that case the court granted an injunction against honor of a letter of credit where the seller-beneficiary had shipped fifty cases of rubbish instead of the fifty cases of goods ordered. The fraud referred to in that case was that involved in presenting to the issuer documents, for purposes of honor, which totally misrepresented the nature of the goods actually shipped. The court said that letter of credit doctine "presupposes that the documents accompanying the draft are genuine," and held that where the beneficiary intentionally ships no goods at all, the documentation is not genuine. Thus, "fraud in the transaction"

under G.S. 25-5-114(2) would refer to the beneficiary's accompanying his draft with documents or declarations which have absolutely no basis in the facts of the underlying performance. *Cf. Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank*, 356 F. Supp. 991, 999 (N.D.Ga. 1973); *Intraworld Industries, Inc. v. Girard Trust Bank, supra.* Since the documents in present case, the note and notice of default, do reflect the nature of the underlying performance and default, there are no grounds here for a claim of fraud in the transaction.

[12] The Official Comment to G.S. 25-5-114 gives little indication of the meaning of the term "fraudulent" document. Presumably such a document would be one that is completely forged or drawn up without any underlying basis in fact, one that is but partly spurious or a document which has been materially altered. *See* White and Summers, *supra*, sec. 18-6, p. 625; Miller, "Problems and Patterns of the Letter of Credit," 1959 U. Ill. L.F. 162, 185-87. *Cf. Dynamics Corp. of Amer. v. Citizens & Southern Nat. Bank, supra; Marine Midland Grace Trust Co. of N.Y. v. Banco Del Pais, S.A.*, 261 F. Supp. 884 (S.D.N.Y. 1966); *Old Colony Trust Co. v. Lawyers' Title & Trust Co.*, 297 F. 152 (2d Cir. 1924); *Nacional Financiera, S.A. v. Banco De Ponce*, 275 App. Div. 827, 89 N.Y.S. 2d 480; *Brown v. C. Rosenstein Co.*, 120 Misc. 787, 200 N.Y.S. 491.

[13] Based on these cases and our interpretation of G.S. 25-5-114(2), we believe that the knowing and intentional attachment of a guaranty letter of credit, as collateral security, to a negotiable instrument which that letter was not intended to secure, and the eventual presentation of these documents to the issuing bank for purposes of honor of the letter of credit, would amount to a presentment of fraudulent documents under G.S. 25-5-114(2). In such a case, though the note may be valid as against other parties to the note, the documents, considered as a whole, are nonetheless fraudulent insofar as the letter of credit was not intended to secure that particular note, and the beneficiary had knowledge of this fact.

[14] In the case before us, if the trial court finds, on retrial, that Pridemore did give notice of O'Grady's condition in the presence of bank officials, that such notice was directed to bank officials, and that bank officials had knowledge of this condition, then the presentment of the 9 April note and notice of default to Bank of

North Carolina for purposes of drafting on the letter of credit would be a presentment of fraudulent documents, and plaintiff O'Grady would be entitled to a permanent injunction and cancellation of the letter of credit. If such is found to be the case, the documents would be fraudulent in that the portion of the 9 April note listing the letter of credit as collateral would have no basis in the facts of the agreement between the parties. In that case, the documents would not be those which gave rise to the establishment of credit referred to in the letter itself. On the other hand, if the court finds that Pridemore gave notice of the condition in the presence of bank officials, but that such notice was directed only to Stewart and was not acknowledged by bank officials in some manner, the preliminary injunction against Bank of North Carolina must be dissolved.

[15] We finally consider plaintiff James Pridemore's appeal. Pridemore alleges that he signed the note of 3 April on condition that Jack F. Stewart, Flora Stewart and Wayne Huddleston, the comakers, were bound on that note. He argues that on 9 April First Union released Mr. and Mrs. Stewart and Mr. Huddleston from said debt by cancelling the 3 April note. In exchange for cancellation of the 3 April note First Union took a new note which, Pridemore alleges, was not properly executed by the other three parties. Pridemore says that his signing of the 9 April note was likewise conditioned on the Stewarts' liability on that note, and since the Stewarts are not liable, the note cannot be binding on him either.

In all of this plaintiff fails to note that he alone signed the note of 9 April, both for himself and in his capacity as agent for Messrs. Stewart and Huddleston. His allegation that he is not bound on this note because Mrs. Stewart was not made a party cannot be sustained for the obvious reason that he, signing the note in the presence of bank officials with full knowledge that she was not listed as a principal on the note, did not insist that she be made a party to the note.

Likewise, Pridemore cannot secure release from liability by virtue of the fact that Mr. Stewart's signature on the note is not binding on Stewart, for Pridemore himself affixed Stewart's signature to the note under the impression that he had authority to do so. Though the bank had a duty to ascertain the scope of

Pridemore's authority, Pridemore, being the agent, clearly had this duty as well. And though Pridemore is not liable to the bank by virtue of his unauthorized signature under G.S. 25-3-404(1) since the bank took the note with notice that the signature was unauthorized, *cf. Vass v. Riddick*, 89 N.C. 6 (1883), Pridemore is, nonetheless, liable on his signature of his own name on the note. Since both parties are deemed to have had knowledge of the scope of Pridemore's authority, it is as though they had agreed that Pridemore and Huddleston alone would be the makers of the note. A finding of Stewart's ratification of Pridemore's signature, in accordance with the directions set forth above, would further render Pridemore liable by virtue of this ratification. Pridemore's assignments of error are therefore overruled.

For the reasons stated above, the decision of the Court of Appeals is reversed as to plaintiffs MacQueen and O'Grady, and the cause is remanded to the Court of Appeals with direction that it be remanded to the Superior Court of New Hanover County for trial *de novo*, in accordance with this opinion, as to those plaintiffs, before a jury, unless the parties again waive the right to a jury trial which they reserved initially. *See Helms v. Rea*, 282 N.C. 610, 194 S.E. 2d 1 (1973).

The decision of the Court of Appeals as to plaintiff Pridemore is affirmed.

Reversed and remanded as to plaintiffs MacQueen and O'Grady.

Affirmed as to plaintiff Pridemore.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. CLINTON BERRY THOMAS

No. 46

(Filed 29 December 1978)

1. Witnesses § 1.2— competency to testify—age

There is no fixed age limit below which a witness is incompetent to testify; rather, the question in each case is whether the witness understands the obligations of the oath and has sufficient intelligence to give evidence.

2. Witnesses § 1.2— competency of child

The evidence on voir dire supported the determination of the court in a murder trial that a child who was five and one-half years of age at the time of the murder and six and one-half years of age at the time of the trial was competent to testify as a witness for the State.

3. Homicide § 21.5— first degree murder—sufficiency of circumstantial evidence

The State's evidence, though circumstantial, was sufficient for submission to the jury in a prosecution for first degree murder where it tended to show: the victim's mutilated body was found in her apartment; prior to the discovery of the body, defendant told a witness that he had killed a woman on the street where the victim lived and that the witness would read about it in tomorrow's paper; the victim's son saw a black man in his mother's apartment on the night of the crime wearing a light brown cap, a light brown coat and black pants; the child told the man his mother's pocketbook was on top of the refrigerator, and the pocketbook was found the next morning on the dining room table, and was smeared with blood; defendant came to a witness's residence at midnight that same evening wearing a brown cap, brown coat and black pants; defendant had blood on the front portions of his body; defendant burned his bloody shirt, put on a pair of the witness's pants, and left his black pants at the witness's residence; a tan cap, brown jacket, and a pair of pants belonging to the witness were seized from defendant's apartment the day after the crime; lab analysis of the cap, jacket and black pants indicated positive signs of blood on each item; blood taken from the pants was the same type as that of the victim; a fingerprint lifted from an ashtray in the victim's apartment matched defendant's fingerprint; and statements by the State's witness and by the victim's son shortly after the crime corroborated their testimony at trial.

Justice BRITT took no part in the considertion or decision of this case.

APPEAL by defendant from *McLelland, J.*, 27 February 1978 Regular Criminal Session, WAKE Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the first degree murder of Linda Stroman Stancil. The State elected to try defendant for second degree murder and the jury returned a verdict of guilty of second degree murder. Defendant appeals from the judgment imposing a sentence of life imprisonment.

The State's evidence tends to show that at approximately 8:00 a.m. on the morning of 3 March 1977 Officer Michael R. Longmeirer of the Raleigh Police Department was summoned to the Shaw Apartments located on Dandridge Drive in southeast Raleigh to investigate a death in Apartment 805-C. When he arrived, the door was slightly open. As he entered the living room he saw the nude body of a black female lying on the floor in a

pool of blood. The couch and television were spotted with blood, and blood was spattered over one wall of the apartment. Blood-stained underwear was found on the couch and other articles of clothing were discovered on the floor near the body. To the left of the living room was a dining area containing a table and chairs. A pocketbook and a puzzle were lying on the table. Bloody footprints led from the table into the kitchen area. An autopsy disclosed 31 cut-type lacerations on the victim's head, neck and hands, inflicted by a knife-like instrument. It was determined that the victim's death was caused by a two and one-half inch deep wound to the left neck which severed the carotid artery.

Defendant offered no evidence. Other facts pertinent to decision of this case will be stated in our discussion of the assignments of error.

A prior trial of this case ended, on motion of defendant, in a mistrial due to the introduction of incompetent and prejudicial testimony by the State.

Attorney General Rufus L. Edmisten by Assistant Attorney General Ben G. Irons, II, for the State.

Fred M. Morelock for defendant appellant.

MOORE, Justice.

Eric Stancil, son of the deceased, who was about five and one-half years of age at the time of the murder and six and one-half years of age at trial, was allowed to testify as a witness for the State. Officer Donald Brinson was allowed to give corroborative testimony concerning a statement made by Eric to him on the day of the murder. Defendant assigns these as error.

When Eric was called as a witness defendant objected to his testifying because of his age. The trial judge excused the jury and conducted a *voir dire* hearing. The trial judge, the district attorney and defendant's attorney questioned Eric at length. In response to questions by the district attorney, Eric testified in part as follows:

"Q. What's your full name?

A. Eric Lee Stancil.

Q. Do you know who I am Eric?

. . . .

A. Narley Cashwell.

Q. We have talked before haven't we, sir?

A. Yes.

Q. Do you know, Eric, how old you are today?

A. Six.

Q. When is your birthday?

A. June 19th.

. . . .

Q. Where do you go to school?

A. Aldert Root.

Q. Aldert Root is located on the other side of town, isn't it?

A. Yes.

Q. What grade are you in, Eric?

A. First.

Q. Did you go to kindergarten?

A. Yes.

Q. Where did you go to kindergarten?

A. Aldert Root.

. . . .

Q. How do you get to school?

A. Bus.

. . . .

Q. Where do you live now?

A. 1201 South East, Apartment D.

. . . .

Q. Now Eric, who do you live with?

A. My grandma.

. . . .

Q. Who else lives with your grandmother besides yourself, Eric?

A. My uncle.

Q. Do you have any brothers or sisters?

A. I have one brother and one sister.

Q. What's your brother's name?

A. Marvin Makeese.

Q. How old is he?

A. One years old.

. . . .

Q. Eric, do you remember when you were living with your mother in the Shaw Apartments with Marvin?

A. Yes.

Q. And Eric, do you know where your mother is today?

A. Yes.

Q. Where is your mother today?

A. Up in heaven.

Q. Who else lives in heaven?

A. God.

Q. Does anybody else live with God?

A. Jesus.

Q. Now Eric, do you know what this book is right here I've got in my hand?

. . . .

A. A Bible.

Q. Do you know what's in a Bible?

. . . .

A. Stuff about God and Jesus.

. . . .

Q. Now Eric, do you know what it means to tell the truth?

A. Yes.

Q. Do you know what it means to tell a story or to tell a lie?

A. Yes.

Q. Do you know what happens to you if you tell a lie?

A. You get in trouble.

Q. Do you know who that gentleman is seated right next to you there in the black robe?

A. Yes.

Q. Do you know what his job is?

A. Yes, sir.

. . . .

Q. What do they call him?

A. "Judge."

Q. Do you know what kind of room you are in today?

A. The courtroom.

. . . .

Q. Has anybody talked to you about telling the truth?

A. Yes.

Q. Do you know whether or not you are supposed to tell the truth all the time?

A. Yes.

Q. Are you supposed to tell the truth all the time?

A. Yes.

Q. Do you think God would like it if you told a story?

A. No.

. . . .

Q. Now Eric, do you recall the morning when you got up and saw your mama lying hurt and you ran across the hall to Mrs. Pemrose Brewington's apartment?

A. Right.

Q. Do you remember where Marvin was?

A. No.

Q. Eric, do you remember coming home from school the day before you saw your mama hurt?

A. Yes.

Q. Do you remember seeing Mr. Finch, the gentleman who just came up here to testify, at your mama's apartment?

A. Yes.

Q. Do you recall your mama being okay at that time?

A. Yes.

Q. Now did you stay with your mama that day?

A. Yes."

At the conclusion of the *voir dire* hearing the trial judge ruled:

"COURT: I find that the witness Eric Lee Stancil is six and one-half years of age; that he attends first grade and attended kindergarten; that he is alert, composed, lucid; that he is cognizant of biblical concepts of God and of God's approval of truth and disapproval of falsehood; that his capacity to recall past events is normal for one of his age; and therefore, I conclude that he is a competent witness and will be allowed to testify."

[1] Children of various ages have been allowed to testify. There is no fixed age limit below which a witness is incompetent to testify. Rather, the question in each case is whether the witness

understands the obligations of the oath and has sufficient intelligence to give evidence. In *Wheeler v. United States*, 159 U.S. 523, 40 L.Ed. 244, 16 S.Ct. 93 (1895), a boy nearly five and one-half years of age was held competent to testify in a murder case; in *State v. Bowden*, 272 N.C. 481, 158 S.E. 2d 493 (1968), a six-year-old girl was held competent as a witness in a rape case; and in *McCurdy v. Ashley*, 259 N.C. 619, 131 S.E. 2d 321 (1963), a six-year-old boy was allowed to testify to events occurring nearly two years earlier. In *Artesani v. Gritton*, 252 N.C. 463, 113 S.E. 2d 895 (1960), it was held that a child's competency to testify is to be determined on the basis of his mental capacity at the time he is called upon to testify.

Our Court in many cases has quoted with approval from *Wheeler v. United States, supra*, as follows:

> "That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless from that which is preserved it is clear that it was erroneous. These rules have been settled by many decisions. . . ."

See State v. Cox, 280 N.C. 689, 187 S.E. 2d 1 (1972); *State v. Cooke*, 278 N.C. 288, 179 S.E. 2d 365 (1971); *McCurdy v. Ashley, supra.*

[2] In present case there was ample evidence to support the trial judge's conclusion that Eric was "alert, composed, lucid" and knew the "concepts of God and of God's approval of truth and disapproval of falsehood." The judge observed Eric's demeanor during the *voir dire* hearing and his finding that Eric was compe-

tent to testify was supported by the evidence. The child said nothing after the judge's findings which would have required the trial judge to reverse his ruling. In fact, Eric's testimony regarding what he saw the night of the crime is wholly consistent with and almost identical to the testimony he gave on *voir dire*. The question of the witness's competency to testify rested in the sound discretion of the trial judge. *State v. Cox, supra*; *McCurdy v. Ashley, supra*. The record shows no abuse of discretion.

Since Eric was competent to testify as a witness, it follows that Officer Brinson's testimony concerning a statement made by Eric to him on the day of the murder, offered for the purpose of corroboration, was competent. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975); *Artesani v. Gritton, supra*; 1 Stansbury, North Carolina Evidence § 51 (Brandis rev. 1973). These assignments are overruled.

Defendant next argues that the trial judge erred in failing to grant defendant's motion for nonsuit. Defendant argues that if each parcel of the State's evidence is dealt with separately, none will prove sufficient to raise anything more than a suspicion of defendant's guilt.

A motion to nonsuit in a criminal case requires a consideration of the evidence in the light most favorable to the State, and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975). If there is substantial evidence—whether direct, circumstantial or both—to support a finding that the offense charged has been committed and that defendant committed it, a case for the jury is made and nonsuit should be denied. *State v. McKinney, supra*; *State v. Norggins*, 215 N.C. 220, 1 S.E. 2d 533 (1939). If the evidence presented is circumstantial, "the question for the court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, *taken singly or in combination*, satisfy them beyond a reasonable doubt that the defendant is actually guilty. . . ." (Emphasis added.) *State v. Rowland*, 263 N.C. 353, 139 S.E. 2d 661 (1965). *See State v. White*, 293 N.C. 91, 235 S.E. 2d 55 (1977). It is clear, therefore, that, in passing on a motion for nonsuit, evidence favorable to the State is to be considered as a whole in order to determine its suf-

ficiency. This is especially necessary in a case, such as ours, when the proof offered is circumstantial, for rarely will one bit of such evidence be sufficient, in itself, to point to a defendant's guilt. If a reasonable inference of defendant's guilt can be drawn from a combination of the circumstances, defendant's motion is properly denied. *Cf. State v. Rowland, supra.*

[3] The evidence in present case, taken as a whole and considered in the light most favorable to the State, is clearly sufficient to warrant a reasonable inference of defendant's guilt. On the early morning of 3 March 1977 the mutilated body of Linda Stancil was found in her apartment on Dandridge Drive. That very evening, prior to the discovery of the victim's body by police, the defendant told Luther Hines that he had killed a woman on Dandridge Drive, and that Hines would read about it in tomorrow's paper. The victim's son testified that on the night of the crime he saw a black man in his mother's apartment, and that the man was wearing a light brown cap, a light brown coat and black pants. The man came into the child's bedroom and cut on the light. In response to the man's question, the child told him that his mother's pocketbook was on top of the refrigerator. The pocketbook was found the next morning on the dining room table, and was smeared with blood. Luther Hines testified that defendant came to Hines' residence at midnight that same evening wearing a brown cap, a brown coat and black pants, and that defendant had blood on the front portions of his body. Defendant put on a pair of Hines' pants and left his black pants at Hines' apartment. The black pants were later recovered from Hines by police. A tan cap, a brown jacket, and the pair of jeans belonging to Hines were seized from defendant's apartment the day after the crime. Lab analyses of the seized cap and jacket and the black pants indicated positive signs of blood on each item. Blood taken from the pants proved to be of type A, the same as that of the victim. Hines testified that these items of clothing were those that defendant was wearing the night of the crime, and that he saw defendant burn his bloody shirt soon after he entered Hines' residence. A fingerprint lifted from an ashtray in the victim's apartment matched defendant's fingerprint. Finally, statements made by Luther Hines and Eric Stancil shortly after the crime corroborated their testimony at trial.

Though none of this evidence, taken separately, would be sufficient to raise more than a mere suspicion of defendant's guilt, it is clear that "[t]he chain of circumstantial evidence in this case was clearly sufficient to establish both the *corpus delicti* and that defendant was the perpetrator of the crime." *State v. Rowland, supra*, 263 N.C. at 358. It was therefore sufficient to overcome defendant's motion for nonsuit. This assignment is overruled.

Finally, defendant assigns as error the failure of the trial judge to allow his motion to set aside the verdict as being against the greater weight of the evidence. Such motion is addressed to the discretion of the trial judge, and the refusal to grant the motion is not reviewable on appeal. *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *State v. Davis*, 282 N.C. 107, 191 S.E. 2d 664 (1972); *State v. Henderson*, 276 N.C. 430, 173 S.E. 2d 291 (1970).

We have carefully examined the entire record, and in the trial, verdict and judgment we find no prejudicial error.

No error.

Justice BRITT took no part in the consideration or decision of this case.

THOMAS EDWIN TOWNSEND v. NORFOLK AND SOUTHERN RAILWAY COMPANY, SUCCESSOR CORPORATION TO CAROLINA AND NORTHWESTERN RAILWAY, AND JOHN REID

No. 13

(Filed 29 December 1978)

Appeal and Error § 46— equally divided Court—judgment affirmed—no precedent

Where one member of the Supreme Court did not participate in the consideration or decision of a case and the remaining six justices are equally divided, the opinion of the Court of Appeals in the case is affirmed without precedential value.

Justice BRITT took no part in the consideration or decision of this case.

APPEAL by defendants from the decision of the Court of Appeals, 35 N.C. App. 482, 241 S.E. 2d 859 (1978) (*Hedrick, J.*, con-

curred in by *Webb, J.*, with *Britt, J.* dissenting). That court affirmed *Snepp, J.*, who denied defendants' motion for directed verdict at the 28 January 1977 Session of CALDWELL Superior Court.

This is a civil action in which the plaintiff is seeking to recover damages for personal injuries sustained by him when his tractor-trailer collided with a train owned and operated by defendants. At the conclusion of plaintiff's evidence, the defendants moved for a directed verdict under Rule 50 of the Rules of Civil Procedure. They claimed that plaintiff failed to show any negligence on the part of defendants and that the evidence showed his own contributory negligence as a matter of law. The motion was denied. The same motion was renewed at the close of all the evidence, and again it was denied.

The jury found that defendants' negligence proximately caused plaintiff's injuries and that the plaintiff was not contributorily negligent. The plaintiff was awarded $151,835.00. Thereafter, the defendants' motions for judgment notwithstanding the verdict and for a new trial, under Rule 50(b)(1) and Rule 59(a)(7) respectively, were denied. The judge also denied defendants' motion under Rule 59(a)(6) to set aside the verdict as being excessive. This last motion has been abandoned by the defendants as a ground for appeal to this Court.

The plaintiff's evidence tended to show the following:

The accident in question occurred in Lenoir, North Carolina at the point where Waycross Drive, running east and west, is intersected by defendants' railroad tracks, which run north and south. There is a junction lying some three hundred to four hundred feet south of the crossing where a side track (hereinafter referred to as the first track) diverges from the main track (hereinafter referred to as the second track). This first track curves slightly to the east and then runs roughly parallel with the second tract across Waycross Drive. There are forty-seven feet between these two tracks at the crossing. A few feet west of the second track lie two other side tracks, which are not involved in this case. There are no automatic signals at the crossing to warn motorists of approaching trains. There is, however, a sign east of the crossing and a crossbuck sign between the first track and the second track.

The plaintiff had been employed as a truck driver by Broyhill Industries for six years. He was so employed on the date of the accident. The terminal from which he worked was located on Waycross Drive just across the railroad tracks; thus, the plaintiff was familiar with the intersection.

Around 12:30 p.m. on 7 September 1972, a clear day, the plaintiff was returning from a long-distance haul in an empty tractor-trailer rig, fifty-five to fifty-six feet long, owned by his employer. Traveling west on Waycross Drive, he came to the first track. The plaintiff stopped his truck at a point about fifteen feet from the first track, where he had previously had to stop for trains "many times," and looked both ways. As he did not see or hear a train approaching, he proceeded across the first track traveling between five and ten miles per hour because the crossing was extremely rough.

As the plaintiff was crossing the first track, he continued to look north and south; however, his vision to the left (south) was obstructed by bushes and trees on defendants' right of way.

> "I did not see any train approaching as I went from the first track to the second track. I could not see any train approaching from a southerly direction as I was between those two tracks because my vision was blocked. It was blocked by those trees in there."

Plaintiff testified that the trees and bushes were from fifteen to twenty feet wide, ranged from low bushes up to twelve or fourteen feet high, and spanned an area of at least thirty feet up and down the track to the left.

Realizing that his vision was obstructed, the plaintiff tried to get a better view down the second track by standing up in his cab and looking through the front windshield to the left and right. Again he saw no train and continued across the second track where he was struck by defendants' train from the south (left). The plaintiff suffered severe and permanent injuries as a result of the accident.

Two other persons in the area at the time of the accident testified that they did not hear any horns or bells as defendants' train approached the Waycross Drive intersection.

The defendants' evidence tended to show the following:

The defendants' train was traveling twenty to twenty-six miles per hour as it approached the Waycross Drive intersection on the second track. The engineer first saw the plaintiff as he was fifteen or twenty feet from the first track. At that time, the train was about one hundred and fifty feet from the crossing, and the engineer started blowing his whistle and horn. He noticed that the plaintiff was traveling so slow "he could have stopped in an instant." It became apparent, however, that plaintiff was not going to stop at the second track, and the engineer applied the emergency brake a few feet from the crossing. A few seconds later the train hit plaintiff's tractor-trailer at a point right behind the rig's cab and carried it some four hundred feet down the track. The engineer stated that he could see the plaintiff over the bushes between the first and second tracks.

There was testimony by four other persons that the train sounded its horn and whistle before it came to the Waycross Drive intersection.

Wilson and Palmer by Hugh M. Wilson for the plaintiff.

Patrick, Harper & Dixon by Bailey Patrick and F. Gwyn Harper, Jr.; Joyner & Howison by William T. Joyner and Henry S. Manning, Jr. for the defendants.

PER CURIAM.

Justice David M. Britt, being a member of the panel of the Court of Appeals which decided the case, did not sit in the appeal to this Court. The remaining six justices are equally divided as to whether the trial court erred in denying defendants' motions for a dircted verdict, for judgment notwithstanding the verdict and for a new trial. Thus, the opinion of the Court of Appeals is affirmed without precedential value in accordance with the usual practice in this situation. *See, eg., State v. Johnson*, 286 N.C. 331, 210 S.E. 2d 260 (1974) and cases cited therein.

Affirmed.

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

BOARD OF TRANSPORTATION v. NEIL E. BROWN AND WIFE, INGRID S. BROWN

No. 77

(Filed 29 December 1978)

ON petition for further review pursuant to G.S. 7A-31 of the Court of Appeals' decision, 34 N.C. App. 266, 237 S.E. 2d 854 (1977), which found error in the trial before *Ervin, J.*, at the 20 July 1976 Session of BUNCOMBE Superior Court and awarded a new trial. This case was argued as No. 26 at the Spring Term 1978.

Rufus L. Edmisten, Attorney General, by James B. Richmond, Special Deputy Attorney General, for the State.

Lentz & Ball, P.A., by Ervin L. Ball, Jr., and Long, McClure & Dodd, by Robert B. Long, Jr., Attorneys for defendants.

PER CURIAM.

We have carefully examined the Court of Appeals' opinion by Clark, J., and the briefs and authorities on the points in question. We find the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it to be altogether correct. Its decision is, therefore,

Affirmed.

Justice BRITT took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA, EX REL. WILLIAM H. ANDREWS, DISTRICT ATTORNEY FOR THE FOURTH DISTRICT OF NORTH CAROLINA v. CHATEAU X, INC., A SOUTH CAROLINA CORPORATION; ATLA THEATERS, INC., A SOUTH CAROLINA CORPORATION; JAMES RUSS, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF BOTH CHATEAU X, INC. AND ATLA THEATERS, INC.; ALBERT PELOQUIN, INDIVIDUALLY AND IN HIS CAPACITY AS AN OFFICER OF BOTH CHATEAU X, INC. AND ATLA THEATERS, INC.; HECTOR RIQUELME, JR.; FREDERICK OLLIE BYROM; SUSAN RUPE; VICTOR STROOP; JIMMIE TUCKER HILL; DENISE TERRY LAMB; GEORGE JOHNSON; JOE HORNSBY; ROBERT JEROME SMITH; AND A PLACE OF BUSINESS KNOWN AS CHATEAU X THEATER AND BOOKSTORE, HIGHWAY 17 SOUTH, JACKSONVILLE, NORTH CAROLINA

No. 23

(Filed 4 January 1979)

1. Obscenity § 3— exhibition and sale of obscene matter—nuisance—injunction

When a business has been established as a nuisance because of the exhibition or sale of obscene matter, the trial judge is not required by G.S. 19-5 to enjoin the future distribution of any and all obscene matter as defined by G.S. 19-1.1(2) but has the discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and the court has the duty specifically to warn the defendant of the prohibited conduct.

2. Obscenity § 3— exhibition and sale of obscene matter—nuisance—injunction

Where defendants' bookstore was found to be a nuisance because of its exhibition and sale of obscene matter, the trial court was not required to restrain defendants from selling any lewd matter at all, whether or not it made up a large part of the store's inventory, and the trial court's order was not erroneous in enjoining defendants from selling obscene matter only when such matter "constitutes a principal or substantial part of [their] stock in trade."

3. Obscenity § 1— exhibition and sale of obscene matter—nuisance—unconstitutional closing of business—severability of provision

Even if G.S. 19-5 unconstitutionally authorizes a judge to close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material, which question is not before the Supreme Court, such provision is severable from the remaining provisions of G.S. Ch. 19 and does not render G.S. Ch. 19 unconstitutional on its face.

4. Obscenity § 3— exhibition and sale of obscenity—nuisance—burden of proof

G.S. 19-1.1(2) does not unconstitutionally place the burden of proving non-obscenity on the defendant in a nuisance action; rather, the State is required to prove all the elements of obscenity found in G.S. 19-1.1(2), including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value."

5. Obscenity § 3— exhibition or sale of "illegal lewd matter"—injunction—abscence of requirement of patent offensiveness

An order enjoining defendants from showing or selling "illegal lewd matter" which "appeals to the prurient interest in sex," which is "without serious literary, artistic, educational, political or scientific value," and which shows certain sexual conduct was not fatally defective because it failed to require specifically that the materials enjoined be "patently offensive" in their depiction of the specified sexual conduct, since the court enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in G.S. 19-1 1(2), and it is permissible for an injunction to include terms that are adequately defined in applicable statutes.

6. Obscenity § 3— exhibition or sale of obscene matter—injunction not unconstitutional prior restraint

An order restraining defendants from selling or exhibiting any obscene matter in the future which depicts specified sexual conduct does not constitute an illegal prior restraint in violation of defendants' first amendment right of free speech since (1) the injunction is in effect nothing more than a personalized criminal statute against selling certain obscene material that is directed toward defendants because they sold illegal matter in the past, and the legislature could have constitutionally imposed the same restrictions on the public in general; (2) the order is narrowly drawn and the prohibited conduct is specifically defined; and (3) defendants are not subject to criminal sanctions until they sell or exhibit obscene matter in violation of the court's order, and the State would have the burden of proving beyond a reasonable doubt that defendants sold or exhibited illegal lewd matter in violation of the injunction.

7. Obscenity § 3— exhibition and sale of obscene matter—nuisance—injunction—contempt proceedings

The plenary proceedings provided for in G.S. 5A-15 apply to contempt actions following a Chapter 19 injunction.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

Justice EXUM dissenting.

APPEAL by defendants and cross-appeal by the State from *Small, J.*, at the 4 January 1978 Session of ONSLOW Superior Court.

On 12 December 1977 the State, through William H. Andrews, District Attorney for the Fourth District, filed a complaint against defendants, a South Carolina corporation doing business in Jacksonville, North Carolina and its officers and employees. The complaint alleged that defendants maintained a business, Chateau X Theater and Bookstore, for the purpose of illegal exhibitions and sales to the public of obscene and lewd films and

publications as a regular and predominant course of business. Among other relief not relevant to this appeal, it prayed that Chateau X be declared a nuisance under Chapter 19 of North Carolina General Statutes. The State also asked that an injunction issue ordering that defendants be "perpetually enjoined from maintaining, using, continuing, owning or leasing said place known as Chateau X Theater and Bookstore . . . as a nuisance" and "any place in the State of North Carolina as a nuisance."

On 20 December 1977 defendants made a motion to dismiss the action or, in the alternative, to continue it. They based this motion on the fact that there was a declaratory judgment action pending in the United States District Court for the Eastern District of North Carolina to test the constitutionality of Chapter 19. On 4 January 1978 defendants filed their answer along with a motion to dismiss the State's complaint on the ground that Chapter 19 is unconstitutional. After argument, the trial court denied defendants' motion.

The parties, by mutual stipulation, waived a jury trial. Trial was conducted before the judge beginning on 4 January 1978.

At trial the State introduced twenty exhibits into evidence without objection by defendants. Nineteen of these were copies of magazines and films possessed for sale or shown by Chateau X. State's Exhibit Number 20 was an inventory of materials found at that operation on 12 December 1977.

The trial judge personally viewed State's Exhibit Number 15, a film called "Airline Cockpit," and State's Exhibit Number 3, a magazine entitled "Spread Your Legs." The parties mutually stipulated that all the films and magazines listed in the inventory, State's Exhibit Number 20, "contain substantially similar material" as is found in State's Exhibit Number 15 and State's Exhibit Number 3.

The defendants presented no evidence. The parties stipulated, however, "[t]hat if the defendants would testify, the evidence would indicate that the motion pictures exhibited and the books distributed and sold were done to consenting adults."

The trial judge found that State's Exhibits Numbers 15 and 3 are obscene, that the remainder of the nineteen films and magazines introduced into evidence are obscene, and that all the

materials listed in the inventory are obscene. He held that all the above films and magazines are nuisances. He also declared Chateau X itself to be a nuisance under Chapter 19.

The judge ordered that all the material listed on the inventory, State's Exhibit Number 20, be confiscated and destroyed. He enjoined the defendants from exhibiting or selling any of these items. The defendants also were enjoined from selling or showing any other obscene matter in the future which depicted certain specific sexual conduct listed in the order.

In his final order the trial judge interpreted a part of G.S. 19-5 as authorizing the actual closing of a business after it had been declared a nuisance. He held this portion unconstitutional.

Both the defendants and the State gave timely notice of appeal from the trial court's final judgment.

On 24 April 1978 the parties petitioned this Court pursuant to G.S. 7A-31(b) for review prior to it being determined by the Court of Appeals. We allowed the petition on 8 May 1978.

Attorney General Rufus L. Edmisten by Senior Deputy Attorney General Andrew A. Vanore, Jr., Assistant Attorney General Marvin Schiller and I. Beverly Lake, Jr. for the State.

Bailey & Raynor by Edward G. Bailey and Frank Erwin; Arthur M. Schwartz, P.C. by Neil Ayervais for the defendants.

COPELAND, Justice.

This case concerns the statutory construction and constitutionality of Chapter 19 of North Carolina General Statutes. For the reasons set out below, we have determined that Chapter 19 as interpreted and applied in this case is constitutional; therefore, the judgment of the trial court is affirmed.

Both parties in this action have brought up assignments of error to this Court. The State is challenging certain interpretations and applications of Chapter 19 by the court below. As the resolution of these issues affects the defendants' constitutional questions, we will consider the State's assignments of error on cross-appeal first.

The core of the controversy in this case stems from that part of the trial court's order that enjoins the defendants from selling

or showing obscene matter that is not listed on the inventory. This portion of the order states:

> "2. The defendants . . . are hereby enjoined and restrained from:
>
> * * *
>
> d. Possessing for exhibition to the public illegal, lewd matter consisting of films which appeals to the prurient interest in sex without serious literary, artistic, educational, political or scientific value and that depicts or shows:
>
> (1) Persons engaging in sodomy, per os, or per anum,
>
> (2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or
>
> (3) Persons engaging in masturbation.
>
> e. Possessing for sale and in selling illegal lewd matter which constitutes a principal or substantial part of the stock in trade at a place of business consisting of magazines, books, and papers which appeal to the prurient interest in sex without serious literary, artistic, educational, political, or scientific value and that depicts or shows:
>
> (1) Persons engaged in sodomy, per os, or per anum,
>
> (2) Enlarged exhibits of the genitals of male and female persons during acts of sexual intercourse, or
>
> (3) Persons engaging in masturbation."

The State contests two aspects of the above injunction. Both of them contain the argument that the judge did not go far enough.

[1] The State first claims the trial court erred by enjoining films and publications showing only "enlarged" exhibits of the genitals during sexual intercourse. It argues that the court was required to prohibit the sale of matter depicting any genitals, enlarged or not, because of the mandates of G.S. 19-5, which reads in part: "If the existence of a nuisance is admitted or established . . . an order of abatement *shall* be entered as part of the judgment in the case." (Emphasis supplied.) Apparently the State is contending that once a business has been established as a nuisance, the

judge is required to enjoin the future distribution of any and all obscene matter as defined by G.S. 19-1.1(2)[1]. We do not agree.

The trial judge necessarily must be given some discretion in formulating his abatement order. The defendants will be subject to contempt of court if they violate the injunction; therefore, it is necessary that they be put on notice as to exactly what material they can and cannot show or sell in the future. *See generally* D. DOBBS, REMEDIES § 2.4 (1973); Developments in the Law—Injunctions, 78 Harv. L. Rev. 994, 1064 (1965). A judge has a *duty* to supply this specificity. Rule 65(d) of the North Carolina Rules of Civil Procedure states that "[e]very order granting an injunction . . . shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined."

The Legislature must have intended for judges to have some discretion in abating nuisances. "[L]egislative intent is usually ascertained not only from the phraseology of the statute but also from the nature and purpose of the act and the consequences which would follow its construction one way or the other." *In re Hardy*, 294 N.C. 90, 97, 240 S.E. 2d 367, 372 (1978). (Emphasis deleted.)

Chapter 19 as applied to obscene matter treads near the area of free speech. The sanctions for disobeying an abatement order could be severe. This Court need not decide today whether a judge must always issue a general injunction, such as this one, against selling or exhibiting obscene matter not actually before the court. *See D. Dobbs, supra* at § 2.11 note 22. We do hold, how-

1. G.S. 19-1.1(2) states:

"Lewd matter" is synonymous with "obscene matter" and means any matter:

(a) Which the average person, applying contemporary community standards, would find, when considered as a whole, appeals to the prurient interest; and

(b) Which depicts patently offensive representations of:

1. Ultimate sexual acts, normal or perverted, actual or simulated;

2. Masturbation, excretory functions, or lewd exhibition of the genitals or genital area;

3. Masochism or sadism; or

4. Sexual acts with a child or animal.

Nothing herein contained is intended to include or proscribe any writing or written material, nor to include or proscribe any matter which, when considered as a whole, and in the context in which it is used, possesses serious literary, artistic, political, educational, or scientific value.

ever, that if such an order does issue, the trial court has some discretion to define what conduct is prohibited as long as it falls within constitutional and statutory mandates, and he has the duty to specifically warn the defendant of the prohibited conduct. This assignment of error is overruled.

[2] The State next argues that the trial court's order was erroneous because it enjoined the defendants from selling obscene matter only when such material "constitutes a principal or substantial part of [their] stock in trade." It contends that the judge was required to restrain the defendants from selling any lewd matter at all, whether or not it made up a large part of defendants' inventory.

A careful reading of the statute refutes this argument. As the State points out, G.S. 19-1.2[2] defines nuisances in terms of businesses that regularly display or sell lewd material and the obscene matter itself. However, G.S. 19-1.2(5) states that a lewd publication is a nuisance only when "possessed at a place which is a nuisance." In order for a bookstore to be a nuisance, the lewd publications must "constitute a principal or substantial part of the stock in trade."

Thus, not every isolated obscene publication is a nuisance that can be abated under G.S. 19-5. First it must be found that the book or magazine is one of many, such that all together they make up a large part of the bookstore's inventory. Once this initial determination is made, however, each individual obscene publication is a nuisance, and any and every one of them can be abated. This assignment of error is overruled.

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2. G.S. 19-1.2. Types of nuisances.—The following are declared to be nuisances wherein obscene or lewd matter or other conduct prohibited in G.S. 19-1(a) is involved:

(1) Any and every place in the State where lewd films are publicly exhibited as a predominant and regular course of business, or possessed for the purpose of such exhibition;

(2) Any and every place in the State where a lewd film is publicly and repeatedly exhibited, or possessed for the purpose of such exhibition;

(3) Any and every lewd film which is publicly exhibited, or possessed for such purpose at a place which is a nuisance under this Article;

(4) Any and every place of business in the State in which lewd publications constitute a principal or substantial part of the stock in trade;

(5) Any and every lewd publication possessed at a place which is a nuisance under this Article;

(6) Every place which, as a regular course of business, is used for the purposes of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, and every such place in or upon which acts of lewdness, assignation, gambling, the illegal possession or sale of intoxicating liquor, the illegal possession or sale of narcotic drugs as defined in the North Carolina Controlled Substances Act, or prostitution, are held or occur.

The trial court determined that a part of G.S. 19-5, stating that the judge's final order "may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance," authorizes the complete closing of a theater or bookstore once it has been declared a nuisance under Chapter 19. It held that portion ineffectual in nuisance actions dealing with obscene matter because such a closing would be an unconstitutional prior restraint on free speech. The State concedes in its brief and in its argument before this Court that any complete closing of a business for past sales of obscene material would constitute illegal prior restraint. We agree. *See Organization for a Better Austin v. Keefe*, 402 U.S. 415, 29 L.Ed. 2d 1, 91 S.Ct. 1575 (1971). Other states have so held. *See, e.g., Sanders v. State*, 231 Ga. 608, 203 S.E. 2d 153 (1974); *State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P. 2d 760 (1976); *Gulf States Theatres of Louisiana, Inc. v. Richardson*, 287 So. 2d 480 (La. 1973).

The State contends, however, that the trial court erred in interpreting G.S. 19-5 as authorizing such a complete closing. That issue is not properly before the Court at this time. This interpretation of the statute was not excepted to by the State, and it also was not included in its grouping of exceptions and assignments of error in the record on appeal.

Under Rule 10 of the Rules of Appellate Procedure, "the scope of review on appeal is confined to a consideration of those exceptions set out and made the basis of assignments of error in the record on appeal." This mandate is subject to various exceptions, none of which are relevant here. The State is as much bound by these Rules as other parties before the courts of this State. Thus, we do not now decide whether G.S. 19-5 does authorize a judge to completely close a business after it has been declared a nuisance because of past exhibitions or sales of obscene material.

We turn now to defendants' assignments of error. At the outset, it is important to note what issues are not before this Court. The trial judge found all the items listed in the inventory, totaling over five hundred different films and magazines, to be legally obscene. Defendants do not contest this finding. Furthermore, from a cursory examination of some of that matter, suffice

it to say that it is, in the words of Chief Justice Burger, "offensive to the point of being nauseous." *Kaplan v. California*, 413 U.S. 115, 117, 37 L.Ed. 2d 492, 496, 93 S.Ct. 2680, 2683 (1973). Thus, we are dealing here not with borderline obscenity but rather with patently hard-core pornography.

Secondly, the defendants do not object to that provision of the court's order restraining them from selling or exhibiting the material before the court. In essence, then, the defendants are attacking only the statute itself and that portion of the final order enjoining them from selling or showing obscene matter not before the court. We now turn to these contentions.

[3] Defendants first assert the trial court erred in denying their motion to dismiss the State's complaint before trial. Although it is somewhat unclear, apparently they argue that Chapter 19 of North Carolina General Statutes is unconstitutional on its face, thereby invalidating any action taken pursuant to it.

The defendants contend that the act in question is unconstitutional *per se* in two respects. First, they assert G.S. 19-5 authorizes the complete closing of a business in violation of the first amendment right of free speech. As stated above, that issue is not being decided by the Court at this time. Assuming, however, that G.S. 19-5 does allow such an illegal action, defendant's position is still untenable.

When only part of a statute is unconstitutional, the constitutional portions will still be given effect as long as they are severable from the invalid provisions. *State v. Smith*, 265 N.C. 173, 143 S.E. 2d 293 (1965); *Clark v. Meyland*, 261 N.C. 140, 134 S.E. 2d 168 (1964). To determine whether the portions are in fact divisible, the courts first see if the portions remaining are capable of being enforced on their own. They also look to legislative intent, particularly to determine whether that body would have enacted the valid provisions if the invalid ones were omitted. *See Hobbs v. Moore County*, 267 N.C. 665, 149 S.E. 2d 1 (1966).

We find from an examination of the statute itself that Chapter 19 is sufficiently complete when this provision of G.S. 19-5, allegedly authorizing the padlocking of a business, is deleted. As that portion relates to only one of many possible remedies a court can adopt in its final order, the statute can be adequately

enforced without it. Furthermore, in G.S. 19-8.3 the Legislature has provided guidance for dealing with its intent in this area:

> "If any section, subsection, sentence, or clause of this Article is adjudged to be unconstitutional or invalid, such adjudication shall not affect the validity of the remaining portion of this Article. It is hereby declared that this Article would have been passed, and each section, sentence, or clause thereof, irrespective of the fact that any one or more sections, subsections, sentences or clauses might be adjudged to be unconstitutional, or for any other reason invalid."

This argument is without merit.

[4] The defendants also contend Chapter 19 is unconstitutional on its face because it places the burden of proving non-obscenity on a defendant in a nuisance action. They claim that G.S. 19-1.1(2), set out above in footnote 1, requires the defendant to prove as an affirmative defense that the material before the court as a whole lacks "serious literary, artistic, political, educational, or scientific value."

In *Miller v. California*, 413 U.S. 15, 37 L.Ed. 2d 419, 93 S.Ct. 2607 (1973), the United States Supreme Court laid down the present constitutional test for obscenity.

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

It is clear that the burden of proving obscenity must be on the State. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L.Ed. 2d 448, 95 S.Ct. 1239 (1975).

It is equally well settled, however, that legislative acts are presumed to be constitutional, and this Court will interpret a statute so as to comport with constitutional mandates unless such a construction is unreasonable. *See, e.g., Painter v. Board of*

Education, 288 N.C. 165, 217 S.E. 2d 650 (1975); *Highway Commission v. Industrial Center*, 263 N.C. 230, 139 S.E. 2d 253 (1964). Therefore, we find that the State is required to prove all the elements of obscenity found in G.S. 19-1.1(2) in a nuisance action, including proof that the material as a whole lacks "serious literary, artistic, political, educational, or scientific value." The trial judge properly denied defendants' motion to dismiss the State's complaint.

[5] The defendants next assert that the judge's final order dealing with illegal lewd matter not before the court enjoined absolutely protected matter. They claim that the order restrained the sale of non-obscene material because it failed to require that the magazines and films enjoined be "patently offensive" in their depiction of the specified sexual conduct.

The *Miller* test of obscenity contains three elements, one of which is that the material depicts defined sexual conduct "in a patently offensive way." A comparison of that test and G.S. 19-1.1 (2) shows that Chapter 19's definition of "lewd matter" almost exactly tracks the Supreme Court's language in *Miller*. In his final order, the trial court enjoined the defendants from showing or selling "illegal lewd matter" which "appeals to the prurient interest in sex," which is "without serious literary, artistic, educational, political or scientific value," and which shows certain sexual conduct. Thus, although the order restated almost all of the definition of obscenity in *Miller* and in G.S. 19-1.1(2), it did not specifically state that the sexual conduct being depicted be "patently offensive."

This minor omission is not fatal to the injunction. Other courts have held it permissible for an injunction to include terms that are adequately defined in applicable statutes. *See, e.g., Gulf King Shrimp Co. v. Wirtz*, 407 F. 2d 508 (5th Cir. 1969); *Wilson Finance Co. v. State*, 342 S.W. 2d 117 (Tex. Civ. App. 1960). In the case before us the trial judge enjoined only the sale of "illegal lewd matter" which is correctly and completely defined in G.S. 19-1.1(2). Thus, the constitutional requirements of *Miller* have been met, and defendants have been restrained from dealing in only legally obscene magazines and films and not ones protected by the first amendment. This assignment of error is overruled.

[6] Defendants' main argument is that the judge's order restraining them from selling or exhibiting obscene matter not actually before the court is unconstitutional. They claim such action constitutes an illegal prior restraint in violation of their first amendment right of free speech.

The United States Supreme Court has repeatedly stated that the first and fourteenth amendments are not absolute. Even the greatly revered right to freedom of speech is subject to various exceptions, one of which is obscenity. "This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment." *Miller v. California*, *supra* at 23, 37 L.Ed. 2d at 430, 93 S.Ct. at 2614. It is equally well settled that the states have a long-recognized legitimate interest in regulating obscenity in the commercial context, which has become big business. *See generally* Cook, The X-Rated Economy, FORBES, Vol. 122, No. 6, Sept. 18, 1978.

> "The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63, 37 L.Ed. 2d 446, 460, 93 S.Ct. 2628, 2638 (1973).

A State can constitutionally attempt to control commercial obscenity through its criminal laws. *Roth v. United States*, 354 U.S. 476, 1 L.Ed. 2d 1498, 77 S.Ct. 1304 (1957). However, that is not the only avenue open to it.

> "We need not linger over the suggestion that something can be drawn out of the Due Process Clause of the Fourteenth Amendment that restricts [a state] to the criminal process in seeking to protect its people against the dissemination of pornography. It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies in combination, is a matter within the legislature's range of choice." *Kingsley*

Books v. Brown, 354 U.S. 436, 441, 1 L.Ed. 2d 1469, 1473-74, 77 S.Ct. 1325, 1327-28 (1957). *See also Times Film Corp. v. Chicago*, 365 U.S. 43, 5 L.Ed. 2d 403, 81 S.Ct. 391 (1961).

Of course, the legislature must choose those means that are within constitutional boundaries.

Defendants have concluded that because it is an injunction they are attacking, that remedy automatically constitutes a prior restraint. We note, however, that in this area prior restraint normally means when allegedly obscene material is seized or preliminarily enjoined before a judicial declaration of obscenity, *see, e.g., Marcus v. Search Warrant*, 367 U.S. 717, 6 L.Ed. 2d 1127, 81 S.Ct. 1708 (1961); *Kingsley Books v. Brown, supra*, or when a person is required to submit material for the approval of a licensing body before it is allowed to be distributed or shown to the public. *See, e.g., Times Film Corp. v. Chicago, supra*; *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 3 L.Ed. 2d 1512, 79 S.Ct. 1362 (1959). In fact, we could find no decision by the United States Supreme Court that struck down an injunction such as this one or that even labelled one a prior restraint.

Assuming, however, that this injunction does fit the definition of a prior restraint, our inquiry as to its legality does not end there. For prior restraints are not *per se* unconstitutional. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 43 L.Ed. 2d 448, 95 S.Ct. 1239 (1975). Rather, the courts must test its validity by its operation in practice, and they have looked to see how the statute differs in effect from a criminal law against selling obscene matter. *Kingsley Books v. Brown, supra.*

In *Kingsley Books* the Supreme Court compared a New York statute, authorizing a preliminary injunction against the distribution of allegedly obscene matter for a short time pending trial, with a criminal obscenity law. In upholding that statute, that Court stated:

> "Criminal enforcement and the proceeding under [the New York statute] interfere with a book's solicitation of the public precisely at the same stage. In each situation the law moves after publication; the book need not in either case have yet passed into the hands of the public. . . . In each case the bookseller is put on notice by the complaint that sale of

> the publication charged with obscenity may in the period before trial subject him to penal consequences. In one case he may suffer fine and imprisonment for violation of the criminal statute, in the other, for disobedience of the temporary injunction. The bookseller may of course stand his ground and confidently believe that in any judicial proceeding the book could not be condemned as obscene, but both modes of procedure provide an effective deterrent against distribution prior to adjudication of the book's content—the threat of penalization." *Id.* at 442-43, 1 L.Ed. 2d at 1475, 77 S.Ct. at 1328-29.

Although we realize that the preliminary injunction in *Kingsley* is quite different from the injunction being scrutinized in this case, the Court's analysis provides us with some guidance. The judge's order here is restricted to legally obscene matter; in fact, it is limited to only a specified portion of what is legally obscene. Thus, the defendants suffer less indecision as to what materials they can deal in under the injunction than they would under a usual criminal obscenity statute. It is true that the defendants may be fined or imprisoned if they violate the injunction, but those same consequences could flow from a violation of the criminal law.

In fact, under a Chapter 19 nuisance proceeding, unlike a prosecution under a criminal law, a defendant gets two chances. Before such an injunction issues, a court must find that a defendant sold illegal lewd matter in the past; however, he is not subject to criminal sanctions until he sells obscene matter again in violation of the court's order. *See* Rendleman, *Civilizing Pornography: The Case For An Exclusive Obscenity Nuisance Statute*, 44 Chi. L. Rev. 509, 556 (1977).

There is no significant difference procedurally in a criminal action for selling obscenity and in a contempt action for violation of an injunction. In both proceedings the defendant can always defend on the ground that the material is not legally obscene. *See McKinney v. Alabama*, 424 U.S. 669, 47 L.Ed. 2d 387, 96 S.Ct. 1189 (1976). The burden is on the State to prove obscenity beyond a reasonable doubt. *See* G.S. 5A-15(f) (Cum. Supp. 1977). Although a defendant is not entitled to a jury trial in the contempt action, the United States Supreme Court has held that a defendant has

no constitutional right to a jury trial in criminal contempt actions if the authorized penalty or the penalty actually imposed does not exceed six months imprisonment. *Taylor v. Hayes*, 418 U.S. 488, 41 L.Ed. 2d 897, 94 S.Ct. 2697 (1974). Under G.S. 19-4, a defendant is subject only to "a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment." Thus, an injunction such as this one is in effect nothing more than a personalized criminal statute against selling certain obscene material that is directed toward the defendants because they sold illegal matter in the past. As the Legislature could have constitutionally imposed the same restrictions on the public in general, it is not an unconstitutional prior restraint.

[7] Although this point has not been raised by any party to this lawsuit, we note that G.S. 19-4 authorizes a judge to "summarily try and punish the offender" for violation of an injunction issued under Chapter 19. While this "summary" action is not defined by the Legislature, we emphasize that the procedural safeguards outlined above must be followed. *See Harris v. United States*, 382 U.S. 162, 15 L.Ed. 2d 240, 86 S.Ct. 352 (1965); *Cooke v. United States*, 267 U.S. 517, 69 L.Ed. 767, 45 S.Ct. 390 (1925).

Although there are provisions for summary criminal contempt proceedings in G.S. 5A-13 and G.S. 5A-14, they apply only to acts of contempt committed near or before a judicial officer which are "likely to interrupt or interfere with matters then before the court." A violation of an order such as this one certainly does not fall within that category. Therefore, the plenary proceedings provided for in G.S. 5A-15 apply to contempt actions following a Chapter 19 injunction.

Defendants strongly assert that this case is controlled by *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S.Ct. 625 (1931). That case concerned a state statute that authorized abatement of certain nuisances, one of which was "a malicious, scandalous and defamatory newspaper." The trial court found the newspaper in question to be a public nuisance, and it permanently enjoined defendants "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title." The United States Supreme Court struck down the in-

junction, declaring that it constituted an invalid prior restraint on defendants' first amendment right to freedom of the press. While there are some analogies between *Near* and this case, we feel that the two are distinguishable in several important respects.

The defendants in *Near* operated a newspaper that chiefly made allegations of misconduct directed toward public officers. The Court, in dealing with the issue of freedom of the press repeatedly emphasized that "[t]hat liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct." *Id.* at 717, 75 L.Ed. at 1368, 51 S.Ct. at 631.

The difference between trying to limit that type of expression and obscenity has been recognized. "[I]t is manifest that society's interest in protecting this type of expression [erotic material] is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. American Mini Theatres*, 427 U.S. 50, 70, 49 L.Ed. 2d 310, 326, 96 S.Ct. 2440, 2452 (1976). We agree with Justice Stevens when he said: "It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment." *Smith v. United States*, 431 U.S. 291, 318-19, 52 L.Ed. 2d 324, 346-47, 97 S.Ct. 1756, 1773 (1977) (Stevens, J., dissenting on other grounds). *See also Kingsley Books v. Brown, supra* at 445, 1 L.Ed. 2d at 1476, 77 S.Ct. at 1330.

It is clear from the *Near* decision itself that the Court did not intend for it to apply to injunctions concerning obscene materials.

> "[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:
> . . . . No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. *On similar grounds, the primary requirements of decency may be enforced against obscene publications.* . . . These limitations are not applicable here." *Near v. Minnesota, supra* at 716, 75 L.Ed. at 1367, 51 S.Ct. at 631. (Emphasis supplied.)

The Minnesota statute in *Near* also authorized an injunction against obscene publications declared to be nuisances. However, the Court specifically limited its holding to striking down clause (b) of the act that dealt with malicious and defamatory newspapers. "The opinion seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance." *Id.* at 737, 75 L.Ed. at 1378, 51 S.Ct. at 638 (Butler, J., dissenting).

The Court in *Near* was also concerned about the lack of specificity in the trial court's injunction, which restrained the defendants from publishing "any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law." The Court noted that "scandalous and defamatory" are broadly defined by law to include publications charging official misconduct. Therefore, if one of the defendants' future editions contained any such allegations, the defendants would then have to prove that the publication is "usual and legitimate," "consistent with the public welfare," and published with "good motives and for justifiable ends" in order not to be held in violation of the order. The Supreme Court recognized that these are vague standards at best.

Our case is different. We have already stated that the burden would be entirely on the State to prove that these defendants had shown or sold illegal lewd matter in violation of the injunction. More importantly, this order is narrowly drawn, and the prohibited conduct is specifically defined.

The defendants assert that the danger here is in self-censorship; they will limit their sale of constitutionally protected matter for fear that they may violate the injunction. The Supreme Court has addressed this issue.

> "The fact that the First Amendment protects some, though not necessarily all, [erotic] material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theater . . . involves the kind of threat to the free market in ideas and expression that justifies the exceptional approach to constitutional adjudication recognized in cases like *Dombrowski v. Pfister*, 380 U.S. 479 [holding that a person can collaterally attack the constitutionality of a criminal law that

chills free speech in the political context]." *Young v. American Mini Theatres, supra* at 61, 49 L.Ed. 2d at 321, 96 S.Ct. at 2448.

We are sensitive to the importance of defendants' claim that their first amendment right to free speech is being chilled by the injunction against future sales of unnamed matter. However, in light of the unquestionably obscene nature of all defendants' films and magazines before the court below, the fact that the defendants are adequately warned of which materials they cannot sell or exhibit by the specifically drawn order, and the procedural safeguards afforded the defendants, we find that the injunction is not an unconstitutional prior restraint.

As to all issues that are properly before this Court, the trial court is in all respects

Affirmed.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

Justice EXUM dissents.

Justice EXUM dissenting.

As the majority opinion notes at the outset, the present case "concerns the statutory construction and constitutionality of Chapter 19 of [the] North Carolina General Statutes." I disagree in part with the majority's handling of both aspects. As to the first, the majority upholds an injunction the breadth of which is not authorized by the statute. As to the second, the procedure upheld here is an unconstitutional prior restraint on the exercise of freedom of speech and the press.

I agree that the "core of the controversy in this case stems from that part of the trial court's order that enjoins defendants from selling or showing obscene matter that is not listed on the inventory," *i.e.*, matter described in the abstract by the statutory definition of obscenity that defendant might acquire in the future. The majority assumes, without stating its reasons therefor, that the trial court was authorized by the statute to enter an order this broad. As I read the statute, it authorizes only an injunction

against future possession or sale of matter before the court and judicially declared to be obscene at the proceeding in which a defendant is adjudged to be maintaining a nuisance.

Chapter 19, which is entitled "Abatement of Nuisances," is not an easy statute to comprehend. Besides obscenity, it deals with places used for purposes of "assignation, prostitution, gambling, illegal possession or sale of intoxicating liquors [and] illegal possession or sale of narcotic drugs . . . ." G.S. 19-1(a). It is, in other words, a general nuisance abatement statute. One of the key methods of abatement it seems to contemplate is the closing of the place where the nuisance is maintained. *See* G.S. 19-2.1, 19-5, 19-6, 19-7. Insofar as these closing provisions might be applied to a place that disseminates printed material or motion pictures, there are, it is conceded, serious constitutional questions. *See State v. A Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P. 2d 760 (1976); *General Corporation v. Sweeton*, 294 Ala. 657, 320 So. 2d 668 (1975).

There are, however, other remedies provided under the statute against one maintaining a nuisance. It is one of these other remedies that is involved here. In addition to the abatement of the nuisance by closing, G.S. 19-2.1 provides for a suit "perpetually to enjoin all persons from maintaining the same, and to enjoin the use of any structure or thing adjudged to be a nuisance under this Chapter . . . ." The statute's primary remedial provisions are set out in G.S. 19-5, as follows:

> "*Content of final judgment and order.*—If the existence of a nuisance is admitted or established in an action as provided for in this Chapter an order of abatement shall be entered as a part of the judgment in the case, *which judgment and order shall perpetually enjoin the defendant and any other person from further maintaining the nuisance at the place complained of, and the defendant from maintaining such nuisance elsewhere within the jurisdiction of this State.* Lewd matter, illegal intoxicating liquors, gambling paraphernalia, or substances proscribed under the North Carolina Controlled Substances Act shall be destroyed and not be sold.

"Such order may also require the effectual closing of the place against its use thereafter for the purpose of conducting any such nuisance.

"The provisions of this Article, relating to the closing of a place with respect to obscene or lewd matter, shall not apply in any order of the court to any theatre or motion picture establishment which does not, in the regular, predominant, and ordinary course of its business, show or demonstrate lewd films or motion pictures, as defined in this Article, but any such establishment may be permanently enjoined from showing such film judicially determined to be obscene hereunder and such film or motion picture shall be destroyed and all proceeds and moneys received therefrom, after the issuance of a preliminary injunction, forfeited." (Emphasis supplied.)

Under this provision the question whether the injunction here is authorized boils down to what is meant by enjoining the defendant or any other person from "further maintaining the nuisance" and from "maintaining such nuisance elsewhere." This language implies a limitation on the scope of injunctive relief to materials before the court at the time of the determination that a nuisance exists. The acts that can be enjoined are "further maintaining *the* nuisance" or "maintaining *such* nuisance elsewhere." The General Assembly has chosen at those two points in this provision to use quite specific language. This language must refer to the particular materials found by the trial court to be "lewd matter" and on which it must have based its determination that a nuisance existed. Thus, a defendant can under the statute be enjoined from restocking the same materials that have once been judicially determined obscene. The statute does not, however, give the court the power to enjoin a defendant from selling or showing other materials that are not before it.

In addition to avoiding a serious constitutional question, *see In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *In re Dairy Farms*, 289 N.C. 456, 223 S.E. 2d 323 (1976), interpreting the statute in this fashion would make it compatible with our criminal obscenity statutes. *See* G.S. 14-190.1 through 14-190.8. Under those statutes, there is provided "an adversary determination of the question of whether books, magazines, motion pictures

or other materials are obscene prior to their seizure or prior to a criminal prosecution relating to such materials." G.S. 14-190.2(a). Thus under our criminal statutes, no one can be prosecuted for selling, showing, distributing or disseminating any material until it has first been determined to be obscene. Where the General Assembly has not spoken more clearly, it is reasonable to assume that it intended this related nuisance statute, which carries with it a possibility of contempt punishment, *see* G.S. 19-4, to follow a similar procedure.

I think the injunction is broader than permitted by the statute and should not be upheld in its entirety. Furthermore the majority's contrary interpretation renders the statute unconstitutional insofar as it permits an injunction against future expression.

The trial judge enjoined defendants from "possessing for exhibition to the public" and "possessing for sale and selling" various kinds of "lewd matter." This "lewd matter" was described generically in the injunction itself in terms of the statutory prohibition. *See* G.S. 19-1.1(2). The injunction thus seeks to proscribe categories of expression rather than any particular film or publication which has been specifically and judicially declared violative of the statute. It prohibits the future possession of unnamed films, magazines, books and papers and subjects defendants to possible fines and imprisonment prescribed in G.S. 19-4 if they should violate it by possessing any of these generically described items which might later be judicially determined in a contempt proceeding to fit within its proscription.

Insofar as the statute authorizes this kind of injunction I believe it and, therefore, the injunction itself contravenes the freedom of speech and freedom of the press clauses of the First Amendment as applied to the states under the Fourteenth Amendment. To me this is the kind of prior restraint against future expression which the United States Supreme Court has consistently and rightly determined to be inconsistent with the guarantees of the First Amendment. The highest courts of at least three other states have found orders virtually identical to the one here to be unconstitutional prior restraints. *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 So. 2d 158, 165-68 (La. 1977); *Mitchem v. Schaub*, 250 So. 2d 883 (Fla. 1971); *New Rivieria*

Arts Theatre v. State, 219 Tenn. 652, 412 S.W. 2d 890 (1967). In addition, in a carefully considered opinion, Judge Franklin T. Dupree, Jr., an able jurist noted for his industry and scholarship, has held that insofar as G.S. 19-5 allows an injunction against distribution of materials not previously adjudged obscene, it is unconstitutional. *Fehlhaber v. State*, 445 F. Supp. 130 (E.D.N.C. 1978). Examination of the relevant constitutional doctrines as applied by the Supreme Court leaves no doubt that these results were correct.

In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), Georgia state prosecutors had filed civil complaints against an Atlanta theater alleging that it was exhibiting two obscene films contrary to a Georgia statute. The complaint prayed that the two films be declared obscene and that the theater be enjoined from exhibiting them. At a non-jury trial, the judge assumed that the films were obscene but ruled that inasmuch as the theater took reasonable precautions against permitting minors to enter and view the films it was constitutionally impermissible to enjoin their further showing. The Georgia Supreme Court reversed. It described the films as "hard core pornography" leaving "little to the imagination" and held that their further exhibition should have been enjoined. *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 347, 185 S.E. 2d 768, 770 (1971). The United States Supreme Court in a 5-4 decision essentially approved the Georgia civil injunction procedure. It remanded the case, however, for reconsideration by the Georgia Supreme Court in light of the new definitions of obscenity contained in *Miller v. California*, 413 U.S. 15 (1973), decided the same day. In approving the use of injunctive action, however, Chief Justice Burger, writing for the majority, was careful to note, 413 U.S. at 55:

> "Here, Georgia imposed no restraint on the exhibition of the films involved in this case until after a full adversary proceeding and a final judicial determination by the Georgia Supreme Court that the materials were constitutionally unprotected. Thus the standards of *Blount v Rizzi*, 400 US 410, 417, 27 L Ed 2d 498, 91 S Ct 423 (1971); *Teitel Film Corp. v Cusack*, 390 US 139, 141-142, 19 L Ed 2d 966, 88 S Ct 754 (1968); *Freedman v Maryland*, 380 US 51, 58-59, 13 L Ed 2d 649, 85 S Ct 734 (1965); and *Kingsley Books, Inc. v. Brown*, supra, at 443-445, 1 L Ed 2d 1469, were met. Cf. *United*

States v Thirty-seven Photographs, 402 US 363, 367-369, 28 L Ed 2d 822, 91 S Ct 1400 (1971) (opinion of White, J.)."

In *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), the Court approved a New York procedure "authorizing the chief executive, or legal officer, of a municipality to invoke a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial to be obscene, and to obtain an order for the seizure, in default of surrender, of the condemned publications." *Id.* at 437. Justice Frankfurter, writing for the majority of five, again, was careful to point out that the procedure under consideration "studiously withholds restraint upon matters not already published and not yet found to be offensive." *Id.* at 445. On this basis he distinguished the procedures then before the Court from those which had been earlier condemned in *Near v. Minnesota*, 283 U.S. 697 (1931).

In *Near v. Minnesota*, the leading case on the constitutionality of injunctions against future expression, the Court had before it a Minnesota statute which provided in pertinent part as follows:

> "Section 1: Any person who . . . shall be engaged in the business of regularly . . . producing, publishing or circulating, having in possession, selling or giving away,
>
> (a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or
>
> (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,
>
> is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided." *Id.* at 702.

The statute further authorized the county attorney or any citizen to maintain an action for the injunction authorized by the statute. A proceeding for an injunction was brought in the Minnesota state courts against Near and other defendants. At trial it was found as a fact that the defendants had published various editions of a periodical known as "The Saturday Press" from 24 September 1927 to 19 November 1927 and that these editions were " 'chiefly devoted to malicious, scandalous and defamatory

articles.' " It was further found that the defendants " 'did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper' " and that such publications constituted a public nuisance. The trial court thereupon enjoined the publication of "The Saturday Press" and perpetually enjoined defendants from publishing " 'any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law.' " *Id.* at 706. The Supreme Court, with Chief Justice Hughes writing for a majority of five, concluded that the injunction was "the essence of censorship" and constituted the kind of prior restraint on expression that was violative of the freedoms of press and speech guaranteed by the First Amendment and made applicable to the states through the Due Process Clause of the Fourteenth Amendment. The Court said in meeting the arguments of the State of Minnesota:

> "Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes.
>
> . . . .
>
> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication." *Id.* at 720, 721-22.

Thus, the Court in *Near* made it clear that the truth or falsity of the charges contained in the particular periodicals under consideration was immaterial to the constitutional question of whether future publications could be enjoined.

Relying on *Near*, the Court in *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), struck down an Illinois state court injunction against " 'passing out pamphlets, leaflets or literature of any kind, and from picketing, anywhere in the city of Westchester, Illinois.' " The trial court found that the persons enjoined had, through the distributions of certain pamphlets, ac-

cused a real estate broker in Westchester, Illinois, of arousing fears of local white residents that Negroes were moving into the area and thereafter exploiting their reactions to bolster his real estate business. The trial court found that the pamphleteers' activities in Westchester had invaded the real estate agent's right of privacy and had caused irreparable harm and that he was without an adequate remedy at law. The Supreme Court in an opinion by Chief Justice Burger struck down the injunction saying:

> "It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v Minnesota*, 283 US 697, 75 L Ed 1357, 51 S Ct 625 (1931), the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000." *Id.* at 418-19.

In *New York Times Co. v. United States*, 403 U.S. 713 (1971), the United States government sought to enjoin the *New York Times* and the *Washington Post* from publishing contents of a classified study entitled "History of U.S. Decision-Making Process on Viet Nam Policy" (the Pentagon papers). District courts for the Southern District of New York and the District of Columbia and the Court of Appeals for the District of Columbia Circuit had refused to issue an injunction against the newspapers. The Court of Appeals for the Second Circuit held, however, that the injunction should issue. The United States Supreme Court in a per curiam opinion concurred in by six justices concluded that the injunction should not issue notwithstanding that in the opinions of the various concurring justices the Pentagon papers, if published, would have "serious impact" on the national security, would "do substantial damage to public interest" and might even constitute a violation of federal criminal law. This case is significant in the area of the permissible limits of restraint on expression in that the very materials sought to be restrained were before the Supreme Court for review. Here, by contrast, the restraint is against materials yet to be seen or even published.

Any restraint against future expression, the Supreme Court has repeatedly said, comes " 'bearing a heavy presumption against its constitutional validity.' " *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), and cases there cited. The reason is that there often is a finely drawn line between protected speech under the First Amendment and that which is not so protected. This is particularly true in the area of obscenity. There are, of course, many items which are clearly on one side or the other of that line. Defendants here concede that all items now before the courts are obscene. Under the statute they can be seized and destroyed. There is no contest in this case as to them. On the other hand there are many forms of expression upon which reasonable persons differ regarding whether they are obscene, or lewd, within the statutory definition of those terms. Examples abound in our literature, cinematic and otherwise.[1] One is found in *Yeager v. Neal*, 26 N.C. App. 741, 217 S.E. 2d 576 (1975). That case concerned the film, "Memories Within Miss Aggie" which the state sought to have declared obscene as that term was defined in a criminal statute, G.S. 14-190.1.[2] At the adversary hearing required by G.S. 14-190.2, over which I, as trial judge

1. Masturbation, homosexuality and sadism are depicted in a recently released film, "Midnight Express," which has nevertheless been critically acclaimed and could hardly be said to lack serious literary, artistic and educational value. *See Newsweek*, 16 October 1978, at 76, 81; *Time*, 16 October 1978, at 111-12; *Vogue*, September 1978, at 62.

Sodomy per anum was graphically depicted in the critically acclaimed film, "Last Tango in Paris." *See Newsweek*, 12 February 1973, at 54-58.

The works of Henry Miller, *Tropic of Capricorn* and *Tropic of Cancer*, were once widely considered obscene, but are now highly regarded as literary pieces. *See* Gordon, *The Mind and Art of Henry Miller* (1967). The same can be said of D. H. Lawrence's *Lady Chatterly's Lover*. *See* Sanders, *D. H. Lawrence: The World of the Five Major Novels*, at 172-205 (1973). *See generally* Rembar, *The End of Obscenity* (1968).

2. The applicable parts of the statute are as follows:

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

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary statewide community standards relating to the depiction or representation of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, educational or scientific value; and

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

(c) Sexual conduct shall be defined as:

(1) Patently offensive representations or descriptions of actual sexual intercourse, normal or perverted, anal or oral;

(2) Patently offensive representations or descriptions of excretion in the context of sexual activity or a lewd exhibition of uncovered genitals, in the context of masturbation or other sexual activity."

presided, the film was shown and various witnesses testified about it. All of the witnesses by reason of training and background possessed some expertise in the field of literary criticism. All felt that the film was clearly a serious literary and artistic work. There was *no* testimony to the contrary. Finding on the evidence presented including the film itself that the film did have serious literary and artistic value, I determined that it could not be declared obscene. The Court of Appeals affirmed on the basis of this finding which was not excepted to by the state although according to a vigorous dissent by Brock, C.J., a member of the panel who also viewed it, they all agreed that "the film depicts in a patently offensive way portrayals of actual sexual intercourse, normal and perverted, anal and oral, and a lewd exhibition of uncovered genitals in the context of masturbation." *Id.* at 745.

The difficulty of defining obscenity in the abstract has long been anathema to legislatures and courts. Some judges have conceded that efforts to do so must ultimately fail.[3] Other judges, however, assert that they know obscenity when they see it.[4] If this is so, then a corollary must be that judges cannot know it *until* they see it. Even if obscenity can be defined in the abstract, it cannot be so enjoined in keeping with the First Amendment. To be dealt with judicially it must first be judicially seen.

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3. *Miller v. California, supra*, 413 U.S. 15, 37 (Douglas, J., dissenting); *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. 49, 73 (Brennan, J., dissenting); *see also Smith v. United States*, 431 U.S. 291, 311 (1977) (Stevens, J., dissenting in a federal criminal obscenity prosecution, sustained by the majority, on the ground that "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Id.* at 316.) The majority opinion, I fear, does not fully represent Justice Stevens' position in this area. He said, *id.* at 318-21:

> "It seems to me ridiculous to assume that no regulation of the *display of sexually oriented material* is permissible unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what *one citizen may communicate to another by appropriate means.*
>
> "I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless." (Emphases supplied.)

4. "I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since Roth and Alberts, that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring.)

Thus the Supreme Court has consistently insisted that states in their efforts to regulate prohibited forms of expression adopt procedures which are sensitive to the constitutional mandate that protected expression be in no wise threatened:

> " '[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. . . . The separation of legitimate from illegitimate speech calls for . . . sensitive tools . . . .' *Speiser v Randall*, 357 US 513, 525, 2 L ed 2d 1460, 1472, 78 S Ct 1332. It follows that, under the Fourteenth Amendment, a State is not free to adopt whatever procedures it pleases for dealing with obscenity as here involved without regard to the possible consequences for constitutionally protected speech." *Marcus v. Property Search Warrant*, 367 U.S. 717, 731 (1961); *accord, Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. 546.

The majority relies on the proposition that an injunction against future expression which, by definition, will be violative of the law is no greater threat to protected speech than a statute which imposes criminal sanctions against one who engages in such expression. Since the United States Supreme Court has approved such criminal sanctions against obscenity, the majority contends, it ought to approve these kinds of injunctions. This argument is an old one. It was made and had to be faced in *Near v. Minnesota*. There the Supreme Court, recognizing that libel could be punished criminally, nevertheless struck down a civil injunction against it. The Court there said, 283 U.S. at 713-14:

> "The liberty deemed to be established was thus described by Blackstone: 'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.' 4 Bl. Com. 151, 152; *see* Storey on the Constitution, §§ 1884, 1889."

The Supreme Court rejected the argument then and has consistently rejected it since. The Court said in *Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. 546, 558-59:

> "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties. Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable."

The reason for this distinction is thus that in a free society restraints on expression not yet uttered are totally antithetical to any notion of free speech largely because of the then uncertainty of what might be said. Once the expression is made it is an accomplished fact upon which it is permissible for courts to act as in other criminal cases. If the expression be illegal those responsible can be held accountable. This notion inheres elsewhere in the law in the familiar doctrine of admittedly uneven application that equity will not enjoin a proposed criminal act on the ground that there is a complete remedy at law if the act is committed. *See Mills v. Cemetery Park Corp.*, 242 N.C. 20, 86 S.E. 2d 893 (1955); *Dare County v. Mater*, 235 N.C. 179, 69 S.E. 2d 244 (1952).

Another distinction is that in a criminal action various procedural safeguards are present, for example, entitlement to a jury trial. Alleged violations of the kind of injunction issued in this case may be tried and punished by the presiding judge.[5]

Furthermore it is well to note again that in North Carolina one may not be criminally prosecuted for dealing in obscene materials unless he deals in material which has first been judicially declared to be obscene in an adversary hearing conducted prior to the criminal prosecution. G.S. 14-190.2. There seems to be no

5. G.S. 19-4 provides:

"*Violation of injunction; punishment.*—In case of the violation of any injunction granted under the provisions of this Chapter, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. A party found guilty of contempt under the provisions of this section shall be punished by a fine of not less than two hundred ($200.00) or more than one thousand dollars ($1,000), or by imprisonment in the county jail not less than three or more than six months, or by both fine and imprisonment."

constitutional requirement for such an adversary proceeding prior to criminal prosecution, *Miller v. California, supra*, 413 U.S. 15, but our General Assembly has deemed it appropriate to provide such protection.

The construction which I feel should be given this legislation does not render the state powerless to deal with the problem of obscenity. The legislature could, if it thinks such action necessary, amend its criminal statutes, G.S. 14-190.1, et seq., so as to eliminate the requirement of an adversary hearing prior to criminal prosecution or provide penalties for the violation thereof which would serve to deter violators. Even under the civil nuisance proceeding as I would interpret it, the remedies against dissemination of obscene material are formidable. Once such materials are located an ex parte judicial order may issue forthwith placing substantial limitations on trafficking in the material. G.S. 19-2.3. If, thereafter, the material is judicially determined or admitted to be obscene it can be confiscated and destroyed. G.S. 19-5. All monies paid in consideration for the sale of obscene material after the ex parte order has issued must be accounted for, and if these monies are thereafter determined to have been paid in consideration of obscene material they may be forfeited to the local government. G.S. 19-6. Even if a defendant, determined to violate these statutes, replenishes his stock with items different from those previously confiscated under prior orders, it would seem that only a few successive confiscations of his stock in a campaign of zealous law enforcement would render his unsavory business so unprofitable that he would have to quit.

For the reasons stated I vote to vacate so much of the trial court's order as seeks to enjoin defendants from dealing in items not yet published or possessed by them.

STATE OF NORTH CAROLINA v. JERRY DOUGLAS PEARCE

No. 96

(Filed 4 January 1979)

1. **Criminal Law § 99.6— court's questioning of witnesses—no expression of opinion**

In a prosecution for second degree rape the trial court's questioning of two witnesses concerning their reluctance to testify did not amount to an expression of opinion as to the credibility of the witnesses.

2. **Criminal Law § 71— use of word "rape" by witnesses—shorthand statement of fact**

Use of the word "rape" by three witnesses in a second degree rape case did not constitute expressions of opinion on a question of law, since the prosecuting witness's use of the word was a shorthand statement of the assault which she had previously described in detail; testimony by the examining physician which included the word was properly admitted to corroborate the prosecuting witness's trial testimony; and use of the word by an officer in explaining why he examined the prosecuting witness's vehicle was not hearsay and in no way connected defendant with the crime charged.

3. **Rape § 4— events following rape—admissibility to show victim's state of mind**

Testimony by a rape victim concerning what occurred after the alleged rape was admissible testimony of the witness's state of mind at that particular time, and no prejudice could result to defendant merely because it was unresponsive.

4. **Criminal Law § 89.2— corroboration of oneself**

It is competent for a witness to corroborate herself by testimony that she had made a statement to another person.

5. **Criminal Law § 128— witness improperly called—no motion to strike—no prejudice**

Where the trial court indicated in the absence of the jury that he would not allow testimony by a proposed witness concerning an alleged assault upon her by defendant, defendant was not entitled to a mistrial when the proposed witness was called and made a short appearance before defendant objected, the jury was excused, and no explanation was made to the jury concerning the witness, since defense counsel did not request an instruction to disregard the testimony or make a motion to strike, and the only testimony given by the witness was a statement of her name and age.

6. **Criminal Law §§ 89.2; 95.1— corroborative evidence—no request for restrictive instruction**

Defendant's contention that the trial court erred in failing to give a restrictive instruction at the time corroborative evidence was admitted and to instruct properly on corroborative evidence in the charge is without merit since the defendant interposed only general objections to corroborative

evidence and made no request for instructions on corroborative evidence; nevertheless, the court, although not required to do so, did properly caution the jury that certain evidence was to be considered only for corroborative purposes if the jury in fact found that it was corroborative.

7. **Criminal Law § 77.2— defendant's exculpatory statement to investigating officer—inadmissibility**

In a prosecution for second degree rape, the trial court did not err in excluding from evidence a statement made by defendant to the investigating officer that he had not had sexual intercourse with the prosecuting witness since such statement was not part of the *res gestae*, was not admissible for purposes of corroboration as defendant did not testify, and constituted a self-serving declaration.

8. **Rape § 5— second degree rape—threatened use of force—lack of consent—sufficiency of evidence**

Evidence was sufficient in a prosecution for second degree rape to show use or threatened use of force and lack of consent where the testimony of the prosecuting witness was that she scratched and fought with defendant to keep him away, that he knocked her head against the car window, choked her, and threatened to kill her if she tried to get away.

9. **Criminal Law § 111— written jury instructions—procedure not erroneous**

Although an oral charge is sufficient and the procedure of submitting to the jury envelopes containing written elements of the separate offenses submitted is usually unnecessary, there was no prejudicial error in the procedure as used in this case; moreover, the interchangeable use of the words "elements" and "facts" in the jury charge did not mislead the jury or affect the verdict returned.

10. **Criminal Law § 114.1— jury instructions—recapitulation of evidence—more time spent on State's evidence—no expression of opinion**

The trial court did not express an opinion in his charge in violation of G.S. 1-180 by devoting more time to recapitulating the State's evidence than defendant's evidence, and the trial judge did not err in failing to review all the evidence favorable to defendant solicited on cross-examination; moreover, use of the words "molesting," "rape" and "assaulted" by the court in his recapitulation of the State's evidence did not amount to an expression of opinion.

11. **Rape § 6.1— second degree rape charged—incorrect instruction on assault with intent to commit rape—no prejudicial error**

In a second degree rape case where the trial court instructed on the lesser included offense of assault with intent to commit rape, the court's error in failing to instruct that in order to convict on the lesser offense, the jury must find that defendant intended to accomplish his purpose notwithstanding any resistance on the part of the victim was not prejudicial to defendant since it was not necessary to submit the lesser included offense, as there was no evidence to support such an instruction, and since the instruction given was more favorable to defendant than a correct instruction would have been and made it easier for the jury to convict on the lesser included offense.

State v. Pearce

12. Criminal Law § 138.2— second degree rape—fifty year sentence—judge's comments before sentencing—no cruel and unusual punishment

A vacated sentence of life imprisonment and the sentence of fifty years finally imposed upon defendant after conviction of second degree rape were within the limits fixed by statute and could not be considered as cruel and unusual punishment in the constitutional sense; moreover, the trial court's statements made prior to sentencing about a pending charge against defendant and about the seriousness of the crime of rape merely reflected his information concerning the habits and propensities of defendant and were not prejudicial to defendant.

Justice BROCK took no part in the consideration or decision of this case.

APPEAL by defendant from the decision of the Court of Appeals (in an unpublished opinion) finding no error in the trial before *Godwin, J.*, at the 25 July 1977 Session of WAKE County Superior Court.

Defendant was charged in a bill of indictment, proper in form, with second degree rape. He entered a plea of not guilty.

The State's evidence tended to show that the prosecuting witness, Brenda Trevathan, and a friend gave defendant a ride to Three Flags, a "foosball" parlor in Raleigh, on 13 March 1977. Thereafter, the friend left, and defendant told Miss Trevathan he needed a ride home. Prior to the night in question, Miss Trevathan had seen defendant only once before, on 11 March 1977, when she had given him a ride to an area near his home. On 13 March 1977, she agreed to take defendant home. She was not sure where he lived, and he directed her to a dirt road in an area unfamiliar to her. Defendant began fondling her, and she wrestled with him and told him to get out of the car which he refused to do. He would not let her out of the car, and he struck her repeatedly with his elbow knocking her head against the window. Thereafter, he made her get out of the car and take her clothes off whereupon he had sexual intercourse with her by force and against her will.

Defendant's only witness was a pathologist who testified that all of the tests of the prosecuting witness were negative. On cross-examination, the prosecuting witness testified that she was a virgin, and the examining physician found that her hymenal ring was intact.

The jury returned a verdict of guilty of second degree rape. Judge Godwin sentenced defendant to life imprisonment but the next day changed the sentence to a term of 50 years.

Defendant appealed to the Court of Appeals which found "no error." We allowed defendant's petition for discretionary review on 24 August 1978.

Rufus L. Edmisten, Attorney General, by Rudolph A. Ashton, Assistant Attorney General, and Leigh Emerson Koman, Associate Attorney, for the State.

Carter G. Mackie for defendant appellant.

BRANCH, Justice.

[1] Defendant contends that the trial judge's questioning of two witnesses amounted to an expression of opinion as to the credibility of the witnesses.

When the prosecuting witness expressed a reluctance to testify concerning some of the acts done by defendant, Judge Godwin inquired if she would be able to proceed if certain persons were removed from the courtroom. The witness indicated that she did not want to testify in the presence of defendant but was advised by the court that it would be necessary for defendant to be present. The judge then ordered the questioning be continued.

The other instance pointed to by this assignment of error occurred when the district attorney was questioning the witness Terrell concerning statements made to her by the prosecuting witness. The witness Terrell stated that she did not know whether she could give such testimony. At that point, the court questioned the witness as to whether she was embarrassed or whether she did not recall the statements made. Mrs. Terrell indicated that she could not remember and that she would also be embarrassed to repeat it. The court thereupon ordered that examination of the witness be continued.

It is settled that a trial judge may not, in any state of the trial, intimate any opinion which tends to discredit the accused or his cause. *State v. Cousin*, 292 N.C. 461, 233 S.E. 2d 554 (1977); *State v. Frazier*, 278 N.C. 458, 180 S.E. 2d 128 (1971). It is equally

well recognized in this jurisdiction that in the exercise of his duty to supervise and control the course of a trial, the trial judge may interrogate a witness for the purpose of developing a relevant fact or clarifying a witness's testimony in order to ensure justice and aid the jury in their search for a verdict that speaks the truth. *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976); *State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). In instant case, Judge Godwin properly questioned the witnesses Terrell and Trevathan concerning their reluctance to testify and in so doing did not express or intimate any opinion prejudicial to defendant or his case.

[2] Defendant's assignment of error number two is as follows:

> Did the court err in admitting testimony which was conclusionary and invaded the province of the jury and in failing to properly instruct about such testimony?

Under this assignment of error, defendant first argues that the use of the word "rape" by the prosecuting witness, Dr. Thomas Morton, and Officer Battle was improperly admitted because it constituted an expression of opinion which was the ultimate fact for the jury to determine.

The prosecuting witness testified that she told Dr. Morton that, "I had gotten raped." She also told Deputy Sheriff Glennon that her car "had been stolen and the guy that stole my car raped me."

Dr. Morton testified that Brenda told him that a recent acquaintance asked her to take him home, but she was directed to a secluded area "where she was raped." Defense counsel on each occasion objected to the use of the word "rape" and moved to strike.

In the recent case of *State v. Goss*, 293 N.C. 147, 235 S.E. 2d 844 (1977), this Court, speaking through Exum, J., stated:

> In *State v. Vinson*, 287 N.C. 326, 215 S.E. 2d 60 (1975), *death sentence vacated*, 96 S.Ct. 3204 (1976), we held the use of the word "rape" by a witness did not constitute an opinion on a question of law. The same issue was presented in *State v. Sneeden*, 274 N.C. 498, 501, 164 S.E. 2d 190, 193 (1968), where we held that the victim's statement that "defendant

was in the act of raping her was merely her way of saying that he was having intercourse with her. She was not expressing her opinion that she had been raped. Rather, she was stating in shorthand fashion her version of the events . . . ." Joyce Johnson testified, "When I say he started raping me, I mean he got on top of me and he started having sexual intercourse with me and I begged him to leave me alone and to get off." She also testified that "on both of these occasions he penetrated me." Her use of the term "rape" was clearly a convenient shorthand term, amply defined by the balance of her testimony. This assignment is overruled.

By his fourth assignment of error, defendant claims the court erred in allowing the repetition by witness Barry Wood of Joyce Johnson's pre-trial statement in corroboration of her trial testimony on grounds that the statement contained hearsay and conclusory declarations. Defendant's objections to the use of the word "rape" in this statement we have already answered. . . .

In the case *sub judice*, the word "rape" was used by the prosecuting witness upon a background of testimony in which she had made a detailed statement of the actual assault upon her. The use of the word "rape" was obviously a "shorthand statement" of the assault which she had previously described in detail. Also, as in *Goss*, testimony by Dr. Morton which included use of the word "rape" was properly admitted since it was offered purely for the purpose of corroborating the prosecuting witness's trial testimony.

We turn to defendant's contention that the failure of the trial judge to strike the testimony of Officer Battle was prejudicial error. Officer Battle testified that, "I was requested by Deputy Smith to process the vehicle in reference to a larceny of auto and also in reference to a rape that probably occurred in the vehicle."

[3] This testimony is not subject to the objection that it was hearsay. It was not offered to prove the truth of the matter stated but merely to show why the officer examined the automobile. *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975). Further, this testimony could not have prejudiced defendant for it in no way connected defendant with the charged crime. Finally, under this assignment of error, we consider defendant's argument

that the following testimony was unresponsive and constituted an impermissible expression of opinion. After the prosecuting witness had testified fully concerning the act of rape, she testified concerning what occurred after the alleged rape:

> I had my clothes on then and he told me to take my pants off and pull my pants down, not all the way off, but pull them down and I hesitated and he told me not to hesitate.
>
> Q. Do you recall exactly how he said it?
>
> A. No sir, I just—I felt the harm was already done.
>
> MR. MACKIE: OBJECTION, motion to strike.
>
> A. Well it was.
>
> MR. MACKIE: OBJECT to that specifically.
>
> COURT: OVERRULED, OVERRULED: motion is denied.

This evidence was admissible testimony of the witness's state of mind at that particular time. *McRae v. Malloy*, 93 N.C. 154 (1885). Since the answer was relevant and admissible, no prejudice could result to defendant merely because it was unresponsive. *State v. Ferguson*, 280 N.C. 95, 185 S.E. 2d 119 (1971).

This assignment of error is overruled.

[4] Defendant next contends that the trial court erred in admitting "self-corroborating" testimony of the prosecuting witness and in failing to immediately instruct the jury about such evidence. During direct examination of the prosecuting witness, the district attorney asked if she had given a statement to a deputy sheriff and indicated that such testimony would be offered for purposes of corroboration. Judge Godwin ruled that the witness was not permitted to corroborate herself. After a recess, the district attorney asked the witness what she had told the deputy, and she was allowed to respond over defendant's objection. It is competent for a witness to corroborate herself by testifying that she had made a statement to another person. *State v. Lentz*, 270 N.C. 122, 153 S.E. 2d 864 (1967), *cert. denied*, 389 U.S. 866. The later admission of this testimony, at most, was repetitive, and we discern no resulting prejudice. Furthermore, where, as here, defendant does not specifically request an instruction restricting

the purpose of corroborative evidence, its admission is not assignable as error. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958; *cert. denied*, 410 U.S. 987.

[5] Defendant contends that the trial court erred in denying defendant's motion for mistrial after the appearance and short testimony of an "unexplained" witness. The prosecuting witness had testified that defendant did not call her by her name, Brenda, on the night in question, but rather called her Barbara. Thereafter, the district attorney informed Judge Godwin and defendant's attorney, in the jury's absence, that he intended to call Barbara Pearce as a witness. Upon learning that the proposed witness would testify about an alleged assault upon her by defendant, Judge Godwin indicated that he would not allow such testimony. Later in the trial, Barbara Pearce was called as a witness, and the following exchange took place:

DIRECT EXAMINATION by Mr. Dombalis:

Q. Would you tell the court your name please?

A. Barbara Louise Pearce.

Q. How old are you Barbara?

A. Eighteen years old.

Q. How old were you on March 11, 1977?

A. Eighteen years old.

Q. Do you know the defendant, Jerry Pearce?

MR. MACKIE: Now I OBJECT. . . .

At this point, it was brought to the court's attention that this witness was the subject of the earlier conference. The jury was excused, the witness was allowed to testify on voir dire, and the trial court ruled that the evidence would not be admitted. Defendant then made a motion for mistrial based on possible speculation in which the jury might engage concerning the identity of the witness. The motion for mistrial was overruled. It is well settled that a motion for mistrial in a non-capital case is addressed to the discretion of the trial court, and his ruling thereon is not reviewable without a showing of gross abuse of discretion. *State v. Daye*, 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Battle*, 267

N.C. 513, 148 S.E. 2d 599 (1966). Here we find no abuse of discretion. Moreover, we find no merit in defendant's contention that the trial court should have instructed the jury to disregard the witness's testimony. Defense counsel did not request an instruction or make a motion to strike. Further, the only testimony given by the witness was a statement of her name and age. Under the circumstances, we see no possible prejudice to defendant resulting from this testimony or any need for an instruction to disregard it.

[6] Defendant assigns as error the failure of the trial judge to give a restrictive instruction at the time corroborative evidence was admitted and to properly instruct on corroborative evidence in the charge.

When corroborative evidence is offered in the nature of prior "consistent statements" and there is a request that the evidence be admitted only for that restricted purpose, the trial judge should instruct the jury that such evidence is admitted not as substantive evidence of the facts stated but solely for the purpose of affirming the witness's credibility if the jury finds that the statement was made and that it was consistent with the witness's trial testimony. 1 Stansbury's North Carolina Evidence (Brandis Rev.), *Witnesses*, Section 52, at 150-151. On the other hand, when there is only a general objection or no objection, the admission of such evidence will not be held to constitute reversible error. *State v. Sawyer*, 283 N.C. 289, 196 S.E. 2d 250 (1973); *State v. Bryant, supra.* When testimony is admitted in corroboration, it will not be ground for exception that the judge fails in his charge to instruct upon the nature of such evidence unless there is a prayer for such instruction. *State v. Ham*, 224 N.C. 128, 29 S.E. 2d 449 (1944); *State v. Johnson*, 218 N.C. 604, 12 S.E. 2d 278 (1940). In the case *sub judice*, when corroborative evidence was first offered by the State upon defense counsel's *general* objection, Judge Godwin instructed:

> The witness may answer the question but I advise you ladies and gentlemen now, that you may consider whatever her answer is, only for the purposes of corroborating testimony already given to you by the witness Brenda Trevathan. You may not consider her response as substantive evidence. You may not consider her response as cor-

roborative of Miss Trevathan unless you find as a fact that it does corroborate her testimony. If you find that part of her response does corroborate and part does not corroborate, you may only consider that part of her response which is corroborative. . . .

This instruction was adequate.

During the examination of Deputy Sheriff Glennon, the State offered evidence through him of a prior consistent statement made by the prosecuting witness. Defense counsel interposed a *general* objection. Again, although not required to do so, Judge Godwin cautioned the jury that this evidence was only to be considered as corroborative evidence. On redirect examination of the same witness, the district attorney requested the witness to read a statement previously given to the officer by the victim. At that point, the record shows:

MR. MACKIE: OBJECTION, except to a limited purpose only.

COURT: The objection as stated is sustained. You ladies and gentlemen may consider the response to the question now put to the witness as corroborative of testimony already given to you by the witness Trevathan. You may not consider it for any other purpose. Court has already defined for you the manner in which you may consider corroborative testimony.

Although the last cautionary instruction was not complete, it clearly told the jury not to consider the evidence for any purpose except in corroboration of the prosecuting witness. This admonition in connection with the court's reference to the full charge sufficiently restricted the purpose of this testimony. Further, we see no merit in defendant's contention that in his charge to the jury the trial judge committed error in the following statement concerning corroborative evidence:

You will recall that some of the evidence has been received under limitation, under restriction and when you come to consider such evidence you must do so within the limitation laid down for you at the time it was received.

There was no duty on the part of the trial judge to charge on corroborative evidence since defendant did not request such an instruction.

[7] Defendant assigns as error the trial court's exclusion from evidence of a statement made by the defendant to the investigating officer. The officer was asked on cross-examination if defendant had denied having sexual intercourse with the prosecuting witness. The district attorney's objection was sustained, and the record indicates that, if allowed to answer, the officer would have testified that defendant did deny having sexual intercourse with the prosecuting witness. Such statement was not part of the *res gestae* nor was it admissible for purposes of corroboration as defendant did not testify. Thus, it was properly excluded as a self-serving declaration. *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972); *State v. Tippett*, 270 N.C. 588, 155 S.E. 2d 269 (1967).

[8] Defendant contends that the trial court erred in denying his motions for nonsuit and directed verdict. He argues that the evidence presented was not sufficient to show use or threatened use of force or lack of consent. The prosecuting witness testified that she scratched and fought with defendant to keep him away, that he knocked her head against the window, choked her, and threatened to kill her if she tried to get away. Certainly, this uncontradicted evidence, when considered in the light most favorable to the State, as we must do, is sufficient to overcome defendant's motion for nonsuit and directed verdict.

[9] Defendant assigns as error the procedure used by the trial judge in delivering to the jury envelopes containing elements of the offenses to be used during its deliberation and in interchangeably using the words "elements" and "facts" in the charge.

In *State v. Frank*, 284 N.C. 137, 200 S.E. 2d 169 (1973), we approved, without *requiring*, the procedure of submitting to the jury envelopes containing written elements of the separate offenses submitted. Although we are of the opinion that an oral charge is sufficient and the envelope procedure is usually unnecessary, we find no prejudicial error in the procedure as used in this case. Further, we agree with defense counsel's supposition that his objection to the isolated use of the words "elements" and "facts" was based on mere semantics. In our opinion, the inter-

changeable use of these words in the charge did not mislead the jury or affect the verdict returned.

[10] Defendant contends that in the recapitulation of the evidence, the trial judge expressed an opinion in violation of G.S. 1-180 by his choice of language and by prejudicially arraying and imbalancing the evidence. Judge Godwin made clear to the jury that, "[n]o attempt will be made to recall or summarize all of the evidence that has been presented." More time was required for summary of the State's evidence than for defendant's simply because the State presented more evidence. Defendant offered only one witness, and his testimony was brief. The trial judge did not err in failing to review all the evidence favorable to defendant solicited on cross-examination, as the law does not require recapitulation of all of the evidence in the charge. *State v. Looney*, 294 N.C. 1, 240 S.E. 2d 612 (1978).

Defendant also complains that the trial judge expressed an opinion by using the words "molesting," "rape," and "assaulted" in his recapitulation of the State's evidence. The law has never required verbatim recitation of the evidence by the court. *State v. Goss, supra; State v. Jones*, 97 N.C. 469, 1 S.E. 680 (1887). The record indicates that the prosecuting witness used the word "rape" several times and that the words "molesting" and "assaulted" as used in the charge fairly summarized the pertinent portions of her testimony. We further note that defendant did not bring to the trial court's attention any of the alleged errors in the recapitulation of the evidence, of which he now complains. This assignment of error is overruled.

[11] Defendant assigns as error the failure of the trial court to correctly instruct on the lesser included offense of assault with intent to commit rape.

A defendant is entitled to have the different permissible verdicts arising on the evidence presented to the jury under proper instructions, and error in failing to submit the lesser included offense is not cured by a verdict of guilty of the charged crime because it cannot be known whether the jury would have convicted on the lesser crime if it had been correctly submitted. However, this principle applies only when there is evidence of the crime of lesser degree. *State v. Thacker*, 281 N.C. 447, 189 S.E. 2d 145 (1972); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971);

State v. Riera, 276 N.C. 361, 172 S.E. 2d 535 (1970); *State v. Davis*, 242 N.C. 476, 87 S.E. 2d 906 (1955).

In all of the above-cited cases, the Court considered cases in which the lesser included offense was *not* submitted. Here the trial judge submitted the lesser included offense upon this instruction:

> . . . I instruct you that if you find from the evidence and beyond a reasonable doubt;
>
> 1) That the defendant assaulted Brenda Trevathan, that is he intentionally put his hands on her private parts and on her breasts without her consent; and 2) that at the time, the defendant intended to have sexual intercourse with her, Brenda Trevathan, I say, if you find those facts from the evidence and beyond a reasonable doubt, it would be your duty to return a verdict of guilty of assault with the intent to commit rape.

We agree with defendant's contention that the instructions on the lesser included offense of assault with intent to commit rape was erroneous. In order to convict a defendant of the crime of assault with intent to commit rape, the State must not only prove an assault but that defendant intended to gratify his passion on the person of the woman, and that he intended to do so, at all events, *notwithstanding any resistance on her part. State v. Gammons*, 260 N.C. 753, 133 S.E. 2d 649 (1963). *See also, State v. Kiziah*, 217 N.C. 399, 8 S.E. 2d 474 (1940). The error in Judge Godwin's charge was his failure to instruct that in order to convict on the offense of assault with intent to commit rape, the jury must find that defendant intended to accomplish his purpose "notwithstanding any resistance on her part."

Rape is 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). The terms "carnal knowledge" and "sexual intercourse" are synonymous, and there is "carnal knowledge" when there is the slightest penetration of the sexual organ of a female person by the sexual organ of a male person. *State v. Murry*, 277 N.C. 197, 176 S.E. 2d 738 (1970); *State v. Jones*, 249 N.C. 134, 105 S.E. 2d 513 (1958). Here there was plenary evidence from the victim that her sexual organ was penetrated. Defendant did not testify

but offered the testimony of Dr. Dewey H. Pate, an expert in pathology, who testified that he made tests for the presence of sperm or an enzyme called acid phosphatase which is present when male ejaculum is present. His test did not disclose the presence of sperm or acid phosphatase in the victim's vagina. However, he testified that, "It is possible for the male organ to penetrate a female organ without either of these particular substances appearing in the female vagina."

Defendant also apparently relied upon the testimony of the State's witness Dr. Thomas Morton, an expert in general medicine, who testified that he examined the prosecuting witness on 14 March 1977 and found her hymen to be intact and found no evidence of trauma in the vagina. However, he also stated:

> It is possible that something, in particular a male organ, could have penetrated her vagina, but I think that what I saw, the penis could have penetrated the hymen and that would also be consistent with what I saw.

Thus, the medical testimony is not inconsistent with the victim's positive testimony that defendant had sexual intercourse with her by force and against her will. Therefore, it was not necessary to submit the lesser included offense because there was no evidence to support such an instruction. However, since the trial judge submitted the lesser included offense, we must decide whether the error in that instruction was prejudicial to defendant. We think not. The vice in failing to submit a lesser included offense when there is evidence to support a conviction of a lesser crime is that the jury might well have found the accused to be guilty of the lesser offense rather than the greater. Thus, in this case, the trial judge gave defendant a more favorable instruction than the evidence warranted. Further, the court's failure to charge that defendant intended to accomplish his purpose "notwithstanding any resistance on her part" would have made it easier for the jury to convict on the lesser included offense.

Defendant contends that the trial court erred in denying his motions for a new trial for errors committed and to set aside the verdict as being contrary to the weight of the evidence. These motions are addressed to the discretion of the trial court and refusal to grant them is not reviewable in the absence of abuse of discretion. *State v. McKenna*, 289 N.C. 668, 224 S.E. 2d 537 (1976),

death sentence vacated, 429 U.S. 912; *State v. Vick*, 287 N.C. 37, 213 S.E. 2d 335 (1975); *cert. dismissed*, 423 U.S. 918; *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974). In instant case, we find no abuse of discretion in the trial court's denial of defendant's motions.

[12] Finally, defendant takes the position that the sentence imposed by Judge Godwin was based on a mistake of law, was cruel and unusual punishment and that the trial judge grossly abused his discretion in the imposition of the sentence.

Upon return of the verdict and after hearing arguments of counsel, the court stated:

> A few short months ago this man could be facing the penalty of death for the crime which he has committed. I can't help but view the crime of rape as equally as serious as it has ever been. The penalty has been modified, but the crime is equally as serious as it has been. If this young man had been at home with his wife and child he wouldn't be standing here convicted of rape today, nor would he have pending in this court charges of an assault on a female. On each of those occasions he appears to have been at a place that was frequented primarily by younger people and people who did not have their families at home wondering where they were.

The court then entered judgment imposing a sentence of life imprisonment on the verdict of second degree rape. On the next day, the court ordered that judgment stricken and imposed a sentence of fifty years imprisonment.

G.S. 14-21, effective 8 April 1974, in pertinent part provides:

> (2) Second-Degree Rape—Any other offense of rape defined in this section shall be a lesser-included offense of rape in the first degree and shall be punished by imprisonment in the State's prison for life, or for a term of years, in the discretion of the court.

Both the vacated sentence and the sentence finally imposed were within the limits fixed by the statute and could not be considered as cruel and unusual punishment in the constitutional sense. *State v. Cameron*, 284 N.C. 165, 200 S.E. 2d 186 (1973), *cert.*

denied, 418 U.S. 905; *State v. Bruce*, 268 N.C. 174, 150 S.E. 2d 216 (1966). Nevertheless, defendant, relying on *State v. Snowden*, 26 N.C. App. 45, 215 S.E. 2d 157 (1975), and *State v. Swinney*, 271 N.C. 130, 155 S.E. 2d 545 (1967), argues that Judge Godwin considered matters extraneous to the record and not embraced in the indictment.

In *Snowden*, the trial court imposed sentence apparently because of his dissatisfaction with the length of time usually served on sentences given by the courts and his assumption that prisoners are automatically released on parole after serving one-fourth of their sentences.

In *Swinney*, this Court concluded from the record and reasons stated by the presiding judge that he punished defendant, not for the crime of involuntary manslaughter of which she stood convicted but because of a party held in the defendant's home on the night of the killing at which whites and Negroes danced together and were served whiskey and beer. In a long statement prior to sentencing, the trial judge never mentioned the crime of manslaughter of which defendant was convicted but spoke at length concerning the party, which was over at the time of the killing. We quote an example of the trial judge's pre-sentencing statement:

> There is no doubt in my mind about it, that these were white and "negroes" (Negroes) in a private home, drinking liquor and dancing. There is evidence in this case that the defendant was dancing with "negroes" (Negroes) and drinking liquor in her home. I want you to know that that's what breeds this kind of trouble. That this is what breeds this kind of trouble just exactly and just as long as I am judge sitting on the bench and tolerate that kind of thing in the community, there will be more crime of every sort and I'll tell you if I didn't punish this woman in this case, that I would be derelict in my duty. . . .

Snowden and *Swinney* differ from instant case in that the sentences in those cases were given and based upon personal views of the judges that had no real connection with the trial.

In this jurisdiction, it is recognized that in pronouncing sentences the court may inquire into the character, habits and

propensities and criminal record of the person to be sentenced before pronouncing judgment. *State v. Cooper*, 238 N.C. 241, 77 S.E. 2d 695 (1953); *State v. Beavers*, 188 N.C. 595, 125 S.E. 258 (1924).

Although heard before verdict, there was sworn testimony before the trial judge in this case that defendant, a married man, had previously assaulted another 18 year old girl at or near an establishment frequented by young people. Thus, in our opinion, the statement made by Judge Godwin prior to sentencing merely reflected his information concerning the habits and propensities of defendant. We are of the opinion that the language used by Judge Godwin does not indicate that the sentence imposed upon defendant was because of the past acts or based upon his personal opinion on matters not connected with the trial. Neither can we see any prejudice to defendant with regard to the court's stated misapprehension as to the former penalty for second degree rape. Obviously, the trial judge referred to the crime of rape before it was divided into degrees by the General Assembly.

The trial judge has broad discretion in imposing sentences. *State v. Fleming*, 202 N.C. 512, 163 S.E. 453 (1932). Under the circumstances of this case, we are unable to find any abuse of discretion on the part of the trial judge in the sentencing procedure.

Our examination of this record discloses no error so prejudicial as to warrant disturbing the verdict returned or the judgment entered.

Affirmed.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. STEVEN CRAIG WILSON

No. 38

(Filed 4 January 1979)

1. **Criminal Law § 66.8— taking of defendant's photograph—"evidentiary use"**

Defendant's contention that a photograph taken prior to his arrest and used in a pretrial photographic identification procedure was illegally taken in contravention of the provisions of G.S. 15A-502 is without merit, since the photograph under consideration was taken and used for an "evidentiary use" as provided in the statute.

2. **Criminal Law §§ 66.8, 66.16— photographing of defendant—independent origin of in-court identification**

The taking of defendant's photograph prior to his arrest was not impermissible and illegal so as to taint in-court identification testimony where there was ample probable cause to arrest defendant on the charge of rape; he voluntarily accompanied officers to the police station where he was advised of his *Miranda* rights and cited for a minor traffic violation; he was told on two occasions prior to being photographed that the police were investigating a sexual assault and that he and his automobile fit the description of the suspect furnished by the victim; and there was evidence from which it could be inferred that defendant consented to have his photograph taken. Even if the taking of defendant's photograph prior to trial was impermissible and illegal, the in-court testimony was nevertheless properly admitted since such testimony was of independent origin based on what the witnesses saw on the day of the alleged crime.

3. **Constitutional Law § 29— photographing of defendant—absence of girlfriend—no denial of constitutional rights**

Defendant's contention that the court erred in admitting certain evidence because it was obtained in violation of his constitutional rights as a result, among other things, of his being illegally photographed and of the denial of his request for the presence of his girlfriend after he had accompanied officers to the police station but before he was placed under arrest is without merit, since defendant was not entitled to the assistance of counsel at the photographing session, much less to the presence of his girlfriend, and the absence of the girlfriend could not be attributed to any fault of the police officers who made every reasonable effort to accommodate defendant's wishes to have her present.

4. **Rape § 11— penetration—sufficiency of evidence**

In a prosecution for rape there was plenary testimony by the victim as well as medical testimony from which the jury could reasonably infer that the victim was penetrated.

5. **Criminal Law § 26.5; Kidnapping § 1— kidnapping and rape—transporting victim six blocks—separate offenses—no double jeopardy**

Defendant was not subjected to double jeopardy when he was convicted of kidnapping and rape arising out of one transaction where the victim was by

trick enticed into defendant's automobile and transported about six blocks away where, by force and by threat of the use of a knife, she was raped; during a period of about 45 minutes the victim was under the complete dominion and control of defendant; the restraint accompanying the rape was not an inherent, inevitable feature of the kidnapping; and the kidnapping was thus a separate, complete act independent of the later committed crime of rape.

6. Constitutional Law § 28; Rape § 8— statutory rape—gender based statute—no violation of equal protection clause

Defendant's contention that G.S. 14-21(1)(a), providing the death penalty for rape of a virtuous female child under the age of 12 by a person over the age of 16, is unconstitutional because it is a gender based criminal law violative of the equal protection clause of the Fourteenth Amendment is without merit since the protection of young females from sexual intercourse and the concomitant potential for physical injury is a legitimate legislative concern, and, for physiological as well as sociological reasons, there is no need by males for protection against females from rape which would be sufficient to demand legislative attention.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

APPEAL by defendant from *Barbee, S.J.*, 9 January 1978 Session of LENOIR Superior Court.

Defendant was charged in separate bills of indictment, proper in form, with kidnapping and rape. The indictments were consolidate for trial.

The State offered evidence tending to show that on 11 September 1977, defendant fraudulently enticed Tanya Joyce Suggs [Tanya], aged 9, to enter his automobile and then transported her to the Kinston High School grounds where by use of a knife and force he had sexual intercourse with her. In addition to the evidence given by the victim, there was eyewitness testimony by Ethel Jones to the effect that on 11 September 1977 she saw Tanya Joyce Suggs enter a green Buick automobile which was being operated by defendant. Police officers testified in corroboration of the witnesses Suggs and Jones concerning prior statements made by the witnesses to them.

Dr. Rudolph I. Mintz, Jr., who was qualified as a medical expert in gynecology, testified that he examined Tanya Suggs on 11 September 1977 and found lacerations and bruises around the entrance to the vagina. Spermatozoa was also found in the vagina.

The State offered other cumulative and corroborative evidence.

Defendant did not testify but offered evidence in the nature of an alibi. Other evidence pertinent to decision will be stated in our consideration of defendant's assignments of error.

The jury returned verdicts of guilty of first degree rape and guilty of kidnapping. Defendant appealed from judgments sentencing him to a life sentence on the first degree rape charge and a concurrent life sentence on the kidnapping charge.

Rufus L. Edmisten, Attorney General, by Rudolph A. Ashton III, Associate Attorney, for the State.

James D. Llewellyn for defendant appellant.

BRANCH, Justice.

Defendant assigns as error the denial of his motions to suppress the in-court identification testimony of Tanya Joyce Suggs and Ethel Jones. We are not concerned with evidence of the actual pretrial photographic procedures since the State did not offer such evidence before the jury. Prior to trial, defendant moved to suppress the testimony of the victim Tanya Suggs, and Judge Brannon properly conducted a voir dire hearing to determine the admissibility of this testimony. During the trial, a similar motion was lodged, and a voir dire hearing was conducted by Judge Barbee concerning the admissibility of identification testimony of Ethel Jones.

[1] In support of this assignment of error, defendant argues that the in-court identification testimony was admitted contrary to statute and in violation of his constitutional rights. We first consider defendant's contention that the photograph taken prior to his arrest for rape was illegally taken in contravention of the provisions of G.S. 15A-502 which provides:

> § 15A-502. *Photographs and fingerprints.*—(a) A person charged with the commission of a felony or a misdemeanor may be photographed and his fingerprints may be taken for law-enforcement records only when he has been:
>
> (1) Arrested or committed to a detention facility, or

(2) Committed to imprisonment upon conviction of a crime, or

(3) Convicted of a felony.

(b) This section does not authorize the taking of photographs or fingerprints when the offense charged is a misdemeanor under Chapter 20 of the General Statutes, "Motor Vehicles," for which the penalty authorized does not exceed a fine of five hundred dollars ($500.00), imprisonment for six months, or both.

(c) This section does not authorize the taking of photographs or fingerprints of a "child" as defined for the purposes of G.S. 7A-278(2), unless the case has been transferred to the superior court division pursuant to G.S. 7A-280.

(d) This section does not prevent the taking of photographs, moving pictures, video or sound recordings, fingerprints, or the like to show a condition of intoxication or for other evidentiary use.

(e) Fingerprints or photographs taken pursuant to subsection (a) may be forwarded to the State Bureau of Investigation, the Federal Bureau of Investigation, or other law-enforcement agencies.

The Official Commentary on this statute states:

This section carries forward the concept of the present provisions of the former first two paragraphs of § 114-19 in a more logical location than in the Chapter dealing with the Department of Justice. Those provisions have been simplified and broadened in some respects, but restricted as to motor vehicle and juvenile offenses.

We believe that the Official Commentary correctly states the Legislature's intent.

[1, 2] We have held that the provisions of G.S. 114-19 were concerned with the compilation and preservation of records and did not create a new exclusionary rule of evidence. *State v. Accor* and *State v. Moore*, 277 N.C. 65, 175 S.E. 2d 583 (1970); *State v. Strickland*, 276 N.C. 253, 173 S.E. 2d 129 (1970). In our opinion, the simplified and broadened G.S. 15A-502 does not now create an

exclusionary rule of evidence. To the contrary, the statute affirmatively states that "[t]his section does not prevent the taking of photographs . . . to show a condition of intoxication *or for other evidentiary use*." [Emphasis ours.] Certainly the photograph under consideration was taken and used for an "evidentiary use." Thus, the first portion of defendant's argument must fail. We, therefore, turn to the question of whether the pretrial photographic procedures violated defendant's *constitutional* rights so as to render the in-court identification testimony inadmissible.

It is well established that evidence unconstitutionally obtained must be excluded. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684 (1961); *State v. Henderson*, 285 N.C. 1, 203 S.E. 2d 10 (1974), *death sentence vacated*, 428 U.S. 902. The test of exclusion under the due process clause is whether the totality of the circumstances reveals pretrial procedures so unnecessarily suggestive and conducive to irreparable mistaken identification so as to offend fundamental standards of decency, fairness and justice. *Foster v. California*, 394 U.S. 440, 22 L.Ed. 2d 402, 89 S.Ct. 1127 (1969); *State v. Henderson, supra*; *State v. Haskins*, 278 N.C. 52, 178 S.E. 2d 610 (1971). It is equally well settled that an in-court identification is properly admitted into evidence even when there is an improper or illegal out-of-court identification procedure when the court finds upon competent voir dire evidence that the in-court identification is of independent origin and based on the witness's observations at the time and place of the crime. *State v. Montgomery*, 291 N.C. 235, 229 S.E. 2d 904 (1976); *State v. Henderson, supra*; *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

On voir dire before Judge Brannon, Tanya Suggs testified, in substance, that on 11 September 1977 at about 11:00 a.m. she was walking home when defendant, who was sitting in a dark green 225 Buick Electra, called her and said that he had something for her father and asked her to accompany him. She entered the automobile but instead of going to her residence he drove approximately six blocks to the grounds of Kinston High School where he produced a knife and despite her protest and resistance forcibly had sexual intercourse with her. Tanya had opportunity to observe her assailant as she entered the automobile, as they drove to the school grounds, and during the actual rape. After the

act was completed, defendant drove from the school grounds and let her out. As the automobile departed, she observed that the license number was KR__-330. She was unsure of the third letter. Tanya proceeded to her grandmother's home and told her relatives that she had been threatened by a young black male driving a green Buick bearing license number KR__-330. Later that night, she told the family of the rape, and she was carried to the hospital and examined by Dr. Mintz. She gave police officers a description of defendant as being about 20 years old, black, about six feet tall, dark complexion, close cut haircut, a little hair under his nose and a little bit of hair under his chin. She described the automobile occupied by her assailant as a green Electra 225. She noticed a little white toy animal hanging on the rear view mirror. She described the clothing that her assailant was wearing.

On 14 September 1977 about 11:00 p.m., Lt. L. B. Green of the Kinston Police Department who had been furnished with an account of the crimes allegedly committed against Tanya including a description of the assailant and his automobile observed a 1972 green Electra Buick bearing license number KRE-330 being operated without headlights. He stopped the car and observed that the operator was a young black about five feet, eight or nine inches tall, of medium build with a small amount of hair on his lip and chin. The man he observed fit the description of Tanya's assailant. He noticed some sort of toy animal hanging from the rear view mirror. At that time, Lt. Green told defendant, who was the operator of the automobile, that he was being cited for a slick tire and further that he and his automobile matched the description given by the victim of a sexual assault case which was under investigation. Pursuant to his request, defendant agreed to follow him to the police station. Upon arrival at the station, the officer gave defendant the *Miranda* warnings, and defendant agreed to answer questions but said he wanted to see his girlfriend; however, he was unable to furnish the officers with his girlfriend's address or telephone number. Defendant was given a citation for improper equipment, and he was fingerprinted and photographed prior to being formally arrested for rape. Other evidence from the victim and police officers was to the effect that on 12 September 1977, Tanya was shown several pictures of black males who were about the same age as defendant. The pictures were of the same type and were exhibited to her by police of-

ficers without any suggestion or instruction except a request that she state whether any of the photographs were of the man who raped her. She at that time stated that photograph number six *looked* like the man, but she would not be positive. Photograph number six was, in fact, a picture of defendant. Again on 15 September 1977, Tanya was shown eight photographs of young black males without any suggestion or comment of any kind. She was again asked if she could recognize her assailant among the photographs shown to her. She picked out a photograph of defendant within a few seconds.

Defendant offered no evidence on this voir dire hearing.

At the conclusion of this voir dire hearing, Judge Brannon found facts consistent with the above-stated evidence and, *inter alia*, concluded:

> 5. There were no illegal identification procedures or photographic lineups involving the defendant or his car.
>
> * * *
>
> 8. The photographic identification procedure here denoted as a confrontation was not so unnecessarily suggestive or conducive so as to lead to any chance of mistaken identification to the extent that the defendant would be denied due process of law.
>
> * * *
>
> 6. That the in-court identification of the defendant by the victim is of independent origin, based solely on what the victim saw at the time and times of the crime of rape, and does not and did not result from any out-of-court confrontation, or from any photograph or from any pretrial identification procedures suggestive or conducive at all to mistaken identification.

Judge Brannon then ruled that the in-court identification testimony of Tanya Suggs was admissible at trial.

A voir dire hearing was conducted by Judge Barbee at trial concerning the admissibility of the identification testimony of the witness Ethel Jones. On voir dire, the testimony of a police officer and Ethel Jones tended to show that on 15 September 1977

officers exhibited a set of eight photographs of young black males to Ethel Jones. The photographs were all of the same type, and the officers made no suggestions of any kind to her when she was asked if she could identify any of the photographs as being a picture of the man she saw talking to Tanya on 11 September 1977. She initially stated that photograph number eight looked very much like defendant, but she ultimately picked out the picture of another man as being the person she observed on 11 September 1977. Photograph number eight was, in fact, a picture of defendant. She testified that at about 11:15 a.m. she saw defendant sitting in a Buick automobile about twenty feet from her back door. He was blowing the horn and was looking at her eight year old "grandbaby." For this reason, she was concentrating on him and "got a mental picture" of him. She was able to describe defendant's features and the type shirt he wore on that day. She had previously seen him engaged in similar activities with children. On 11 September 1977 after she had observed defendant for some time, she saw Tanya go to defendant's car. Lt. Green testified in corroboration of the witness Jones. Defendant offered no evidence.

At the conclusion of the voir dire conducted before him, Judge Barbee, after finding facts consistent with the above-stated evidence, in part, concluded:

> 1. Mrs. Jones had ample opportunity to observe the defendant while the defendant was allegedly sitting in the green Buick near her home around 11:15 a.m., on September 11, 1977;
>
> * * *
>
> 3. There were no illegal identification procedures;
>
> 4. The in-court identification of the defendant by Mrs. Jones is of independent origin based solely on what Mrs. Jones saw at the time around 11:15 a.m., on September 11, 1977, and does not result from any out-of-court confrontation or from any photograph or from any pretrial identification procedures suggestive or conducive to mistaken identification;

He thereupon ordered that defendant's motion to suppress the in-court identification of defendant by Mrs. Ethel Jones be denied.

In support of his argument that an illegally taken photograph rendered the in-court testimony inadmissible, defendant relies upon *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed. 2d 676, 89 S.Ct. 1394 (1969), and *State v. Accor* and *State v. Moore, supra.*

In *Davis*, an elderly woman was raped by an assailant whom she could only describe as a Negro youth. Fingerprints were found on the windowsill at her home, and defendant along with twenty-four or more other Negro youths were fingerprinted without any reasonable probable cause to believe that they were guilty of the rape. It was ascertained that the prints found on the windowsill were those of defendant. The United States Supreme Court ruled that the introduction of this fingerprint evidence was error.

In *State v. Accor* and *State v. Moore, supra,* defendants were picked up and brought to the police station without a warrant and without probable cause. There was no evidence that the defendants voluntarily accompanied the officers to the police station. Neither was there evidence that they voluntarily and understandingly consented to the taking of their photographs. This Court, speaking through Chief Justice Bobbitt, held that standing alone, this pretrial photographic evidence and evidence of defendants' in-court identification were rendered inadmissible. However, the Court noted that it did not necessarily follow that the in-court identification testimony would be incompetent should the State offer clear and convincing evidence that the in-court testimony originated independently of the pretrial photographic procedures.

Instant case differs from *Davis* and *Accor and Moore*. Here, although defendant was photographed prior to his arrest for rape, there was ample probable cause to arrest him on that charge. There was evidence that defendant voluntarily accompanied the officers to the police station where he was advised of his *Miranda* rights and cited for a minor motor vehicle violation. He was told on two occasions prior to being photographed that the police were investigating a sexual assault and that he and his automobile fit the description of the suspect furnished by the victim. There was also evidence from which it could be inferred that defendant con-

sented to have his photograph taken. In our opinion, these substantial differences remove the case *sub judice* from the ambit of the holdings in *Davis* and *Accor and Moore*.

Even if we were to concede that the taking of defendant's photograph prior to his arrest was impermissible and illegal so as to taint the in-court testimony, and we do not so concede, the in-court identification testimony would have still been properly admitted. This is so because the findings of fact by Judges Barbee and Brannon were supported by competent, clear and convincing voir dire evidence, and the findings supported the conclusion of each of the judges that the in-court identification testimony of the witness Ethel Jones and the witness Tanya Joyce Suggs was of independent origin based on what each witness observed on 11 September 1977. The findings of each judge likewise supported their respective conclusions that there were no illegal identification procedures which were so unnecessarily suggestive or conducive to irreparable misidentification as would deprive defendant of his constitutional right to due process.

We hold that Judge Barbee and Judge Brannon correctly ruled that the in-court identification testimony of the witnesses Suggs and Jones was admissible into evidence.

[3] Defendant next contends that the trial court erred in admitting certain physical evidence, photographs, and testimony resulting from the search of his apartment and automobile. It is defendant's position that all such evidence was inadmissible because it was obtained in violation of his constitutional rights as a result of: his being illegally photographed; the denial of his request for the presence of his girlfriend; the failure to inform him whether he could leave the police station if he did not submit to photographs; and the inclusion in the subsequently issued search warrant of the positive identification of defendant from the illegally obtained photograph.

Defendant does not attack the validity of the search warrants. Therefore, we must only determine whether the alleged violations, of which he complains, are of such a nature that the evidence seized as a result of the searches was tainted and should have been suppressed.

When defendant arrived at the police station with Officer Green, he was advised of his rights. After being informed that he was not under arrest, he said he felt that he didn't need a lawyer but would like his girlfriend to be present. He requested a telephone book which he thumbed through briefly then stated that his girlfriend did not have a telephone. Officer Green told defendant that he would send a patrol car to pick her up if defendant would tell him where she lived. However, defendant did not know his girlfriend's address. Defendant then requested Officer Green to drive him to his girlfriend's house, which request was refused. Later when defendant was asked if he would submit to fingerprinting and photographing, he stated that he would but "he wanted his girlfriend down there."

We are advertent to defendant's right to communicate with counsel, friends and relatives at every critical stage of the proceedings against him. *State v. Hill*, 277 N.C. 547, 178 S.E. 2d 462 (1971). However, the photographing of defendant was outside the protection of the Fifth Amendment right against self-incrimination and did not constitute a "critical stage" which entitled him to the assistance of counsel. *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968), *cert. denied*, 396 U.S. 934. Certainly if defendant was not entitled to the assistance of trained counsel, we cannot perceive how the absence of his girlfriend was prejudicial to him. Moreover, the absence of defendant's girlfriend cannot be attributed to any fault of the police officers, who made every reasonable effort to accommodate defendant's wishes. She was not present simply because defendant did not know how to contact her.

We have heretofore concluded that neither defendant's detention nor the taking of photographs was improper. That being so, we perceive no irregularities with respect to the searches which would render the evidence resulting therefrom inadmissible. This assignment of error is without merit.

Defendant assigns as error the trial court's denial of his motions for a directed verdict.

A motion for a directed verdict has the same legal effect as a motion for judgment as of nonsuit. Both motions challenge the sufficiency of the evidence to carry the case to the jury. *State v. Glover*, 270 N.C. 319, 154 S.E. 2d 305 (1967); *State v. Wiley*, 242

N.C. 114, 86 S.E. 2d 913 (1955). The trial court in its consideration of such motions must view the evidence in the light most favorable to the State, take it as true, and give the State the benefit of every reasonable inference to be drawn from the evidence. *State v. Goines*, 273 N.C. 509, 160 S.E. 2d 469 (1968).

[4] In instant case, defendant's argument that the motion should have been allowed on the charge of rape because there was no proof of penetration is without merit. Without recounting the sordid details, we think it is sufficient to state that there was plenary testimony by the victim as well as medical testimony from which the jury could reasonably infer that the victim was penetrated.

[5] Defendant also argues that his motion for a directed verdict on the charge of kidnapping should have been allowed because to permit him to be convicted on the charges of kidnapping and rape would be violative of due process and his constitutional protection against double jeopardy.

G.S. 14-39(a) provides:

> (a) Any person who shall unlawfully confine, restrain or remove from one place to another, any other person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person, shall be guilty of kidnapping if such confinement, restraint, or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.

In support of this argument, defendant relies heavily upon language contained in *State v. Fulcher*, 294 N.C. 503, 243 S.E. 2d 338 (1978). We quote that language:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the Legislature to make a restraint, which is an inherent, inevitable feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy . . . .

However, under the factual circumstances of this case, defendant's position is undone by the language contained in the next ensuing paragraph of *Fulcher*, to wit:

> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (*e.g.*, a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written. . . .

In the case *sub judice*, the victim was by trick enticed into defendant's automobile and transported about six blocks away where by force and by threat of the use of a knife, she was raped. During a period of about forty-five minutes, the victim was under the complete dominion and control of defendant. The restraint accompanying the rape was not an inherent, inevitable feature of the kidnapping. Under these circumstances, the kidnapping was a separate, complete act independent of the later committed crime of rape. Thus, the constitutional problem of double jeopardy does not arise, and defendant fails to show denial of due process.

We hold that the trial judge correctly denied defendant's motions for a directed verdict.

[6] Finally, defendant contends that G.S. 14-21(1)(a) is unconstitutional because it is a gender based criminal law violative of the equal protection clause of the Fourteenth Amendment.

Defendant relies on *Meloon v. Helgemoe*, 564 F. 2d 602 (1st Cir. 1977), *cert. denied*, ---- U.S. ----, 98 S.Ct. 2858, which held unconstitutional the New Hampshire statute under which the defendant was convicted of statutory rape, for engaging in consensual sexual intercourse with a female under the age of 15 years. Under the New Hampshire statute, any male who had sexual intercourse with a female under age 15 would be guilty of a felony. There was no prohibition or penalty for a female having sexual intercourse with a male under age 15.

We feel that defendant's reliance on *Meloon* is misplaced. In that case, the New Hampshire court was careful to point out that the offense was not based on forcible rape but rather on an act of consensual sexual intercourse. The decision was narrowly limited to the specific facts which involved a "love tryst" between a 16 year old boy and a 14 year old girl. The court went so far as to distinguish cases from other jurisdictions, relied upon by the State in support of its contention that the statute was constitutional, on the ground that the cited cases involved forcible rape. It is apparent that *Meloon* does not dictate the result in instant case.

Nevertheless, decision dictates that we examine the provisions of our own rape statute, G.S. 14-21(1)(a). While the United States Supreme Court has not provided a definitive statement of the standard of scrutiny to be applied to a gender based classification, the decisions of that Court indicate that such a classification requires more heightened scrutiny than would be applied to completely non-suspect legislation, but less stringent scrutiny than is typically applied to racial classifications. *Reed v. Reed*, 404 U.S. 71, 30 L.Ed. 2d 225, 92 S.Ct. 251 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 36 L.Ed. 2d 583, 93 S.Ct. 1764 (1973).

Although forcible rape was involved in the instant case, defendant was convicted of statutory rape under G.S. 14-21(1)(a), which provides:

§ 14-21. *Rape; punishment in the first and second degree.* —Every person who ravishes and carnally knows any female of the age of 12 years or more by force and against her will, or who unlawfully and carnally knows and abuses any female child under the age of 12 years, shall be guilty of rape, and upon conviction, shall be punished as follows:

(1) First-Degree Rape—

a. If the person guilty of rape is more than 16 years of age, and the rape victim is a virtuous female child under the age of 12 years, the punishment shall be death . . . .

The primary distinction between G.S. 14-21(1)(a) and the New Hampshire statute, which was held unconstitutional in *Meloon*, is the age differential in our statute. Under the New Hampshire statute, sexual intercourse with a female under age 15 constituted statutory rape. In North Carolina, statutory rape is committed only if the male is over 16 years of age and the victim is a "virtuous female child under the age of 12 years . . . ." Unquestionably, the protection of young females from sexual intercourse and the concomitant potential for physical injury is a legitimate legislative concern. In upholding a statute containing a similar age differential, the Iowa Supreme Court, in *State v. Drake*, 219 N.W. 2d 492, 496 (Iowa 1974), stated:

> . . . Once we accept the principle that the purpose of the statute—to protect certain young females from sexual intercourse—is a proper subject of state interest, it inevitably follows that the curbs adopted to accomplish that purpose can only be imposed against males because they are the only persons who may inflict the injury which the law seeks to avoid.

We also find enlightening the following language from *Finley v. State*, 527 S.W. 2d 553, 556 (Tex. Crim. App. 1975):

> . . . Furthermore, a unique characteristics test can be applied to justify the statutory classification. Hymen and uterine injury to female rape victims, the possibility of pregnancy, and the physiological difficulty of a woman forcing a man to have sexual intercourse with her all suggest a justification for the sexual distinction embodied in [the rape statute].

While the possibility of pregnancy may be slight for a girl under 12 years of age, the possibility of physical injury is greater than the possibility of physical injury to older and more physically mature females. This is particularly true when the male is over 16 years of age. The age differential in G.S. 14-21(1)(a) indicates that the Legislature recognized this distinction.

We agree with the conclusion reached in *State v. Kelly*, 111 Ariz. 181, 184, 526 P. 2d 720, 723 (1974), *cert. denied*, 420 U.S. 935:

> In the instant case, we believe that the need for treating males and females differently in enacting the rape statute is clearly reasonable. The statute satisfies the real, if not compelling, need to protect potential female victims from rape by males.
>
> However, for obvious physiological as well as sociological reasons we perceive no need by males for protection against females from rape which would be sufficient to demand legislative attention.

For reasons stated, we hold that G.S. 14-21(1)(a) is logically and rationally related to a legitimate governmental objective and, therefore, is not violative of the equal protection clause of the Fourteenth Amendment.

Our examination of this record discloses that defendant has been accorded a fair trial free from prejudicial error.

No error.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JEROME H. LOUCHHEIM III

No. 50

(Filed 4 January 1979)

1. **Searches and Seizures § 23— false information in affidavit—other information sufficient for probable cause**

A search warrant was not invalid because the affidavit on which the warrant was based contained false information where there was probable cause to support the warrant on the face of the affidavit when the false information is disregarded.

2. **Searches and Seizures § 24— probable cause—business records—elapse of 14 months since informants saw records**

There was a "substantial basis" for a magistrate to conclude that business records relating to a State advertising contract were "probably" located at defendant's business offices on the date a search warrant was issued where an officer's affidavit stated that two persons had seen two different sets of invoices relating to the costs incurred under the contract some 14 months earlier; the affidavit further alleged that the invoices "were never removed from [defendant's] offices . . . but were kept in those offices in compliance with the State advertising contract"; the place to be searched was an ongoing business; and the warrant authorized a search for other business records constituting evidence of an alleged crime of obtaining property from the State by false pretense in addition to the two sets of invoices observed 14 months earlier.

3. **Criminal Law § 15— motion to dismiss for improper venue—burden of proof**

When a defendant makes a motion to dismiss for improper venue, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county named in the indictment.

4. **Criminal Law § 15— proper venue—sufficiency of evidence**

The State carried its burden of proving that Wake County was the proper venue in a prosecution for conspiracy to commit false pretense and obtaining money by false pretense by overbilling the State for advertising work where it presented evidence that defendant's place of business was located in Wake County, that defendant submitted allegedly false bills to the State from defendant's business in Wake County, and that the State received those bills in Wake County.

5. **Criminal Law § 15— motion to dismiss for improper venue—proof required**

In a hearing on a motion to dismiss for improper venue, the State does not have to prove that a crime actually occurred but only that *if* a crime took place, it occurred in the county named in the indictment.

6. Criminal Law § 15— motion to dismiss for improper venue—affidavit—harmless error

The admission of an affidavit in a hearing on a motion to dismiss for improper venue, if error, was not prejudicial to defendant where the oral testimony properly admitted at the hearing was sufficient to show that the alleged crimes were committed in the county named in the indictment.

7. Criminal Law § 56— expert in accounting—comparison of cost figures—determination of deductions

In this prosecution for conspiracy to commit false pretense and false pretense in overbilling the State for advertising work, the testimony of an expert in accounting and auditing comparing the total amount defendant billed the State for work done by another advertising agency with the amount defendant paid such agency for production work pursuant to the State contract was not incompetent because the witness made certain deductions for work that was unrelated to the State contract and for postage when he did not actually know whether certain charges were unrelated to the State contract and whether postage was properly included in production costs, since such determination logically stemmed from the witness's expertise and experience in auditing and accounting and from his own personal examination of the documents in question.

8. Criminal Law § 56— expert testimony by accountant—basis—documents not in evidence

A sufficient basis was shown for testimony by an expert in accounting and auditing as to the amount defendant overbilled the State for advertising work where the witness admitted that he had used several documents not in evidence to reach his conclusion as to the total overbillings but testified as to the existence of such documents, where he got them, what they contained, and how they were used in preparing a chart showing the overbillings.

9. Conspiracy § 6; False Pretense § 3.1— overbilling State for advertising work—false representations

In this prosecution for conspiracy to commit false pretense and false pretense in overbilling the State for advertising work, there was sufficient evidence from which the jury could infer that false representations were made by defendant where the State's evidence tended to show that defendant's advertising contract with the State provided that defendant's agency was to be paid for production work purchased from outside sources "for actual amounts paid by the agency or in accordance with the prevailing rate for this type of work, whichever is lower," and that defendant paid another agency less for work performed by such agency than amounts billed by defendant to the State for such work.

10. Corporations § 8; Criminal Law § 9; False Pretense § 1— corporation as alter ego of individual—criminal liability of individual for corporate acts

Defendant could properly be convicted of obtaining property from the State by false pretense even though the false representations were made by a corporation where the indictments charged and the evidence tended to show that the corporation was the *alter ego* of defendant, and the evidence also

tended to show that defendant was the person who ordered that inflated bills for advertising work be submitted to the State.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

THIS Court granted defendant's petition for discretionary review of the decision of the Court of Appeals, 36 N.C. App. 271, 244 S.E. 2d 195 (1978) (*Clark, J.*, concurred in by *Morris* and *Arnold, JJ.*), which found no error in his conviction entered in the 10 June 1977 Session of WAKE County Superior Court, *Braswell, J.* presiding.

On 25 May 1976, a search warrant was issued by a magistrate on the basis of the affidavit of Curtis L. Ellis, an S.B.I. agent. The affidavit submitted facts alleging probable cause to believe the defendant had obtained money by false pretense through submitting inflated bills and invoices to the State of North Carolina pursuant to an advertising contract. The affidavit also alleged there was probable cause to believe that the business offices of Louchheim, Eng & People, Inc. (formerly Capital Communications, Inc.) contained various documents constituting evidence of the crime. A search was conducted that same day, and various business records were seized.

On 28 June 1976 defendant was charged, in nine separate indictments, proper in form, with conspiracy to commit felonious false pretense and eight charges of feloniously obtaining property by false pretense.

The defendant then moved to quash the search warrant and suppress the use of all materials seized pursuant to it. On 15 July 1976 a pretrial hearing on the motion was held, and the judge denied it. The defendant made a motion to dismiss the indictments on the ground that venue was improper, which also was denied after a pretrial hearing.

At trial the evidence for the State tended to show the following:

On 1 June 1973 Capital Communications, Inc. (hereinafter referred to as CCI), a corporation of which defendant was president and principal stockholder, was let a State advertising contract for the period 1 July 1973 to 30 June 1974. At the time the

contract was let to CCI, Julian Eng was represented as the senior vice president of the company, and he was listed as treasurer of CCI in its franchise tax return filed 12 December 1973. Annual advertising contracts were subsequently let to CCI on 1 July 1974 and 1 July 1975.

Under all three contracts, CCI was to be compensated at the rate of "15% of amount billed, or such fee as may be agreed upon in advance in writing, plus actual expenses incurred." For production work that may be purchased from outside sources, "the advertising agency shall be compensated for actual amounts paid by the agency or in accordance with the prevailing rates for this type of work, whichever is lower." CCI submitted bills to the State under the advertising contract, and State employees testified that the bills were approved and paid. The contracts also stipulated that all invoices were subject to inspection and audit by the State.

In December of 1974 a state auditor, Donnie Wheeler, examined the State CCI account and determined that documentation of the invoices and bills received from that company was inadequate. An audit was conducted, and numerous instances of CCI either overcharging or undercharging the State were discovered. The auditors concluded that the advertising company owed the State approximately $14,000. This figure was later reduced to $10,907 and was paid by CCI.

A second audit began in February of 1976, and all of CCI's accounts were examined, not just the account relating to the State advertising contract. Ad Com International (hereinafter referred to an Ad Com) was a company based in Florida which did some production work for CCI in connection with the State contract and other unrelated contracts. The auditors discovered that the dollar amounts in all the invoices to CCI from Ad Com were different from the amounts stated in bills from CCI to the State for work done by Ad Com relating to the State contract. The defendant explained that the differences were due to a monthly service fee and other expenses that were credited back and forth between the two companies. When the auditors asked CCI personnel for various specific Ad Com invoices, it took anywhere from a matter of minutes to a full day to obtain one. In comparing the invoices with the corresponding bills from CCI to the State, both

the descriptive language and the monetary amounts were identical.

The auditors asked the defendant to assist them in obtaining Ad Com's books. The address for CCI's Florida office and that of Ad Com were the same. He stated that he had nothing to do with Ad Com and therefore could give them neither permission nor access to that company's books. He would, however, contact Mr. Julian Eng, the president of Ad Com, to see if he would grant them permission. Later the defendant informed the auditors that the books had been sent but he never received them.

Toni Brennan testified that when she was working for Ad Com in Florida in the summer of 1974, the defendant asked her to type Ad Com invoices dating from June 1973 from bills CCI had sent the State. The defendant told her "he needed a copy for the auditors because the real bills that were sent up on a monthly basis did not match what he had actually billed the State." Ms. Brennan testified that these bills were different from the corresponding Ad Com invoices she had previously typed; the dollar amounts had been raised. This employee then moved to Raleigh and began working for CCI in October of 1974. The defendant brought back blank Ad Com invoices after a trip to Florida, and she continued to type Ad Com invoices in this fashion from CCI bills sent to the State. The original Ad Com invoices were put in a file folder marked "real" and given to the defendant. The second set were placed in a file folder in the front office of CCI. Ms. Brennan also stated that she typed a few Ad Com invoices during the CCI audit when specific ones were requested.

Ms. Brennan testified she had heard the defendant and Mr. Eng talking about the State contract several times. "It was said that anytime you had a government account you have to milk it for all it's worth and that's when you make all the money you can while you've got it." The two men discussed how they were going to "mark up the bill," and she saw Mr. Eng writing figures on Ad Com bills during phone conversations with the defendant.

Toni Brennan's job was terminated by the defendant on 31 May 1975. Thereafter she informed him that newspaper reporters had been to her office to get information about CCI and the State advertising contract. The defendant told her not to tell the reporters anything and that "they can't prove anything."

State's Exhibit Number 28, introduced into evidence at trial, was a file folder seized during the search of CCI. On the index tab was the heading "BILLS—Ad/Com Billing," and there was a black ink mark between the words "Ad/Com" and "Billing." A document examiner for the S.B.I. testified that the word "Special" had been crossed out.

Donnie Wheeler, a state auditor, took the stand and was qualified by the court as an expert in accounting and auditing. State's Exhibit Number 24 had previously been admitted into evidence and identified as a copy of one of the ledger sheets of Ad Com. State's Exhibit Number 41 had been admitted into evidence and was a compilation of invoices allegedly from Ad Com to CCI that Ms. Brennan testified she had typed from CCI bills to the State at defendant's request. The auditor compared corresponding invoice numbers in the two exhibits, and many of the figures were different.

At the close of the State's evidence, the defendant moved for judgment as of nonsuit on all the indictments. The trial court granted the motion as to one substantive count and denied it as to the conspiracy case and the remaining false pretense charges.

The evidence for the defendant tended to show the following:

Three former employees of CCI testified that in all the time they worked with the defendant, they were aware of no inflated billings to the State. They had never been asked to alter bills in any way. Two other witnesses vouched for the defendant's good reputation in the community.

The defendant took the stand in his own behalf. He stated that sometimes he received "working copies" of Ad Com invoices that were changed either in Florida by Mr. Eng or by him in North Carolina due to increased costs. He admitted that CCI's bookkeeping system was inefficient, partly because reimbursement by the State pursuant to the advertising contract was often erratic and overdue.

The defendant denied asking Toni Brennan or anyone else to type Ad Com invoices from bills that had been submitted to the State. He also denied ever having submitted false bills to the State or having stated that he was going to "milk" the State contract. The "Special" Ad Com file referred to Ad Com work that was unrelated to the State contract.

The defendant testified he had known Mr. Eng for twelve years when CCI obtained the State advertising contract. Mr. Eng was probably introduced at the time as the vice president of CCI, but he was never an officer of that company. In 1975 the defendant and Mr. Eng reorganized CCI and Ad Com into Louchheim, Eng & People, Inc. in order to turn "two unprofitable companies in one that would make some money."

At the close of all the evidence, the defendant renewed his motion as of nonsuit, which was denied. The jury returned verdicts of guilty in the conspiracy case and four of the substantive charges and not guilty in the other three false pretense charges. The Court of Appeals found no error in the trial, and this Court granted defendant's petition for discretionary review.

Other facts relevant to the decision will be included in the opinion below.

Attorney General Rufus L. Edmisten by Associate Attorney R. W. Newsom III and Associate Attorney J. Chris Prather for the State.

Akins, Harrell, Mann & Pike by Bernard A. Harrell and Ragsdale, Liggett & Cheshire by Joseph B. Cheshire V and Peter M. Foley for the defendant.

COPELAND, Justice.

For the reasons stated below, we have determined that the defendant had a trial free from prejudicial error. His conviction is affirmed.

[1] In his first assignment of error, the defendant contends the trial court erred in denying his motion to suppress the evidence seized pursuant to the search warrant. He claims the affidavit on which the warrant was based contained false information that was crucial for the probable cause determination. We do not agree.

In *Franks v. Delaware*, ---- U.S. ----, 57 L.Ed. 2d 667, 98 S.Ct. 2674 (1978), the United States Supreme Court squarely addressed this issue.

> "[W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and in-

tentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. Id. at ---, 57 L.Ed. 2d at 672, 98 S.Ct. at 2676-77.

In this case there was a pretrial hearing on defendant's motion to suppress the evidence seized during the search. The defendant presented witnesses tending to show that some of the information in the affidavit of the S.B.I. agent was false. Thus, the requirement in *Franks* that a defendant have the opportunity to prove falsity has been met. *See also* G.S. 15A-978(a).

The affidavit in question contained an assertion that Judith Justice, a former employee of CCI, "confirmed the existence of two sets of incompatible and different invoices from Ad-Com International to CCI and Louchheim, Eng and People, Inc." At the motion hearing Mrs. Justice testified she had never said there were "incompatible" sets of invoices. Instead, she had told the agents there were two sets of invoices but that she did not know whether they were alike or different. The S.B.I. agent took the stand and essentially corroborated Mrs. Justice's testimony.

The court found that "the affidavit was truthful as defined in Section 15A-978(a) of the General Statutes in that it reported in good faith, although exaggerated, the circumstances relied upon to establish probable cause." We need not now decide whether the "good faith" test for truthfulness set forth in G.S. 15A-978(a) meets the standards in *Franks* or whether the court's determination of good faith in this case is supported by the evidence. Rather, we find that there was probable cause to support the search warrant on the face of the affidavit when this false information is disregarded.

[2] The defendant attacks the magistrate's finding of probable cause in this case on the ground that there was no reason to believe the materials sought were located at that time in the place to be searched, the defendant's business offices. It is beyond dispute that probable cause must exist at the time the warrant issues. "[I]t is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210, 77 L.Ed. 260, 263, 53 S.Ct. 138, 140 (1932). Whether probable cause exists, however, is a determination based on practicalities, not technicalities, *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed. 2d 684, 85 S.Ct. 741 (1965), and each case must be decided on its own facts. *Sgro v. United States, supra.*

The affidavit in question stated in part:

> "The confidential source of information disclosed that CCI maintained two different sets of invoices detailing the production costs purported to be incurred as a result of the State advertising contract. . . . The informant further related that records concerning the actual and true production costs incurred by Ad-Com International, Inc., were in the possession of Jerome M. Louchheim at the Raleigh offices of Louchheim, Eng and People, Inc. (Formerly CCI). . . . The informant further related based on personal knowledge and observation of the said records and invoices, that said records and invoices were never removed from the offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim, but were kept in those offices in compliance with the State advertising contract previously entered into with the State of North Carolina. The informant's last personal knowledge of and observation of the said records and invoices was during the month of March of 1975, at which time the said records and invoices were located under lock in the Raleigh offices of Louchheim, Eng and People, Inc. and Jerome H. Louchheim."

Disregarding the allegedly false information, the affidavit also stated that Judith Justice confirms the existence of two sets of Ad Com invoices based on her own observation during her employment at CCI.

We find that the above information was sufficient to establish probable cause for the magistrate to issue the search warrant. Two people had seen different sets of invoices at defendant's offices. Although it was fourteen months since either one had personally observed the invoices, that fact is not conclusive.

> "The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc." *Andresen v. Maryland*, 24 Md. App. 128, 172, 331 A. 2d 78, 106 (1975), *cert. denied*, 274 Md. 725 (1975), *aff'd*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976). *See also United States v. Steeves*, 525 F. 2d 33 (8th Cir. 1975).

In this case, the alleged crime is a complex one taking place over a number of years. The place to be searched is an ongoing business. The affidavit further alleged that the invoices "were never removed from [defendant's] offices . . . but were kept in those offices in compliance with the State advertising contract."

Most important, the items to be seized included "corporate minutes, bank statements and checks, sales invoices and journals, ledgers, correspondence, contracts, . . . and other books and documents kept in the course of business by Louchheim, Eng and People and Capital Communications, Incorporated, of N.C. during all periods which said corporations were under contract to perform any advertising services [for] the State of North Carolina." Thus, the supposedly incompatible invoices that had been seen fourteen months earlier were not the only items to be seized during the search. All these materials could constitute evidence of defendant's alleged crime of obtaining property from the State by false pretense pursuant to the advertising contract.

We think there was a "substantial basis" for the magistrate to conclude that these business records were "probably" located at defendant's business offices on 25 May 1976 when the search

warrant issued. "No more is required." *Rugendorf v. United States*, 376 U.S. 528, 533, 11 L.Ed. 2d 887, 891, 84 S.Ct. 825, 828 (1964). *See also Andresen v. Maryland*, 427 U.S. 463, 49 L.Ed. 2d 627, 96 S.Ct. 2737 (1976). Moreover, reviewing courts are to pay deference to judicial determinations of probable cause, *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed. 2d 723, 84 S.Ct. 1509 (1964), and "the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca*, *supra* at 109, 13 L.Ed. 2d at 689, 85 S.Ct. at 746. This assignment of error is overruled.

The defendant claims the court improperly denied his motion to dismiss the indictments on the ground that venue was improper.

[3] It is clear that when a defendant makes a motion to dismiss for improper venue in North Carolina, the burden is on the State to prove by a preponderance of the evidence that the offense occurred in the county named in the indictment. *State v. Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977). In this case the indictment specified that venue lay in Wake County.

[4] At the pretrial hearing on defendant's motion, the State introduced testimony that the defendant came to North Carolina when he received the State advertising contract. His place of business, CCI, was located in Raleigh, North Carolina, and vouchers were issued by the State to his Raleigh office pursuant to the contract. In addition, bills or invoices were submitted by the defendant on behalf of CCI to the North Carolina Department of Natural and Economic Resources, which we note is also located in Raleigh. The defendant offered no evidence. Thus, the State proved by a preponderance of the evidence that if the substantive charges of obtaining property by false pretense were committed, they occurred in Wake County.

"It is generally held that the venue in an indictment for conspiracy may be laid in the county where the agreement was entered into, or in any county in which an overt act was done by any of the conspirators in furtherance of their common design." *State v. Davis*, 203 N.C. 13, 25, 164 S.E. 737, 744 (1932), *cert. denied*, 287 U.S. 649, 77 L.Ed. 561, 53 S.Ct. 95 (1932). Again, the evidence recounted above is sufficient to prove that overt acts pursuant to the conspiracy were performed in Wake County; to

wit: submission of allegedly false bills to the State from defendant's Raleigh business and receipt of the State vouchers by that office.

[5] The defendant argues that at the motion hearing the State had the burden of proving a crime actually occurred in addition to proving where it allegedly took place. This contention is without merit. The issue of whether there is reason to believe a crime was committed is properly raised at the probable cause hearing and at trial, not at a pretrial hearing on a motion to dismiss for improper venue. At the motion hearing, the State has to prove merely that *if* a crime took place, it occurred in the county indicated in the indictment.

[6] The State introduced the affidavit of Charles Randell Lassiter III over defendant's objection at the pretrial hearing. The defendant claims that this action constituted error in that the affidavit was inadmissible hearsay and violated defendant's Sixth Amendment right to confront the witnesses against him.

We need not decide whether the admission of that document was improper. As shown above, the oral testimony properly admitted at the hearing was sufficient to show that the alleged crimes were committed in Wake County. Therefore, the admission of the affidavit, if error, was nonprejudicial beyond a reasonable doubt. This assignment of error is overruled.

[7] Defendant next assigns as error the fact that Donnie Wheeler testified before the jury regarding CCI's total overbillings to the State and used State's Exhibit Number 45 to illustrate his testimony. The defendant argues that this evidence was incompetent and inadmissible because it was based on the auditor's unfounded assumptions and on evidence not admitted at trial.

Before Mr. Wheeler testified, a *voir dire* was conducted, and he was found to be an expert in accounting and auditing. The trial court stated that his testimony was necessary for the understanding of both the court and the jury because of the complexity of the case.

Mr. Wheeler compared dollar amounts in certain invoices CCI sent the State for Ad Com work with corresponding invoice entries in State's Exhibit Number 24, a copy of a sheet in Ad Com's ledger. He pointed out specific discrepancies in the figures. Defendant raises no objection to that testimony to this Court.

The State auditor was then going to use State's Exhibit Number 45 to illustrate his testimony regarding the aggregate amount of CCI's overbilling to the State. That exhibit was a three-page chart prepared by Mr. Wheeler purporting to compare the total amount CCI billed the State for Ad Com work with the total amount CCI paid Ad Com for production work pursuant to the State contract. Another *voir dire* examination was conducted, and the court ruled that the testimony and use of the exhibit would be allowed.

In preparing State's Exhibit Number 45, Mr. Wheeler added all the checks from the State to CCI, which had been admitted into evidence at trial. He then added all the Ad Com invoices that were sent to CCI, which also had been introduced into evidence. The defendant had told Mr. Wheeler during the second audit of CCI that some of the Ad Com invoices included work done for CCI that was unrelated to the State contract. The auditor subtracted those amounts he concluded were unconnected to work done for North Carolina. Mr. Wheeler also deducted an amount totalling the monthly service charges between Ad Com and CCI for the period in question because the defendant had stated "that the $1,500 was a 5% agency service fee payable to Ad Com that was not in the bill to the State." The auditor also subtracted postage because he determined that it was not part of production costs. Defendant's objection is partly based on the fact that the auditor made these deductions. This argument is without merit.

An auditor is defined as "[a]n officer who examines accounts and verifies the accuracy of the statements therein;" an audit is "[a]n official examination of an account or claim, comparing vouchers, charges, and fixing the balance." BLACK'S LAW DICTIONARY 166-67 (Rev. 4th ed. 1968). An expert conducting an audit must regularly make the very types of conclusions of which defendant now complains. Determining whether a particular charge falls within a specific account is certainly within an auditor's area of expertise.

Apparently the defendant claims that because Mr. Wheeler did not actually *know* whether certain Ad Com charges were unrelated to the State contract or whether postage was not properly included in production costs, his testimony was incompetent. On the contrary, these determinations logically stemmed from Mr.

Wheeler's expertise and experience in auditing and accounting and from his own personal examinations of the documents. If some of his deductions were erroneous, the defendant had the opportunity to and actually did bring this fact to the attention of the jury during cross examination of Mr. Wheeler and during direct examination of his own witnesses.

Before Mr. Wheeler testified to these matters, the trial judge properly instructed the jury that State's Exhibit Number 45 was not direct evidence. He stated that it was "received solely for the limited purpose of illustrating and explaining the testimony of the witness and it is for you alone to say whether it does so." Furthermore, although the jury asked for and was given the exhibits to consult during its deliberation, with the consent of the State and defendant, State's Exhibit Number 45 was not included among them.

Defendant claims that the chart was overly prejudicial in that it "invited the jurors to disregard the assumptions made by the witness and concentrate on the bottom line figure." This assertion is belied by the fact that the jurors, instead of blindly accepting the total amount stated in the exhibit, returned verdicts of guilty in four of the substantive charges and not guilty in three of them.

[8] The defendant further objects that Mr. Wheeler based at least part of his testimony and State's Exhibit Number 45 on hearsay. This claim is controverted by the record.

It is well settled that an expert can base his opinion on his own personal knowledge and observations, *or* on evidence introduced at trial presented to the expert through a hypothetical question, or both. *See, e.g., State v. Holton*, 284 N.C. 391, 200 S.E. 2d 612 (1973). Mr. Wheeler admitted using several documents not in evidence to reach his conclusion as to CCI's total overbillings. The record indicates, however, that these materials were personally viewed and considered by him in his expert capacity. He testified to their existence and where he got them, to what they contained, and to how they were used in preparing State's Exhibit Number 45. "Since it is the jury's province to find the facts, the data upon which an expert witness bases his opinion must be presented to the jury in accordance with established rules of evidence." *Todd v. Watts*, 269 N.C. 417, 420, 152 S.E. 2d 448, 451

(1967). Mr. Wheeler's oral testimony was sufficient in this respect. This assignment of error is overruled.

[9] The defendant next contends the trial court erred in denying his motion as of nonsuit as to all the crimes with which he was charged. We do not agree.

In ruling on a motion as of nonsuit, it is beyond dispute that the evidence is to be considered in the light most favorable to the State, and the State is allowed every reasonable inference therefrom. *State v. Bell*, 285 N.C. 746, 208 S.E. 2d 506 (1974).

> "A motion for nonsuit of a charge of obtaining property by false pretense must be denied if there is evidence which, if believed, would establish or from which the jury could reasonably infer that the defendant (1) obtained value from another without compensation, (2) by a false representation . . . , (3) which was calculated and intended to decieve and (4) did in fact deceive." *State v. Agnew*, 294 N.C. 382, 387-88, 241 S.E. 2d 684, 688 (1978), *cert. denied*, ---- U.S. ----, 58 L.Ed. 2d 124, 99 S.Ct. 107 (1978).

The defendant claims the State failed to meet its burden of proving in both the conspiracy charge and in the substantive ones that there was a *false* representation. He argues there was no competent evidence introduced at trial that the bills CCI submitted to the State did not represent true production costs. This argument is without merit.

Under the State advertising contract, CCI was to be paid for production work purchased from outside sources "for actual amounts paid by the agency or in accordance with the prevailing rate for this type of work, whichever is lower." State's Exhibit Number 24 was admitted into evidence and identified by Toni Brennan as a copy of one of Ad Com's ledger sheets. She testified that in preparing the first set or "true" Ad Com invoices, she would assemble the invoices from other companies and give the compilation to Mr. Eng. He would then make up a bill, and she would type the invoice and enter the invoice number and amount in Ad Com's ledger. Thus, although the entries in State's Exhibit Number 24 cannot be used to show the true costs to the third party producers who actually performed the work, they can be used to show the amount CCI had to pay Ad Com for that work.

Those figures were different from the corresponding amounts CCI billed North Carolina. Therefore, there was sufficient evidence from which a jury could reasonably infer that false representations were made.

[10] The defendant claims the State did not show that the defendant personally committed any crime because the allegedly false representations were made by CCI in its corporate capacity. This contention likewise is without merit.

The indictments charged and the trial judge properly instructed the jury that CCI was alleged to be the *alter ego* of the defendant. The evidence at trial showed that the defendant owned seventy-five percent of the stock of CCI; the other twenty-five percent was held in a blind trust for Stephen Crouch. The defendant was at all times the president and managing officer of the advertising company. There was testimony that the defendant was the person who ordered the inflated Ad Com invoices typed from State bills, and he and Mr. Eng decided to "milk" the State contract. The record is replete with evidence that CCI was run according to defendant's wishes.

> "[W]hen, as here, the corporation is so operated that it is a mere instrumentality or *alter ego* of the sole or dominant shareholder and a shield for his activities in violation of the declared public policy or statute of the State, the corporate entity will be disregarded and the corporation and the shareholder treated as one and the same person." *Henderson v. Security Mortgage and Finance Co.*, 273 N.C. 253, 260, 160 S.E. 2d 39, 44 (1968). *See also State v. Salisbury Ice and Fuel Co.*, 166 N.C. 366, 81 S.E. 737 (1914).

This assignment of error is overruled.

For the foregoing reasons, the defendant had a trial free from prejudicial error. The decision of the Court of Appeals is

Affirmed.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

IN THE MATTER OF THE APPEAL OF: NORTH CAROLINA FORESTRY FOUNDATION, INC., FROM THE ASSESSMENT OF ITS PROPERTY KNOWN AS THE "HOFMANN FOREST" FOR AD VALOREM TAXATION BY ONSLOW COUNTY FOR 1974 AND 1975 AND JONES COUNTY FOR 1975

Nos. 34 and 35

(Filed 4 January 1979)

1. **Taxation § 22 — ad valorem taxes — nonprofit corporation — educational, scientific, charitable purposes — exclusive use — lease of timberland to business**

Forest land owned by a nonprofit corporation was not used "exclusively" for an exempted purpose within the meaning of G.S. 105-275(12), G.S. 105-278.4, or G.S. 105-278.6, and thus was not exempted from ad valorem taxation by those statutes, where the forest land has been leased to a paper company and has been primarily used by the paper company since 1951 as commercial property, and where the use of the forest land as an educational and scientific resource is incidental to the activities of the paper company thereon.

2. **Taxation § 22 — ad valorem taxes — nonprofit corporation — protected natural area**

Property was not held by a nonprofit corporation as a "protected natural area" within the meaning of G.S. 105-275 because of an extensive program of road building, construction of drainage ditches and fire lanes, site preparation, including disking and burning, leasing of hunting rights to local hunting clubs, and the cutting of timber and pulpwood.

3. **Taxation § 22 — ad valorem taxes — nonprofit corporation — rescue squads**

All nonprofit organizations do not come within the provision of G.S. 105-278.6(a)(7) exempting from taxation certain property owned by a "nonprofit, life-saving, first aid, or rescue squad organization," since it is apparent that "nonprofit" is limited to "life-saving, first aid, or rescue squad organizations."

4. **Taxation § 21 — ad valorem taxes — forest land — ownership not in U.N.C.**

The "Hofmann Forest" is not exempt from ad valorem taxation under G.S. 116-16 as property owned by the University of North Carolina since the record discloses that the property is owned solely by the North Carolina Forestry Foundation, Inc., a nonprofit corporation.

5. **Taxation § 25.3 — ad valorem taxes — discovered property — absence of notice to taxpayer**

Where, from 1969 to 1973, a foundation made payments of 10 cents per acre for its timberland, pursuant to G.S. 105-279, in lieu of "county taxes otherwise assessed," and the option of making payments in lieu of taxes was not available after 1973, failure of the county tax supervisor to give the foundation notice of the discovery and listing of the property as required by G.S. 105-312 (d) was not fatal to the 1974 tax assessment on the property since the purpose of the notice requirement is to inform the taxpayer that his property is subject to ad valorem taxation; the foundation should have known its property was in-

cluded in the tax base; the foundation was chargeable with knowledge that the option of making payments in lieu of taxes was not available in 1974; and the foundation thus should have known that its property was subject to ad valorem taxation. Furthermore, although failure of the tax supervisor to give the foundation timely notice delayed its opportunity for a hearing on the matter, this omission did not amount to a denial of due process where the foundation did have a full *de novo* hearing before the Property Tax Commission.

6. Taxation § 38— ad valorem taxes—presumption of correctness

Ad valorem tax assessments are presumed to be correct, and the burden of proof is on the taxpayer to rebut this presumption by producing competent, material and substantial evidence that the county tax supervisor used an arbitrary or illegal method of valuation and that the assessment substantially exceeds the true value in money of the property.

7. Taxation § 25.4— ad valorem taxes—division of land into classifications

A foundation failed to present material and substantial evidence that tax appraisers acted arbitrarily or illegally in dividing its land into four classifications based on soil type, location, and ability of the land to produce and in assigning a different value to each classification for ad valorem taxes.

Justice BROCK took no part in the consideration or decision of this case.

ON petitions for discretionary review of the decisions of the Court of Appeals (reported in 35 N.C. App. 414 (1978) and 35 N.C. App. 430 (1978)) which affirmed the judgments in favor of respondents entered by *Herring, J.*, at the 25 October 1976 Session of WAKE Superior Court.

Petitioner, North Carolina Forestry Foundation, Inc., (hereinafter referred to as Foundation) is a nonprofit corporation which was organized under the laws of North Carolina to promote the development and practice of improved forestry methods and to promote the production and preservation of growing timber for experimental, demonstration, educational, park and protection purposes. Another purpose of the Foundation is "to aid and promote by financial assistance and otherwise all types of forest education and research at, or by, the Division of Forestry of North Carolina State University . . . ."

In 1934, the Foundation acquired approximately 81,867 acres of land known as the Hofmann Forest. Approximately 49,455 acres of this tract are located in Onslow County and approximately 31,648 acres are located in Jones County. Also in 1934, the Attorney General of North Carolina expressed his opinion that the Hofmann Forest property was exempt from ad valorem taxes "be-

cause of the public nature of the [Foundation] and the purpose for which these lands are held . . . ." For this reason, Hofmann Forest was not taxed by either county.

In 1945, the Foundation entered into a ninety-nine year lease with Halifax Paper Company, Inc., [hereinafter Paper Company] which lease included the following purpose:

> . . . (I)n order to properly prosecute the objects for which the Foundation was organized, it is necessary and desirable that an outlet be found having the disposition by sale of merchantable timber, pulpwood and wood-products, equal to the annual growth of all merchantable timber, trees, and wood, growing upon the real property. . . .

This lease or contract placed upon the Foundation the responsibility for cutting and delivering timber and pulpwood to the Paper Company. The contract provided the Foundation with a source of income for debt payment and equipment.

This contract was amended in 1951 to effectively give the Paper Company operational control of Hofmann Forest. Pursuant to this amendment, the Paper Company and its successors in interest (Albemarle Paper Company and Hoerner-Waldorf Corporation, now Champion International) engaged in extensive construction of roads, drainage ditches and fire lanes within the Forest, in addition to the cutting of timber and pulpwood.

For purposes of this appeal, the most significant provision of the amended contract is as follows:

> On July 2, 1951, Paper Company shall take over and assume authority and responsibility for the operation of Hofmann Forest and fire protection and hunting rights in and on Hofmann Forest; that Paper Company will consult with the Foundation or its representative or representatives, concerning its proposes [sic] master or over all plans for the operation of Hofmann Forest and for hunting and fire protection therein; tha [sic] The Foundation shall review said master or over all plans and make recommendations and suggestions to Paper Company in connection therewith, IT BEING UNDERSTOOD, HOWEVER, THAT THE FINAL AUTHORITY FOR SAID PROGRAMS WILL REST WITH PAPER COMPANY; that during the life of this contract, the Foundation shall be accepted by Paper

> Company as a forestry consultant for Hofman [sic] Forest, however, this shall not serve to exclude the use of other consultants should they appear to Paper Company to be desirable. [Emphasis added.]

The Paper Company pays the Foundation one-twelfth (1/12) of the market price for pulpwood and one-sixth (1/6) of the market price for saw timber, which amounts are credited against advances made to the Foundation by the Paper Company. In 1974, the Paper Company cut approximately 270,000 feet of saw timber and 10,700 cords of pulpwood from the Forest. Depending on the work being done, the Paper Company has from twenty-five to one hundred men working in the Forest.

Students and study groups interested in the operation of the Forest are allowed to tour or conduct research in the Forest by permission of the Directors of the North Carolina State University School of Forestry, subject to the contract provision that "such study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by Paper Company in or on Hofmann Forest." Other groups and individuals have conducted research in the Forest, and the results of such studies have been widely disseminated. The Paper Company has never denied access to groups or individuals engaged in research in the Forest. In addition, there appears to be an ongoing program for the development of forest fire control techniques.

In 1969, the Attorney General expressed his opinion that the Forest was no longer exempt from ad valorem taxes. The Foundation, as a nonprofit organization holding timberland for the benefit of an educational institution, opted, pursuant to G.S. 105-295.1, to pay 10 cents per acre per year in lieu of county taxes which would otherwise be assessed against such timberland. From 1969 to 1973, the Foundation made payments in lieu of county ad valorem taxes to both Jones County and Onslow County. In 1971, G.S. 105-295.1 was renumbered G.S. 105-279, and the provisions allowing the payment of 10 cents per acre in lieu of county ad valorem taxes was repealed effective 1 July 1973.

In 1974, the Foundation received from the Onslow County Tax Collector a notice of tax assessment for the Hofmann Forest. The Foundation appealed the taxation of the Forest to the Onslow County Board of Commissioners, which rejected the appeal.

In 1975, the Foundation filed applications for exemption with the tax supervisors of Jones and Onslow Counties. These applications were denied, and the Foundation filed application for a hearing before the North Carolina Property Tax Commission. After conducting a hearing in January, 1976, the Commission rendered separate decisions adverse to the Foundation.

The Foundation then filed petitions for review by the Superior Court. The Foundation's appeals were heard at the 25 October 1976 term of Wake County Superior Court by Judge Herring, who entered judgments affirming in all respects the final decision of the Property Tax Commission.

The Foundation appealed to the Court of Appeals which, in separate decisions of 7 March 1978, affirmed the judgments entered by the superior court.

We allowed the Foundation's petition for discretionary review and consolidated the cases for hearing and decision.

Poyner, Geraghty, Hartsfield & Townsend, by Thomas L. Norris, Jr., and Curtis A. Twiddy, attorneys for petitioner North Carolina Forestry Foundation, Inc.

Joyner & Howison, by R. C. Howison, Jr., and James E. Tucker, attorneys for respondents, Jones and Onslow Counties.

James R. Hood, attorney for Jones County.

Roger A. Moore, attorney for Onslow County.

BRANCH, Justice.

The primary question presented by this appeal is whether the Hofmann Forest is exempt from ad valorem taxation. The Onslow County case also presents the question as to whether the county, through procedural default, is precluded from collecting ad valorem taxes for the years in question, 1974 and 1975. An additional question in the Jones County case is whether the land has been properly valued for ad valorem tax purposes.

We first consider the exemption question.

The Foundation relies upon four statutes (G.S. 105-275(12), 105-278.4, 105-278.6, and 116-16) as alternative bases for its contention that the Hofmann Forest land is exempt from ad valorem taxes.

The first three of these statutes require that the property be used *exclusively* for one exempt purpose or another. The pertinent provisions of these three statutes are:

> § 105-275. *Property classified and excluded from the tax base.*—The following classes of property are hereby designated special classes under authority of Article V, Sec. 2(2), of the North Carolina Constitution and shall not be listed, appraised, assessed, or taxed:
>
> * * *
>
> (12) Real property owned by a nonprofit corporation or association *exclusively held and used by its owner for educational and scientific purposes as a protected natural area.* (For purposes of this subdivision, the term "protected natural area" means a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study.) [Emphasis added.]

§ 105-278.4. *Real and personal property used for educational purposes.*—(a) Buildings, the land they actually occupy, and additional land reasonably necessary for the convenient use of any such building shall be exempted from taxation if:

(1) Owned by an educational institution (including a university, college, school, seminary, academy, industrial school, public library, museum, and similar institution);

(2) The owner is not organized or operated for profit and no officer, shareholder, member, or employee of the owner or any other person is entitled to receive pecuniary profit from the owner's operations except reasonable compensation for services;

(3) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(4) *Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution* (as defined herein)

and wholly and exclusively used by the occupant for nonprofit educational purposes.

(b) Land (exclusive of improvements); and improvements other than buildings, the land actually occupied by such improvements, and additional land reasonably necessary for the convenient use of any such improvement shall be exempted from taxation if:

(1) Owned by an educational institution that owns real property entitled to exemption under the provisions of subsection (a), above;

(2) Of a kind commonly employed in the performance of those activities naturally and properly incident to the operation of an educational institution such as the owner; and

(3) *Wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution* (as defined herein) *and wholly and exclusively used by the occupant for nonprofit educational purposes.* [Emphasis added.]

§ 105-278.6. *Real and personal property used for charitable purposes.*—(a) Real and personal property owned by:

* * *

(7) A nonprofit, life-saving, first aid, or rescue squad organization;

* * *

shall be exempted from taxation if: (i) As to real property, it is *actually and exclusively occupied and used*, and as to personal property, it is entirely and completely used, *by the owner for charitable purposes*; and (ii) the owner is not organized or operated for profit. [Emphasis added.]

[1] The focal point in interpreting three of these exemptive statutes is whether the Foundation *exclusively* used the property for one of the exempted purposes. The Foundation stressfully contends that its use of the property brings it within the excluding

language of the statute and argues that where the property is used for educational purposes, the general rule requiring a statute to be construed strictly must yield to a less narrow and stringent construction. The Foundation apparently relies upon the following language from *Seminary, Inc. v. Wake County*, 251 N.C. 775, 112 S.E. 2d 528 (1960):

> By the rule of strict construction, however, is not meant that the statute shall be stintingly or even narrowly construed * * * but it means that everything shall be excluded from its operation which does not clearly come within the scope of the language used. . . .

However, the Foundation can find little comfort in this statement. In our opinion, this language does not appear to be inconsistent with the Court's flat statement that statutes exempting property from taxation because of the purposes for which property is held and used are construed against exemption and in favor of taxation. We note that *Seminary* also stands for the well-recognized rule that the words used in a statute must be given their natural or ordinary meaning.

Webster's Third New International Dictionary lists the words "sole" and "single" as synonymous for the word "exclusive." We also find the following in *Ballentine's Law Dictionary*, Second Edition:

> *exclusive*. The Century Dictionary defines the word as meaning, "appertaining to the subject alone; not including, admitting, or pertaining to any other or others; undivided; sole; as, an exclusive right or privilege; exclusive jurisdiction."

The Foundation nevertheless contends that the term "exclusively" is not to be construed literally and that in the statutes here considered the word refers to the primary and inherent activity and does not preclude incidental activities related to the primarily exempt activity. In support of this position, the Foundation relies upon the case of *Rockingham County v. Elon College*, 219 N.C. 342, 13 S.E. 2d 618 (1941). In that case, Elon College, an educational institution, owned and rented buildings for business purposes to private enterprise and the net profit from these rentals was exclusively used for educational purposes. In affirming

the decision of the trial court which held that the property was subject to ad valorem taxes, the Court in part stated:

> "The power to grant exemptions under authority of the second sentence in Art. V, sec. 5, which may be exercised in whole, or in part, or not at all, as the General Assembly shall elect, is limited to property held for one or more of the purposes therein designated. *Southern Assembly v. Palmer*, 166 N.C., 75, 82 S.E., 18; *United Brethren v. Comrs.*, 115 N.C., 489, 20 S.E., 626. Property held for any of these purposes is supposed to be withdrawn from the competitive field of commercial activity, and hence it was not thought violative of the rule of equality or uniformity, to permit its exemption from taxation while occupying this favored position. But when it is thrust into the business life of the community, it loses its sheltered place, regardless of the character of the owner, for it is then held for profit or gain. *Trustees v. Avery County*, 184 N.C., 469, 114 S.E., 696. . . . It is not the character of the corporation or association owning the property which determines its status as respects the privilege of exemption, but the purpose for which it is held. *Grand Lodge, F. A. M. v. Taylor*, 146 Ark., 316, 226 S.W., 129. This is the plain meaning and intent of the Constitution. *Corp. Com. v. Construction Co., supra.*"
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> * * *
>
> . . . The fact that a commercial enterprise devotes its entire profits to a charitable or other laudable purpose does not change the character of its business nor the purpose for which it is held. It is still a commercial enterprise, and is held as such. . . .

For like holdings, *see Odd Fellows v. Swain*, 217 N.C. 632, 9 S.E. 2d 365 (1940); *Guilford College v. Guilford County*, 219 N.C. 347, 13 S.E. 2d 622 (1941); *Redevelopment Comm. v. Guilford County*, 274 N.C. 585, 164 S.E. 2d 476 (1968).

[1] On this record, we conclude that the requisite exclusive use has not been shown. Our conclusion is compelled by the Paper Company's virtually complete operational control of the Forest pursuant to the contract as amended in 1951. With respect to the operation of the Forest, the 1951 contract amendment provided

that "the final authority for said programs will rest with Paper Company . . . ." The record indicates that from 1951 to the present time, the Hofmann Forest has been primarily used by the Paper Company as commercial property. While we recognize the Forest's importance as an educational and scientific resource and the value of research conducted there, we cannot escape the conclusion that the use of the Forest in this regard is incidental to the activities of the Paper Company. This conclusion is supported by the record and by the provision of the amended contract which states that "study groups or students will do nothing whatsoever to interfere with any program undertaken or in progress by Paper Company in or on Hofmann Forest."

[2] The Foundation's arguments for exemption under the statutes cited above fail on other grounds. G.S. 105-275 exempts real property "exclusively held and used by its owner for educational and scientific purposes as a protected natural area." The statute defines "protected natural area" as "a nature reserve or park in which all types of wild nature, flora and fauna, and biotic communities are preserved for observation and study." The Hofmann Forest does not come within the statutory definition of a "protected natural area" due to the extensive program of road building, construction of drainage ditches and fire lanes, site preparation, including disking and burning, leasing of hunting rights to local hunting clubs, and the cutting of timber and pulpwood. While such activities may well constitute prudent management techniques, they certainly do not result in the preservation of "all types of wild nature, flora and fauna . . . ."

G.S. 105-278.4 exempts real property which is "wholly and exclusively used for educational purposes by the owner or occupied gratuitously by another nonprofit educational institution . . . and wholly and exclusively used by the occupant for nonprofit educational purposes." We have already concluded that said property is not "exclusively used" by the Foundation. Neither is it "occupied gratuitously by another nonprofit educational institution . . . and wholly and exclusively used by the occupant [Paper Company] for nonprofit educational purposes." On the contrary, the Forest is used by the Paper Company, obviously not a nonprofit educational institution, as a commercial enterprise.

[3] G.S. 105-278.6(a)(7) exempts real property owned by "a nonprofit, life-saving, first aid, or rescue squad organization" if the property is "actually and exclusively occupied and used . . . by the owner for charitable purposes." We have concluded that the property in question is not "exclusively used" by the Foundation. Furthermore, we disagree with the Foundation's contention that, due to the placement of commas, any nonprofit organization comes within the purview of this statute. Applying the rule of *ejusdem generis*, it is apparent that "nonprofit" is limited to "life-saving, first aid, or rescue squad organizations." Had the Legislature intended such a broad exemption so as to include *all* nonprofit organizations, it would have so stated without beclouding its intention by the use of the specific type organization set out in G.S. 105-278.6(a)(7).

[4] Finally, the Foundation contends that the Hofmann Forest is exempt under G.S. 116-16, which provides:

> The lands and other property belonging to the University of North Carolina shall be exempt from all kinds of public taxation.

We note that the Foundation is the sole owner of the Forest. Examination of this record discloses that the University of North Carolina has no legal or equitable title to the land in question. Thus, the land simply does not "belong" to the University of North Carolina.

We hold that the Court of Appeals correctly decided that the Foundation did not use the Forest exclusively for an exempt purpose and is not entitled to the exemption applicable to lands "belonging to the University of North Carolina."

The Foundation next contends that Onslow County, through procedural default, is precluded from collecting ad valorem taxes for 1974 and 1975. This question does not involve Jones County.

From 1969 to 1973, the Foundation paid 10 cents per acre pursuant to G.S. 105-279, in lieu of county taxes which would otherwise be assessed against the Forest. This option was not available in 1974 or 1975 as it was deleted when the statute was amended effective 1 July 1973.

On 15 July 1974, the Foundation received a tax notice from Onslow County showing an ad valorem tax liability of $25,466.40 for 1974.

By letter dated 11 November 1974, the Foundation notified the Onslow County Board of Commissioners that it objected to the Forest being subjected to taxation and sought to present its exemption claim to the Board. The Onslow County Manager informed the Foundation in a letter dated 13 January 1975 that the County Commissioners had rejected the Foundation's letter of 11 November 1974 but would be willing to meet with the Foundation to consider any presentation it wished to make.

The Foundation wrote the County Manager on 29 January 1975 to inform him that it would file a formal application for exemption of Hofmann Forest for 1975. The Foundation requested that any meeting with the Commissioners concerning the 1974 tax liability be deferred until action had been taken on the 1975 application for exemption. The Foundation's application for exemption was sent by certified mail on 30 January 1975 to the office of the Onslow County Tax Supervisor. This application was received and signed for, apparently by someone in the Tax Supervisor's office, but the Tax Supervisor testified that he never saw the application.

On 1 August 1975, Onslow County sent the Foundation a tax notice showing a total 1975 ad valorem tax liability of $23,558.98 for the Onslow portion of Hofmann Forest. The Foundation never received acknowledgment of its application for exemption.

On 4 December 1975, pursuant to an application filed by the Foundation, the Property Tax Commission conducted a full *de novo* hearing into Onslow County's assessment of Hofmann Forest for 1974 and 1975 ad valorem taxes. The Commission affirmed these assessments.

Upon appeal by the Foundation, the decision of the Commission was affirmed by the superior court which in turn was affirmed by the Court of Appeals.

[5] The Foundation argues that the 1974 tax assessment was improper due to Onslow County's failure to give the Foundation notice of the discovery and listing of the property as required by G.S. 105-312(d). We do not agree.

From 1969 to 1973, the Hofmann Forest property had been subject to payment of 10 cents per acre, pursuant to G.S. 105-279, in lieu of county taxes otherwise assessed, which payments had in fact been made. These payments in lieu of ad valorem taxes, necessitated by the Attorney General's opinion in 1969 that the property was no longer exempt, lead us to the conclusion that the property was neither exempt from taxation under G.S. 105-278 nor excluded from the tax base by G.S. 105-275. Furthermore, during the time the Foundation made these payments, it did not contend that the property was either exempt or excluded from the tax base. Thus, the property should have been listed as required by G.S. 105-285.

Upon failure of the Foundation to list this property, it became incumbent upon Onslow County tax officials to discover and list the property pursuant to G.S. 105-312 and G.S. 105-303(b). It appears from the Onslow County tax records, which properly set forth the name and address of the Foundation, the acreage in Onslow County and the payments made thereon pursuant to G.S. 105-279, that the property was, in fact, listed. The Onslow County Tax Supervisor testified that he listed the property in 1974 as the Foundation no longer had the option of paying 10 cents per acre in lieu of taxes. The Tax Supervisor also testified that he did not give the Foundation any notice that the property was being listed. Thus, he did not comply with the discovery procedures of G.S. 105-312(d) which require that notice be sent to the taxpayer.

On the facts here presented, the Tax Supervisor's failure to send the Foundation the required notice is not fatal to the 1974 tax assessment. The purpose of the notice requirement is to inform the taxpayer that his property is subject to ad valorem taxation. When, in 1969, the Foundation began making payments in lieu of paying the "county taxes otherwise assessed . . ." pursuant to G.S. 105-279, it was, or should have been, aware that its property was included in the tax base. Otherwise, it would not have been required to make these payments as there would have been *no* "county taxes otherwise assessed . . . ." As everyone is presumed to know the law, the Foundation was charged with the knowledge that the option of making payments in lieu of taxes was not available in 1974. *Pinkham v. Mercer*, 227 N.C. 72, 40 S.E. 2d 690 (1946). Thus, the Foundation should have known that its property was subject to ad valorem taxation.

Although failure to timely notify the Foundation that its property had been discovered delayed its opportunity for a hearing on the matter, this delay did not adversely affect the Foundation's rights. The Foundation was given a full *de novo* hearing before the Property Tax Commission which decided the exemption issue adversely to the Foundation. Thus, although the Tax Supervisor was derelict in not giving the Foundation notice of the tax listing as required by G.S. 105-312, we are of the opinion that this omission did not amount to a denial of due process.

In the Jones County case, the Foundation challenged the county's valuation of the Forest for ad valorem tax purposes.

The Foundation's appraisal expert testified that for the 31,648 acres in Jones County, the average value per acre was approximately $50. Moreover, he was of the opinion that this valuation should be discounted by about 25 percent due to the Hoerner-Waldorf lease which would influence the price a willing buyer would pay for the property. Thus, he felt that the proper valuation of the property would be between $30 and $36 per acre.

The Jones County Tax Supervisor and Jones County's regular appraiser both valued the land at $100 per acre. This valuation was adopted by the Tax Commission.

[6] The lowest rate on the Jones County schedule was $60 per acre, which is higher than the average unadjusted value per acre arrived at by the Foundation's appraiser. As ad valorem tax assessments are presumed to be correct, the burden of proof is on the taxpayer to show that the assessment was erroneous. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E. 2d 752 (1975). In order for the taxpayer to rebut this presumption, he must produce competent, material and substantial evidence that the county tax supervisor used an arbitrary or illegal method of valuation and that the assessment substantially exceeded the true value in money of the property. *In re Appeal of Amp, Inc., supra.*

[7] The record indicates that the county's appraisers divided the property into four classifications, based on soil type, location, and ability of the land to produce, and assigned a different value to each classification. The method used by the county's appraisers was consistent with the presumption that ad valorem assessments are correct. The Foundation has failed to present material and

substantial evidence that the method used was arbitrary or illegal.

In its brief filed in this Court, the Foundation contends that the Court of Appeals misconstrued the effect given by the Foundation to Hoerner-Waldorf's leasehold estate. The Court of Appeals apparently thought that the Foundation's contention was that the value of the lease should be excluded from the assessment of ad valorem taxes. The Court of Appeals correctly decided that such exclusion would be erroneous. By way of clarification, the Foundation informs us that, in its appraisal of the property, the leasehold estate was considered solely as an encumbrance on the property which would be considered by a willing buyer as affecting the fair market value of the property. It appears then that the Foundation's position, simply stated, is that its valuation of the property, rather than the County's valuation, should have been adopted by the Tax Commission. The Commission is free, however, after considering the evidence and weighing the pertinent factors, to adopt the assessment it deems to be proper. Where, as here, the findings of the Tax Commission are supported by competent, material and substantial evidence, they are binding on appeal. *In re Appeal of Amp, Inc., supra.*

For the reasons stated herein, the decisions of the Court of Appeals are affirmed.

Affirmed.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ANDREW THOMAS CARTER, SR.

No. 70

(Filed 4 January 1979)

Constitutional Law § 35; Criminal Law § 75.10— waiver of rights—knowledge of charges not required for effective waiver

Miranda v. Arizona does not require that a person being interrogated must be informed of the crime which he is suspected of having committed

before he can knowingly and intelligently waive his rights; rather, a defendant's awareness of the charges about which he is to be questioned is only one factor to be considered in assessing the validity of a waiver of rights.

Justice BROCK took no part in the consideration or decision of this case.

Justice EXUM dissenting.

APPEAL by defendant from *McKinnon, J.*, at the 23 January 1978 Criminal Session of DURHAM Superior Court.

Defendant was tried upon an indictment, proper in form, charging him with the murder of Irene Alley. A verdict of guilty of murder in the first degree was returned by the jury. Thereafter, the sentencing proceedings provided by G.S. 15A-2000 were held with the state and the defendant offering additional evidence before the same jury. After fourteen hours the foreman announced that the jury could not make a unanimous recommendation as to punishment. The court thereupon discharged the jury and entered judgment sentencing defendant to life imprisonment.

On 16 January 1978, prior to trial, defendant moved to suppress any statements made to the police by him on the ground that such statements were taken pursuant to a waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966), but that the waiver was not knowingly and intelligently made. A *voir dire* hearing on the motion was conducted. On *voir dire* the evidence for the state tended to show:

While investigating the 24 September 1977 death of Irene Alley, a receipt book traced to defendant was found in the driveway of her residence on Stewart Drive. Pursuant to this lead, three plainclothes police officers went to defendant's place of employment on 26 September 1977 and asked him to accompany them to the police station for questioning. He voluntarily agreed to do so and was not formally arrested at that time.

Officers Sarvis and Roop, two of the officers who escorted defendant to the police station, testified at the *voir dire* hearing. Officer Sarvis testified that defendant was not informed of the purpose of the questioning and that no discussion of the investigation took place during the drive to the police station. Officer Roop testified that defendant was told that the police wanted to question him relative to an incident on Stewart Drive. He stated that

no threats or promises were made to defendant and that defendant was not informed that the investigation concerned a homicide until after he had signed a waiver of rights form. He further testified that at the beginning of the interrogation, defendant was told that the investigation concerned a break-in and homicide.

Investigator Simmons, who conducted the interrogation at the police station, testified that he initially asked defendant if he knew why the police wanted to question him and that defendant responded that he understood that the interrogation was about a break-in. Simmons stated that he learned that defendant had passed a high school equivalency examination and could read and write. He observed that defendant was not under the influence of drugs or alcohol and did not seem nervous at this time. He then testified as follows:

> "Exhibit 1 is a Miranda Rights and waiver which we read to anybody who may be a possible suspect in a crime, and this is the form that I read to Mr. Carter on the day in question. I placed Mr. Carter's name and date and time on the form and found out that he had obtained a G.E.D. and could read and write. I then read the form as follows:
>
> " 'Miranda rights and waiver: Before we ask you any questions, you must understand your rights. You have the right to remain silent; anything you say can be used against you in a court of law; you have the right to talk to a lawyer and have him present with you before you are questioned and during questioning. If you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish one. You have the right to stop answering questions at any time.'
>
> "At the completion of this, I asked him whether he understood his rights and he acknowledged that he did. I asked him whether he had any questions in regard to what I had just read to him, and he replied that he did not. I then asked him to read along with me as I read the waiver of rights, and I read this to him as follows:
>
> " 'This statement of my rights was read aloud to me and I have read this statement of my rights shown above. I understand each of my rights. Having these rights in mind, I

am willing to answer questions without talking to a lawyer. I do not want a lawyer present during this questioning. I understand what I am doing. No threats or promises have been made and no pressure of any kind has been used against me.'

"At the completion of this I asked the defendant whether he had any questions as to what I had just read to him anywhere on this form and he replied that he did not. I then asked him, 'Having these rights in mind, are you still willing to talk to me and answer some questions?' To which he replied, 'Yes.' I then asked him to sign the form and indicated with a check mark where to sign. He signed his name 'Andrew T. Carter, Sr.' and I checked the first box listed under departmental use only and signed my signature below. Exhibit No. 1 is the form that he signed in my presence. It has been in my custody and control since the time that he signed it."

After defendant signed the waiver form the interrogation, which lasted approximately two hours, began. During the interrogation defendant was not again advised of his rights. After about one hour of questioning, defendant was made aware that the investigation concerned a homicide. Approximately twenty minutes later he made a statement implicating himself in the strangulation of Irene Alley. Prior to being informed that the investigation concerned a homicide, defendant had indicated that he had been to the decedent's home in the course of his employment as an exterminator. Only after being informed that a homicide was involved did defendant show any signs of nervousness. Defendant did, however, willingly continue to answer the investigator's questions.

The defendant testified on direct examination on *voir dire* that he was picked up at work by three police officers. He stated that they told him that the investigation concerned a break-in and that they did not mention Stewart Drive; that he signed the statement waiving his rights which had been read by Investigator Simmons; that he was not informed until forty-five minutes to an hour after the questioning started that the investigation involved a homicide; and that he would not have waived his right to an attorney had he known that the investigation concerned a homicide.

On cross-examination defendant admitted that he understood the waiver when he read it and that he signed it voluntarily. He also testified that no threats or promises were made to him and that he had given his statement voluntarily. He added that he assumed that signing the waiver precluded him from later refusing to waive his rights.

On 26 January 1978 the court ruled that the statements made by defendant to the police were admissible. The facts found by the court are summarized as follows: Defendant voluntarily accompanied three police officers to the police station at approximately 5:00 p.m. on 26 September 1977. He told the police that he thought their investigation concerned a break-in and was not informed by them that the interrogation was concerned with a homicide. Defendant had his rights explained to him and understood those rights when he executed the waiver form. Defendant was informed that the investigation involved a homicide after approximately one hour of questioning and before he made the statement that he had put a belt around the neck of the victim. The statement of the defendant was made "voluntarily and without duress or coercion of any kind after he had been informed of his rights and had waived the presence of an attorney and had elected to make a statement." The defendant signed a written statement prepared by Investigator Simmons from the oral statements given him by defendant after he was made aware that the investigation concerned a homicide and after he had been fully advised of his rights and the nature of the charges against him. "[T]he failure of the officers to inform the defendant that an investigation related to a homicide at the time of warning him of his rights and before the execution of the waiver does not make the waiver of rights invalid or invalidate any statement made by the defendant and make it inadmissible in evidence."

At trial the uncontradicted evidence for the state tended to show that Irene Alley died from manual strangulation. A belt had been pulled tightly around her neck. The state also introduced the following statement of the defendant:

> "Saturday morning, September 24, 1977, I got up out of bed at eight o'clock. Left home about 8:15-8:20 to go to work for Allied Exterminators, address 1419 Watts Street. I already had company truck. I serviced five accounts and

went back to the office about 12:15. Left the office about 12:50. Went to 2913 Beechwood. Serviced them, left there approximately 1:30. Went to Bobby Smith's house, sat there about a couple of hours drinking rum and Coke. Played a hand of 'bid wiz' cards. There was a couple of other guys but I didn't know what their name was. After we got through playing cards we got on one of the fellow's car. It was a new model car, green and white vinyl top piece, I believe. Went and picked up another guy. Then we went to South Alston to pick beans. I don't know how long we stayed out there picking beans. I was pretty well loaded. Between the four of us we had drank about a fifth and a half of Bicardi's Rum. After we left picking beans they took me back to get the company truck. Told them I was going home. Put my tee shirt on. Got in the truck, started it up, rolled it down the hill. Left there and went to Mary Alston's on Bacon Street. I got another drink of liquor. I stayed there about a half hour. Left there and started home. I got to Hope Valley Road and Cornwallis. Thought I would stop in and talk with Mrs. Alley, Stuart Drive. Had been servicing her since June. Every time I went there to service her we would sit down and talk about the world situation. I had things on my chest that I had to talk over with someone. Been trying to buy a house and my wife was talking about going back to Roanoke Rapids or not. Pulled up in the driveway behind Miss Alley's car. Knocked on the side door. Mrs. Alley opened the door. She said, 'I didn't think you were supposed to be back until next month.' She opened the door and I went on it. I told her I wasn't suppose to be back until next month for regular service. She said, 'What do you want?' I said, 'I want to talk.' She said, 'I ain't got time to talk to you, you drunk fool.' She hit me across the shoulder with a yardstick in the kitchen dining room area. She had the yardstick in her hand when she come to the door. Well I hit her with my open hand. She said, 'You will go to jail for his, you drunk fool,' and started screaming. I tried to put my hand over her mouth to keep her from screaming. She kept turning her head. I couldn't get my hand across her mouth. So I put one hand around her neck, took my belt off with the other hand. I put the belt around her neck and pulled it tight. She started gagging and I got up and left. It was about dusk dark. Near I can remember I

went straight home. Got home I went in the house. Put my shirt in the chair and went to bed. My wife come back about eleven o'clock. Told me if I wasn't going to watch wrestling to take my clothes off. Instead I got up and went to the kitchen, open a can of tomatoes, put them in the bowl, cut them up, put salt and pepper on the tomatoes got me two cold biscuits, sat down at the table and ate."

Defendant offered no evidence at trial. Defendant did testify at the post-verdict hearing to determine if he should receive the death sentence. At that time he gave testimony very similar to that contained in his pretrial statement.

Attorney General Rufus L. Edmisten, by Assistant Attorney General James Peeler Smith, for the State.

R. Hayes Hofler III for defendant.

BRITT, Justice.

Defendant has brought forward a single assignment of error. By it he contends that the court erroneously admitted into evidence statements made to the police by him during the course of custodial interrogation. He argues that one cannot knowingly, intelligently, and voluntarily waive his rights under *Miranda* when he has not been informed of the charges which the police are investigating.

Counsel for defendant has ably urged that we adopt the rule set forth in *Schenk v. Ellsworth*, 293 F. Supp. 26 (D. Mont. 1968). There the court held that a person being interrogated must be informed of the crime which he is suspected of having committed before he can knowingly and intelligently waive his right to counsel. As additional support for his position, defendant cites a line of cases from the state courts in Pennsylvania: *Commonwealth v. Dixon*, --- Pa. ---, 379 A. 2d 553 (1977); *Commonwealth v. Richman*, 458 Pa. 167, 320 A. 2d 351 (1974); *Commonwealth v. Collins*, 436 Pa. 114, 259 A. 2d 160 (1969). The Pennsylvania rule is that "the suspect need not have knowledge of the 'technicalities' of the criminal offense involved; rather, it is necessary only that he be aware of the 'transaction' involved." Dixon, *supra* at 556.

The approach to *Miranda* taken in the cases cited by defendant does not appear to have been followed in other jurisdictions, and we likewise refuse to follow this minority rule.

Miranda does not explicitly require that a person in custody be informed of the charges which the police are investigating. In *Collins v. Brierly*, 492 F. 2d 735 (3rd Cir., 1974), *cert. denied*, 419 U.S. 877, 95 S.Ct. 140, 42 L.Ed. 2d 116 (1974), the defendant was the alleged driver of the getaway car used in a robbery perpetrated by him and three others. One of the four went into a lunchroom alone while the others waited in the car. The lone individual shot and killed the proprietor of the lunchroom. The others fled when they heard the shots. Later that same day, police went to defendant's home and asked him to accompany them to the police station for questioning. He agreed to do so voluntarily. At the station, prior to being told that the investigation concerned a homicide, defendant signed a waiver of rights form. He then made statements which implicated him in the robbery and ultimately in the homicide by virtue of the application of the felony-murder rule. At trial the defendant argued that his statements were not admissible as he had not knowingly, intelligently and voluntarily waived his rights under *Miranda*. In response to this argument the court said:

> "We have serious reservations about an interpretation of *Miranda v. Arizona*, *supra*, which would require that before custodial interrogation begins, in addition to the mandated declarations, a statement must be made by the police as to the nature of the crime under investigation. That landmark decision was painstakingly specific in listing the basic constitutional rights which the police must propound to a suspect before he is questioned. Nowhere is there the slightest indication that there must be included a warning about the nature of the crime which has led to the interrogation conference, what the penalty is for the offense, what the elements of the offense consist of, and similar matters. That these might be requisites for the entry of a valid guilty plea in open court is not relevant to the standards applicable to the custodial interrogation stage of a prosecution. In a sense, all of these elements might conceivably enter into an 'intelligent and understanding' rejection of an offer for the assistance of counsel, but the simple answer is that *Miranda* does not by its terms go so far. It requires that the accused be advised of his rights so that he may make a rational decision, not necessarily the best one or one that would be reached

only after long and painstaking deliberation. Indeed, it may be argued forcefully that a choice by a defendant to forego the presence of counsel at a police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that *Miranda* speaks of 'intelligent' waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom. . . ."

A number of courts which have examined challenges to the validity of a waiver of *Miranda* rights where the defendant was not informed of the charges about which he was to be questioned prior to executing the purported waiver have reached the same result as that obtained in *Collins. United States v. Anderson*, 533 F. 2d 1210 (D.C. Cir., 1976); *United States v. Campbell*, 431 F. 2d 97 (9th Cir., 1970); *United States Ex Rel. Smith v. Fogel*, 403 F. Supp. 104 (N.D. Ill., 1975); *State v. Allen*, 111 Ariz. 546, 535 P. 2d 3 (1975); *James v. State*, 230 Ga. 29, 195 S.E. 2d 448 (1973); *State v. Russell*, 261 N.W. 2d 490 (Iowa, 1978); *State v. Clough*, 147 N.W. 2d 847, 259 Ia., 1351 (1967); *Commonwealth v. Griswold*, 358 N.E. 2d 482 (Mass. App., 1977); *Commonwealth v. Tatro*, 346 N.E. 2d 724 (Mass. App., 1976); *Commonwealth v. Roy*, 307 N.E. 2d 851, 2 Mass. App. 14 (1974); *People v. MacDonald*, 403 N.Y.S. 2d 337 (1978); *cf., United States v. Hall*, 396 F. 2d 841 (4th Cir., 1968) (informing defendant of possible punishment prior to waiver of rights is not essential to make waiver knowing and intelligent).

We believe that *Miranda* not only lacks an explicit requirement that an individual be informed of the charges about which he is to be questioned prior to waiving his rights but also lacks any implicit requirement that such action be taken by authorities before a valid waiver of rights can be executed by one who is to be interrogated. *Miranda* "reflects the Supreme Court's concern that an accused might, to his detriment, forfeit rights afforded him by the Constitution simply because he was not aware that he possessed such rights." *United States v. Hall, supra* at 845; Collins, *supra.*

In the instant case the court specifically found that defendant was fully and accurately advised of his rights prior to answering any questions. Thus he was clearly aware that he had the right to

refrain from answering questions at any time and to insist at that point on the presence of counsel. The language of the form which the defendant signed has been approved by this court. *State v. McAllister*, 287 N.C. 178, 214 S.E. 2d 75 (1975); *State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968). We also note that defendant had knowledge of his rights and was aware that the investigation concerned a homicide before he made the incriminating statement. Yet, he willingly continued to answer the questions put to him. The record reveals no point at which he expressed a desire for counsel or a desire to terminate the questioning. An individual in police custody must appraise for himself the import of the questions propounded to him and the significance of his answers to those questions. *United States v. Anderson, supra*; *People v. MacDonald, supra.*

Finally, we do not rest our holding in this case on mere technical compliance with the requirements of *Miranda*; standing alone that is insufficient, for the test of admissibility of an in-custody statement is whether from a consideration of the entire record it was knowingly, intelligently, and voluntarily made. *State v. White*, 291 N.C. 118, 229 S.E. 2d 152 (1976). We do not hold that the court need not consider the defendant's awareness of the charges about which he is to be questioned in assessing the validity of a waiver of rights. Rather, that factor is one which must be considered in view of the totality of circumstances. *Commonwealth v. Tatro, supra.* The court in this case weighed this factor in light of the other facts in the case and concluded that defendant's lack of knowledge of the charges, standing alone, was not sufficient to invalidate his waiver. The court found that the defendant's statement, even without this information, was voluntarily made. The findings of fact are supported by competent evidence and cannot, therefore, be disturbed on appeal. *State v. White, supra*; *State v. Childs*, 269 N.C. 307, 152 S.E. 2d 453 (1967), *death sentence vacated*, 403 U.S. 948, 29 L.Ed. 2d 859, 91 S.Ct. 2278 (1971).

In defendant's trial and the judgment appealed from, we find

No error.

Justice BROCK took no part in the consideration or decision of this case.

Justice EXUM dissents.

Justice EXUM dissenting.

The majority sees the issue with respect to the admissibility of defendant's pre-trial statement as being whether a defendant must be informed of the charge under investigation before he can make a knowing and intelligent waiver of his right to counsel and his right to remain silent, recognizing that only a knowing and intelligent waiver will suffice under *Miranda v. Arizona*, 384 U.S. 436 (1966), as a prerequisite to the statement's admissibility. Concluding that no such information is required by *Miranda* or any other authority, the majority finds here that defendant did make the required waivers and holds his statement admissible.

To me the issue presented by these facts is whether an intelligent and knowing waiver can be made when the suspect sought to be questioned is misled by police officers to believe that the crime under investigation is different from and much less serious than the crime which is in fact being investigated. The answer to this issue must surely be "No."

Here on voir dire investigator Simmons testified unequivocally that he "was interviewing [defendant] in relation to a homicide, the murder of Miss Irene Alley of Stewart Drive." Simmons then testified as follows:

> "Q. Did you tell him what you wanted to talk to him about?
>
> A. Yes, I asked him did he know why he was there.
>
> Q. And what did he respond?
>
> A. He stated that it was with reference to a possible break-in."

Earlier investigative supervisor Sarvis had testified on voir dire:

> "Right at the beginning after I entered the room we explained to Mr. Carter why he was there, what had happened on Stewart Drive. We told him there had been a homicide and a possible break-in. I am fairly certain that I said homicide and a break-in. But I am not really sure. I do not recall whether the word homicide had been mentioned before

that or not. I was not present when the statement was taken by Detective Simmons."

Defendant on voir dire testified that the investigators told him "they were investigating a break-in that had happened over the weekend" and that he, defendant, told Simmons "that they told me when they picked me up that it was for a possible break-in that happened over the weekend." After this conversation between Simmons and defendant, Simmons advised defendant of his rights and took his written waiver. On this voir dire evidence the trial court found as facts:

> "That at police headquarters Mr. Simmons questioned the defendant and asked if he knew why he was there and that he responded that he understood it was in relation to possible breaking and enterings. . . . That at the time of the execution of the waiver the defendant had not been informed that the investigation included a homicide but had been informed that the investigation related to breakings and enterings."

Practically all the evidence in the record supports these findings.

Thus defendant at the time he made his written waiver was led by the officers to believe that they wanted to question him with regard to a breaking when, in fact, they were investigating a homicide. The statement he made exculpates him from any involvement in a breaking but implicates him in a homicide.

I am unwilling to say under these circumstances that defendant made knowing and intelligent waivers when he signed the waiver form. It is understandable why he would have no hesitancy to respond to questions about a possible breaking nor feel the need for counsel if this was the purpose of the inquiry. Not only was he clearly innocent of such an offense, but also it is a felony which carries a maximum punishment of 10 years imprisonment. First degree murder, on the other hand, is punishable by death and, in this case, defendant had knowledge of facts which seriously implicated him in such a crime. Whether defendant was entitled to be informed of the murder investigation before he could make valid waivers is a question upon which courts, as noted in the majority opinion, are divided. Clearly, however, he could not make valid waivers when the investigators had misled him to

believe (1) that the matter to which his waivers would pertain was far less serious than in fact it was and (2) that it was a matter in which he was not at all implicated when in fact it was a matter in which he was seriously involved. In this case the misinformation given defendant by the investigators precluded him from making valid waivers at least until he was correctly informed of the true reason for his interrogation.

The majority relies in part on the fact that defendant was aware that the investigation concerned a homicide "before he made the incriminating statement. Yet, he willingly continued to answer the questions put to him." The majority, however, does not, nor could it under our cases, hold that by merely making statements in response to questions at that point in the interrogation defendant waived his right to counsel. This Court has consistently held "that a defendant's waiver of counsel must be 'specifically made.' In other words, there must be some *positive* indication by the defendant that he does not wish to have an attorney present during the questioning." *State v. Silhan*, 295 N.C. 636, 639, 247 S.E. 2d 902, 904 (1978). (Emphasis original.) "Failure to request counsel is not synonymous with waiver. Nor is silence." *State v. Butler*, 295 N.C. 250, 255, 244 S.E. 2d 410, 413 (1978). The United States Supreme Court said in *Miranda v. Arizona*, *supra*, 384 U.S. at 470, 475:

> "No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given.
>
> . . . .
>
> But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained."

Since defendant could not have made a knowing and intelligent waiver of his rights when he signed the written form and did not make a waiver of counsel during the interrogation itself I conclude that his pre-trial statement was not admissible. For this reason I vote for a new trial.

MAZDA MOTORS OF AMERICA, INC. v. SOUTHWESTERN MOTORS, INC., D/B/A MAZDA OF RALEIGH

No. 51

(Filed 4 January 1979)

1. **Contracts § 17.2— automobile dealer franchise agreement—mutual termination agreement—notice and hearing requirements inapplicable**

The notice and hearing provisions of G.S. 20-305(6) for termination of an automobile dealership franchise agreement apply solely to unilateral franchise terminations by the manufacturer and do not extend to mutual agreements between manufacturer and dealer to terminate a franchise.

2. **Duress § 1— termination of automobile dealership franchise—no economic duress**

The evidence supported the trial court's finding that an agreement terminating an automobile dealership franchise was not the result of coercion or duress imposed by the automobile manufacturer.

3. **Accounts § 2— account stated**

For an account stated to arise, it is essential that there be an agreement between parties that an account rendered by one of them to the other is correct.

4. **Accounts § 2— transfer of indebtedness—letter not account stated**

A letter from plaintiff to defendant automobile dealer stating that parts and tools from another dealership had been placed in defendant's inventory and that the indebtedness for these parts and tools would be transferred to defendant's account was insufficient to establish an account stated where there was no evidence that plaintiff ever submitted to defendant an account reflecting the value of the transferred inventory.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

ON plaintiff's petition for discretionary review of the decision of the Court of Appeals, 36 N.C. App. 1, 243 S.E. 2d 793 (1978), affirming in part and reversing in part judgment of *Bailey, J.*, entered 24 November 1976 in WAKE Superior Court.

This is an action for breach of contract arising out of a dispute over the termination of an automobile dealership agreement between plaintiff and defendant.

In the fall of 1971 plaintiff's predecessor granted defendant a franchise to open a dealership in Raleigh, North Carolina, for the sale of Mazda automobiles. Defendant began operations as an

authorized Mazda dealer in January 1972. Thereafter, by an instrument dated 1 January 1973, defendant and plaintiff entered into a written agreement entitled "Mazda Direct Dealer Agreement" for the calendar year 1973.

Plaintiff and defendant did not enter into a dealership agreement for 1974; however, defendant continued to operate as a Mazda dealer and bought parts and vehicles from defendant during a portion of that year. Defendant experienced economic problems during 1974. It lost its floor plan financing and its premises were temporarily padlocked by the Internal Revenue Service for nonpayment of taxes. In late May 1974 plaintiff requested defendant to execute a mutual termination agreement, but defendant refused to do so.

Following such refusal, plaintiff, by letter dated 3 June 1974, notified defendant that any and all agreements for the conduct of a Mazda dealership were terminated effective 18 June 1974. A copy of this letter was mailed to the Commissioner of Motor Vehicles on 7 June 1974.

On 21 June 1974 Jack Carlisle, president of defendant, telephoned plaintiff's branch manager and requested that defendant's Mazda dealership be allowed to continue until 31 August 1974. The text of this conversation was written into a letter dated 21 June 1974 from Carlisle to plaintiff's branch manager. Thereafter, on 10 July 1974, the parties entered into a written agreement whereby plaintiff and defendant mutually agreed to terminate the Mazda dealership in Raleigh effective 31 August 1974. Notice of this agreement was sent to the Commissioner of Motor Vehicles on 14 October 1974.

Defendant continued operations after 31 August 1974, refused to terminate the dealership as it had agreed to do, continued to hold itself out as a Mazda dealer, and refused to permit plaintiff to enter the premises to take an inventory of parts. As a result, this action was filed by plaintiff on 21 October 1974, alleging breach of contract.

In its complaint plaintiff sought to permanently enjoin defendant from representing itself as a Mazda dealer and from preventing plaintiff from taking a detailed inventory of parts, accessories, special tools and equipment, and authorized signs.

Plaintiff also sought a temporary restraining order and preliminary injunction to the same effect pending a final determination of the matter. Finally, plaintiff sought leave to amend its complaint to plead damages after completing the inventory.

Plaintiff's motion for a temporary restraining order was granted 21 October 1974 and its motion for preliminary injunctive relief was heard and granted 30 October 1974. By its amended complaint, allowed 15 November 1976, plaintiff alleged specific damages.

Defendant timely filed answer and counterclaim. In its counterclaim defendant sought to recover compensatory and punitive damages for the alleged unlawful termination of its Mazda dealership.

The case came on for trial before Judge Bailey at the 15 November 1976 Civil Session of Wake Superior Court. After considering the evidence of both parties Judge Bailey, sitting as judge and jury, entered final judgment on 24 November 1976. In that judgment he found facts and (1) made permanent the injunctive relief previously granted, (2) determined that plaintiff's and defendant's mutual agreement to terminate defendant's Mazda franchise was in all respects lawful, (3) concluded that G.S. 20-305(6) was inapplicable to the facts in this case, and (4) determined all remaining questions as to the rights of the parties raised by the pleadings. Defendant appealed to the Court of Appeals.

On 18 April 1978 the Court of Appeals held in pertinent part that the franchise agreement between the parties was wrongfully terminated because plaintiff failed to comply with the notice requirements of G.S. 20-305(6) and remanded the case to the trial court. Plaintiff appealed to the Supreme Court on alleged constitutional grounds and petitioned for discretionary review. We allowed the petition and denied a motion to dismiss the appeal.

Poyner, Geraghty, Hartsfield & Townsend by John J. Geraghty, David W. Long and Cecil W. Harrison, Jr., attorneys for plaintiff appellant.

Newsom, Graham, Strayhorn, Hedrick, Murray, Bryson & Kennon by Josiah S. Murray III and Lewis A. Cheek, attorneys for defendant appellee.

HUSKINS, Justice.

Plaintiff presents two questions which determine this appeal: (1) Does the 10 July 1974 mutual termination agreement between plaintiff and defendant effectively terminate the automobile dealership between the parties? (2) Does defendant owe plaintiff on account the sum of $8,795.09?

Resolution of the first question requires consideration of G.S. 20-305(6) which provides:

> "It shall be unlawful for any manufacturer, factory branch, distributor, or distributor branch, or any field representative, officer, agent, or any representative whatsoever of any of them:
>
> * * * *
>
> (6) Notwithstanding the terms of any franchise agreement to terminate, cancel, or refuse to renew the franchise of any dealer, without good cause, and unless (i) the dealer and the Commissioner have received written notice of the franchisor's intentions at least 60 days prior to the effective date of such termination, cancellation, or the expiration date of the franchise, setting forth the specific grounds for such action, and (ii) the Commissioner has determined, if requested in writing by the dealer within such 60-day period, and after a hearing on the matter, that there is good cause for the termination, cancellation, or nonrenewal of the franchise, except in the event of fraud, insolvency, closed doors, or failure to function in the ordinary course of business, 15 days' notice shall suffice; provided that in any case where a petition is made to the Commissioner for a determination as to good cause for the termination, cancellation, or nonrenewal of a franchise, the franchise in question shall continue in effect pending the Commissioner's decision . . . ."

Plaintiff contends this statute is not applicable to the voluntary mutual termination agreement under attack by defendant in this case.

Defendant contends the 10 July 1974 mutual termination agreement did not effectively terminate the dealership agreement

between the parties. Defendant relies on G.S. 20-305(6) which, "notwithstanding the terms of any franchise agreement," makes it unlawful for a manufacturer to "terminate, cancel, or refuse to renew the franchise of any dealer without good cause" and without giving sixty days' written notice of intention to terminate. Subsection (6) entitles dealers who have received the statutory termination notice to make a written request within the sixty-day notice period for a hearing before the Commissioner of Motor Vehicles on the question whether there was good cause for the termination. In the event of "fraud, insolvency, closed doors, or failure to function in the ordinary course of business," the notice period is reduced to fifteen days. Defendant argues that the notice and hearing provisions of G.S. 20-305(6) are applicable even when manufacturer and dealer enter into a mutual agreement to terminate the franchise. According to defendant, the mutual termination agreement of 10 July 1974 could not lawfully terminate the earlier franchise agreement between plaintiff and defendant on account of plaintiff's failure to give the required statutory notice of termination to both defendant *and* the Commissioner of Motor Vehicles.

[1] Do the notice and hearing provisions of G.S. 20-305(6) apply to a mutual agreement between dealer and manufacturer to terminate an earlier franchise agreement? In order to answer this question we must interpret the language of G.S. 20-305(6).

The intent of the legislature controls the interpretation of a statute. *In re Banks*, 295 N.C. 236, 244 S.E. 2d 386 (1978); 12 N.C. Index 3d, Statutes, § 5.1. If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls. *Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E. 2d 297 (1976); *Commissioners v. Henderson*, 163 N.C. 114, 79 S.E. 442 (1913). Conversely, "where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, 107 S.E. 505 (1921). *See also In re Hardy*, 294 N.C. 90, 240 S.E. 2d 367 (1978).

Due consideration of the language of G.S. 20-305(6) leads us to conclude that its provisions are free from ambiguity, apply *solely*

to unilateral franchise terminations by the manufacturer, and do not extend to mutual agreements between manufacturer and dealer to terminate a franchise. The language of G.S. 20-305(6) is expressly couched in terms of the unilateral conduct of the franchisor. The franchisor cannot terminate, cancel, or refuse to renew a franchise unless it has good cause for taking such action and unless it gives written notice to dealer and Commissioner of Motor Vehicles of its "intentions" at least sixty days prior to the date of termination. Moreover, upon being notified of "franchisor's intentions" dealer has the option of requesting a hearing before the Commissioner of Motor Vehicles to determine whether there is good cause for the termination. In effect, the express language of G.S. 20-305(6) imposes substantial curbs on the unilateral actions of a manufacturer with respect to franchise termination. The express language does not cover voluntary mutual termination agreements between manufacturer and dealer.

Such a reading of subsection (6) does not lead to absurd results nor does it contravene the manifest purpose of the statute. Literally read, the language adopted by the General Assembly permits an automobile dealer to voluntarily forego the substantial protection of notice and hearing by signing a mutual termination agreement. Rather than enter into such an agreement, a dealer may require the manufacturer to terminate the franchise in accordance with the provisions of G.S. 20-305(6). Such result does not frustrate the protection afforded a dealer by subsection (6); rather, it represents a legislative determination that a dealer may voluntarily forego the safeguards against franchise termination if in his judgment he deems them unnecessary. It is not for us to question the wisdom of this determination. *Commissioners v. Henderson, supra.* The meaning of the law is plain and we must apply it as written. *In re Poindexter's Estate,* 221 N.C. 246, 20 S.E. 2d 49 (1942). We note parenthetically that a dealer who enters into a mutual termination agreement with a manufacturer still benefits from the protection offered by the common law defense of economic duress and the specific provisions of G.S. 20-305(2) which make it unlawful for a manufacturer to coerce or attempt to coerce a dealer to enter into an agreement with such manufacturer by threatening to cancel any franchise existing between manufacturer and dealer.

In light of the foregoing conclusions, we neither reach nor decide the constitutional question argued in the briefs. *See State v. Blackwell*, 246 N.C. 642, 99 S.E. 2d 867 (1957); *State v. Lueders*, 214 N.C. 558, 200 S.E. 22 (1938).

[2] Defendant next contends that it executed the mutual termination agreement of 10 July 1974 under duress and coercion imposed by plaintiff. Defendant alleged, in pertinent part, that plaintiff refused to resupply it with replacement parts necessary to the operation of its business unless it entered into a mutual termination agreement. The trial court found as a fact that the mutual termination agreement of 10 July 1974 was not the product of coercion or duress. Such finding is binding on this Court if supported by competent evidence, even though there be evidence to the contrary. *Cogdill v. Highway Comm.*, 279 N.C. 313, 182 S.E. 2d 373 (1971). There is competent evidence in the record before us to support the trial court's finding of no duress or coercion. The evidence offered by plaintiff includes a letter dated 21 June 1974 from Jack Carlisle, president of defendant, to plaintiff's branch manager in which Mr. Carlisle expresses gratitude to plaintiff for its past cooperation and indicates defendant's willingness to terminate the franchise 31 August 1974. This letter memorialized the contents of a telephone conversation initiated by Mr. Carlisle on 21 June 1974. Also negating duress and coercion is evidence tending to show that defendant was kept supplied with replacement parts during the summer of 1974; that by the summer of 1974 defendant had lost its floor plan financing and had been padlocked for several days by the Internal Revenue Service for nonpayment of taxes. Defendant's objections to the trial court's findings of no coercion or duress in the execution of the 10 July 1974 mutual termination agreement were properly overruled.

[4] Finally, defendant contends the trial court erred in finding that defendant Mazda of Raleigh owed plaintiff on account the sum of $8,795.09. The record contains the following evidence pertinent to this question: Mr. Jack J. Carlisle, president of defendant Mazda of Raleigh, was also a principal in Sentry Mazda, a Mazda dealership in Greensboro, North Carolina. Sentry Mazda was given notice of termination the same day as Mazda of Raleigh. Sentry Mazda was closed in June of 1974 and its parts inventory was transferred to Mazda of Raleigh. Mr. Carlisle testified that "after the termination [plaintiff] had sent us, I

realized that I could not fight [plaintiff] on two fronts. We moved twenty-some hundred dollars worth of parts from Greensboro, closed up, and moved the parts to Raleigh." Thereafter, on 15 August 1974, plaintiff's controller stated the following in a letter directed to Carlisle:

> "This letter is to inform you that because, upon termination of Sentry Mazda, parts and tools were taken to your Mazda of Raleigh dealership and, at least partially, integrated into the Mazda of Raleigh inventory, Mazda Motors of America will transfer the indebtedness for these parts and tools from the account of Sentry Mazda to the account of Mazda of Raleigh.
>
> Accordingly, we will this month credit the outstanding Sentry parts balance to Sentry's parts account and will debit a like amount to the Mazda of Raleigh account.
>
> When Mazda of Raleigh terminates at the end of this month, all parts and tools returned will be netted against the Mazda of Raleigh parts account."

Mr. Carlisle received this letter but never responded to it.

Is the above evidence sufficient to establish an account stated between defendant Mazda of Raleigh and plaintiff for $8,795.09, representing the value of parts transferred to defendant from Sentry Mazda? We think not.

[3] " 'An account stated may be defined, broadly, as an agreement between the parties to an account based upon prior transactions between them, with respect to the correctness of the separate items composing the account, and the balance, if any, in favor of the one or the other. The amount or balance so agreed upon constitutes a new and independent cause of action, superseding and merging the antecedent causes of action represented by the particular constituent items; it is a liquidated debt, as binding as if evidenced by a note, bill or bond.' 1 Am. Jur. 272, Accounts and Accounting, Section 16." *Teer Co. v. Dickerson, Inc.*, 257 N.C. 522, 126 S.E. 2d 500 (1962). Thus, for an account stated to arise it is essential that there be "an agreement between parties that an account rendered by one of them to the other is correct." *Mahaffey v. Sodero*, 38 N.C. App. 349, 247 S.E. 2d 772 (1978). *See also, Little v. Shores*, 220 N.C. 429, 17 S.E. 2d 503 (1941).

[4] Due consideration of the record reveals no competent evidence to support a finding that plaintiff and defendant ever agreed on the balance due as a result of the transfer of parts between Sentry Mazda and defendant. There is sufficient evidence to establish that a transfer of parts did take place and that the parties agreed to reflect this transfer as a credit on the Sentry account and a debit on defendant's account. However, there is no evidence in the record that plaintiff ever submitted to defendant an account reflecting debits attributable to the transfer of parts from Sentry Mazda to defendant. Nor is there any evidence which establishes *the value of the inventory transferred from Sentry Mazda to defendant.* Plaintiff contends that an account it submitted to Sentry Mazda dated 30 June 1975 in the amount of $8,795.09 establishes the value of the transferred inventory. This contention is unsound. The 1975 Sentry account of $8,795.09 is not probative of the value of inventory transferred from Sentry to defendant in June of 1974 since such indebtedness does not necessarily reflect *the inventory on hand* at the time of the transfer. In sum, plaintiff has established its right to debit defendant's account to reflect parts transferred from Sentry Mazda but has failed to establish the amount to be debited.

The judgment of the trial court debiting defendant's account in the amount of $8,795.09 is unsupported by the evidence. Let the case be remanded to the trial court for a determination of the amount of defendant's indebtedness to plaintiff for inventory received by defendant from Sentry Mazda. We note that the calculations contained in the judgment of the trial court are seemingly a few dollars in error, but neither party has objected to the minimal discrepancies in the calculations.

For the reasons stated the decision of the Court of Appeals is reversed with respect to question (1), affirmed with respect to question (2), and the case is remanded for further proceedings consistent with this opinion.

Reversed in part; affirmed in part; and remanded.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

ROSS REALTY COMPANY v. FIRST CITIZENS BANK & TRUST COMPANY, AS TRUSTEE OF THE PROFIT SHARING RETIREMENT PLAN AND TRUST OF THERMO INDUSTRIES, INC. AND AFFILIATED COMPANIES

No. 93

(Filed 4 January 1979)

Mortgages and Deeds of Trust § 32.1 — purchase money deed of trust — statute abolishing deficiency judgment — prohibition of action on note

G.S. 45-21.38 not only abolishes deficiency judgment after foreclosure of a purchase-money mortgage or deed of trust but also prohibits a suit upon a purchase-money note without foreclosure of the mortgage or deed of trust securing the note.

Justice BROCK took no part in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals (37 N.C. App. 33) which affirmed the judgment of *Griffin, J.*, entered at the 8 August 1977 Session of MECKLENBURG Superior Court.

Plaintiff instituted this action to recover from defendant $106,601.86 plus interest, the amount allegedly due on a promissory note executed by defendant in favor of plaintiff. In its answer defendant admitted execution of the note but alleged that it was given to secure the balance of the purchase price of real estate and that defendant had offered to reconvey the real estate to plaintiff.

Pursuant to stipulations entered into between the parties, the trial court found facts summarized in pertinent part as follows:

(1) Plaintiff is a corporation organized and existing under the laws of the State of North Carolina with its office and principal place of business in Mecklenburg County. Defendant is a North Carolina banking corporation having an office in Mecklenburg County. Defendant is trustee of the Profit Sharing Retirement Plan and Trust of Thermo Industries, Inc., and affiliated companies.

(2) By deed dated 25 March 1974 and duly recorded on 19 June 1974 in Mecklenburg County Registry, plaintiff conveyed to defendant certain real estate located in the City of Charlotte. As

part of the purchase price for said real estate, defendant executed under seal a note for the balance of the purchase price for said real estate, payable to the order of plaintiff, in the amount of $126,000. Said note provided by its terms that it was for the balance of purchase money on real estate.

(3) To secure plaintiff seller the payment of the balance of said purchase price, a purchase money deed of trust conveying said real estate as security for payment of said note was executed by defendant; said deed of trust is dated 1 April 1974 and was duly recorded in Mecklenburg County Registry on 19 June 1974. F. T. Miller, Jr., is named trustee in said deed of trust which by its terms provides that it secures a note which is for the balance of the purchase money of the real estate.

(4) Defendant failed to make the payment which was due on 1 October 1976 and refuses to make any further payments on the note aforesaid. Plaintiff is still the owner and holder of the note and deed of trust aforesaid.

(5) Prior to the commencement of this action defendant tendered to plaintiff, in lieu of foreclosure, a deed to convey to plaintiff all the interests of defendant in the real estate embraced in the deed of trust.

(6) Plaintiff refused to accept the deed offered in lieu of foreclosure.

(7) Said note and deed of trust were given as payment for and security for the balance of the purchase price of the real estate referred to in the deed and deed of trust aforesaid.

The trial court concluded as a matter of law that the provisions of G.S. 45-21.38 are inapplicable to the subject matter of this action; that this action was brought solely to effect collection of the balance due on a purchase money note without recourse to or foreclosure of the deed of trust securing the same; that G.S. 45-21.38 "abolished deficiency judgments arising out of the sale of real property securing a balance purchase money note; however, in this case, such security was abandoned, resulting in there being no foreclosure and no sale of said real estate".

The court rendered judgment against defendant for the amount prayed and defendant appealed.

Ragsdale & Kirschbaum, by William L. Ragsdale, for defendant appellant.

Miller, Johnston, Taylor & Allison, by John B. Taylor and James W. Allison, for plaintiff appellee.

Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, by Maurice A. Weinstein, T. LaFontine Odom and L. Holmes Eleazer, Jr., Amicus Curiae Brief, for Henderson Belk.

Seay, Rouse, Johnson & Harvey, by James L. Seay and Ronald H. Garber, and Sanford, Adams, McCullough & Beard, by J. Allen Adams, E. D. Gaskins, Jr., and Catharine B. Arrowood, Amicus Curiae Brief, for Lee A. Debnam and Algie Stephens.

BRITT, Justice.

Defendant contends the Court of Appeals erred in affirming the trial court's conclusion of law that the provisions of G.S. 45-21.38 are inapplicable to the subject matter of this action and in entering judgment based on that conclusion. We think the contention has merit.

G.S. 45-21.38 provides in pertinent part as follows:

> "Deficiency judgments abolished where mortgage represents part of purchase price.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate . . . ."

Decision in this case depends upon the interpretation or construction of the quoted statute. "In the interpretation of statutes, the legislative will is the all-important or controlling factor. Indeed, it is frequently stated in effect that the intention of the

legislature constitutes the law. Accordingly, the primary rule of construction of statutes is to ascertain and declare the intention of the legislature, and to carry such intention into effect to the fullest degree. A construction adopted should not be such as to nullify, destroy, or defeat the intention of the legislature." 73 Am. Jur. 2d, Statutes § 145, p. 351.

Through the years this court has adhered to the principle that the legislative intent is a controlling factor in the construction of statutes. "The object of all interpretations of statutes is to ascertain the meaning and intention of the Legislature . . . ." *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911). *Accord: State v. Hart*, 287 N.C. 76, 213 S.E. 2d 291 (1975); *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968); *Freeland v. Orange County*, 273 N.C. 452, 160 S.E. 2d 282 (1968); *Buck v. Guaranty Company*, 265 N.C. 285, 144 S.E. 2d 34 (1965); *Canteen Service, Inc. v. Johnson*, 256 N.C. 155, 123 S.E. 2d 582, 91 A.L.R. 2d 1127 (1962); *Mullen v. Town of Louisburg*, 225 N.C. 53, 33 S.E. 2d 484 (1945); *In Re Steelman*, 219 N.C. 306, 13 S.E. 2d 544 (1941); *Branch Banking and Trust Company v. Hood*, 206 N.C. 268, 173 S.E. 601 (1934); *Hunt v. Eure*, 188 N.C. 716, 125 S.E. 484 (1924); *State v. Burnett*, 173 N.C. 750, 91 S.E. 597 (1917); *Abernethy v. Board of Commissioners*, 169 N.C. 631, 86 S.E. 577 (1915); *McLeod v. Board of Commissioners*, 148 N.C. 77, 61 S.E. 605 (1908); *Blair v. Coakley*, 136 N.C. 405, 48 S.E. 804 (1904).

In *State v. Bell*, 184 N.C. 701, 705, 115 S.E. 190 (1922), this court in construing a statute relating to the abandonment of children said: "In our endeavor to ascertain the purpose of the statute, we should also have due regard to the rule that the spirit and reason of the law shall prevail over its letter, especially where a literal construction would work an obvious injustice. (Citations.)"

In *Board of Education v. Dickson*, 235 N.C. 359, 361, 70 S.E. 2d 14 (1952), this court, speaking through Ervin, J., in construing certain statutes relating to the employment of school principals, said: ". . . No good purpose will be served by setting forth verbatim the somewhat awkward language in which these enactments are couched. Their meanings are to be found in what they necessarily imply as much as in what they specifically express. 50 Am. Jur., Statutes, section 242."

While the statute now codified as G.S. 45-21.38 is not artfully drawn, we think the manifest intention of the Legislature was to limit the creditor to the property conveyed when the note and mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the balance of the purchase price.

We have found very helpful an article (cited in the *Amicus* briefs) by Professors Brainerd Currie and Mark S. Lieberman appearing in the 1960 Duke Law Journal, pages 1 *et seq.* We quote a portion of the article:

> "Nothing in the way of conventional legislative history is available to shed light on the purpose of the legislation. There are no committee reports and no record of the legislative debates; even contemporary editorial comment is lacking. We are not, however, entirely without evidence on which to base a judgment. The year 1933 was one of deep depression, and North Carolina, along with other states, was concerned with the economic distress associated with wholesale mortgage foreclosures. The act which has been quoted—chapter thirty-six of the Laws of 1933—was the first in a series of legislative attempts at the same session to deal with the mortgage problem. It was enacted on February 6. On February 9, the legislature approved a joint resolution requesting a voluntary moratorium until November 1, 1934, on all principal payments secured by mortgages on farm lands and homes, so long as interest and taxes were paid. On April 18, chapter 275 was enacted, dealing rather comprehensively with the foreclosure problem. Section one empowered the courts, prior to confirmation of any foreclosure sale of real estate, to enjoin the sale or its confirmation on the ground that the amount bid or price offered was inadequate and inequitable and would result in irreparable damage. Section two authorized the courts, prior to confirmation, to order resale upon such terms as might be just and equitable. Section three provided that in suits for deficiency judgments after the exercise of a power of sale, the mortgagor, if the holder of the obligation was the purchaser at the sale, could defend by showing that the property was fairly worth the amount of the debt secured by it at the time and place of sale. All of these provisions applied to existing mortgages;

they included, without being limited to, purchase-money mortgages. On May 15, the time within which actions for deficiencies might be brought was limited to one year from the date of sale." Currie and Lieberman, *Purchase-Money Mortgages and State Lines: A Study in Conflict-of-Laws Method*, 1960 Duke Law Journal 1, 11-12.

Most of the enactments mentioned now appear in Chapter 45, Article 2B of the General Statutes. The writers of the article concluded, among other things, that the 1933 General Assembly intended to protect vendees from oppression by vendors and mortgagors from oppression by mortgagees. Moreover, the authors examined the specific problem which this court confronts in the case *sub judice*.

"[T]he legislature was concerned about the situation in which the vendor finances the sale, and was particularly concerned for the protection of the purchaser in that situation. The question may well be asked: If that was the purpose, why confine the remedial statute to deficiency judgments when the mortgagee could inflict substantially the same injury on the mortgagor simply by suing on the personal obligation. . . . The only answer is simply that legislatures do not always see the whole problem, and are not always astute to close all the loopholes. The evidence is strong that the legislature wanted to furnish protection to the purchaser where the vendor did the financing. The only alternative possibility is that there was something distasteful about the action to recover a deficiency under a purchase-money mortgage, as an action, which was not shared by actions on personal obligations, suits for specific performance, and actions to recover mortgage deficiencies brought by third-party mortgagees. This is manifestly absurd. . . . [T]he policy was one of protecting the purchaser where the vendor did the financing; the North Carolina legislature simply did not do an efficient job of insuring the effectiveness of the policy." *Id.* at 23-24.

Where the Legislature has enacted a statute to achieve a specific aim, it is incumbent upon the court to construe the statute in a manner which effectuates that legislative purpose. In *Underwood v. Howland, supra* at 478, in an opinion by Huskins, J., this court said:

"Furthermore, '. . . where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the Legislature, the reason and purpose of the law should control, and the strict letter thereof should be disregarded. [Citations omitted.]' "

Plaintiff relies very heavily on the opinion in *Page v. Ford*, 65 Or. 450, 131 P. 1013 (1913). Plaintiff correctly states that the Oregon court, construing an anti-deficiency statute similar if not identical to ours, held that their statute—literally construed—did not prevent the holder of a note given for the purchse price of the land, and secured by a mortgage, from disregarding the mortgage and bringing an action for personal judgment on the note. Plaintiff has urged us to construe G.S. 45-21.38 similarly, but this we refuse to do.

We do not attempt to distinguish our statute from that of Oregon, nor the facts in this case from those before the court in *Page*. We note only that the Oregon court, using the same approach to statutory construction employed by the Court of Appeals in its consideration of this case, mechanically construed the language of the statute while failing to attempt to determine the purpose which the Legislature sought to accomplish. We feel compelled to follow the long tradition of this court which is to ascertain, if possible, the intent of our Legislature in interpreting statutes and to respect the rule "that the spirit and reason of the law shall prevail over its letter."

Our conclusion that the Legislature did not intend to allow suit upon the note in purchase-money mortgage situations is also buttressed by what appears to have been the only contemporary commentary on the statute. In an article written by members of the faculty of the U.N.C. Law School a brief summary of the statute is followed by this observation: "The effect of this (the statute) is to limit the creditor to the property conveyed, when for the purchase money, changing in that respect the present statute. This applies only to such contracts as are made after the ratification of the Act, Feb. 6, 1933." *A Survey of Statutory Changes in North Carolina in 1933*, 11 N.C. Law Rev. 191, 219 (1933).

Furthermore, the procedure attempted by plaintiff in the case at hand would circumvent the spirit and purpose of the

statute in question. The Court of Appeals acknowledges in its opinion that its literal construction of the statute creates an "anomalous situation" which enables a creditor to easily evade the effect of the statute. After obtaining judgment on a note, a plaintiff could foreclose the deed of trust, apply the proceeds from the sale to the judgment, and then proceed with execution against the judgment debtor's general assets. Or, a plaintiff could ignore the deed of trust and proceed with execution against the judgment debtor's assets including the real estate covered by the deed of trust. Clearly, the General Assembly did not intend to allow such circumvention.

In the recent case of *State v. Shook*, 293 N.C. 315, 317, 237 S.E. 2d 843 (1977), this court, in an opinion by Exum, J., construing G.S. 15A-943(b), said:

> "We must, of course, construe the meaning of the statute in accordance with the ascertainable intent of the legislature. *In re Arthur*, 291 N.C. 640, 231 S.E. 2d 614 (1977); *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E. 2d 281 (1972). In construing a statute to determine its legal effect, we may infer the legislative intent by looking to the purpose of the statute, the evils which it is designed to remedy and the effects of alternative constructions. *In re Arthur, supra.*"

Having in mind the purpose for which G.S. 45-21.38 was adopted, the perceived problem which the statute seeks to remedy, and the effect which a literal construction of the statute produces, we are compelled to construe the statute more broadly and to conclude that the Legislature intended to take away from creditors the option of suing upon the note in a purchase-money mortgage transaction. This construction of the statute not only prevents its evasion, but also gives effect to the Legislature's intent.

Finally, plaintiff argues that a ruling against it in this case would place sellers of real estate at a serious disadvantage in the present-day market place. This argument is not persuasive. The seller still has the prerogative of determining the amount of the down payment as well as the amounts and due dates of the future payments; in case of default the seller gets the land back while the purchaser loses his down payment and any other payments made on the purchase price.

For the reasons stated, the decision of the Court of Appeals is reversed and this cause is remanded to that court who will order the judgment appealed from reversed and vacated.

Reversed.

Justice BROCK took no part in the consideration or decision of this case.

NORTH CAROLINA NATIONAL BANK v. HENRY THOMAS EVANS, BETTY TRIP EVANS, AND J. RUSSELL WOOTEN

No. 6

(Filed 4 January 1979)

1. **Fraudulent Conveyances § 1— "voluntary" conveyance defined**

A conveyance is deemed to be voluntary when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud.

2. **Fraudulent Conveyances § 3.4— consideration given for conveyances—fair and reasonable price for property—question of fact**

Where plaintiff alleged that defendants Evans fraudulently conveyed their interests in certain tracts of land to defendant Wooten in violation of G.S. 39-15, defendant Wooten did not meet his burden of establishing that there was no triable issue of fact on the question of adequate consideration and that the conveyances to him were not fraudulent as a matter of law, since his evidence that he agreed to assume all outstanding balances due on any and all notes secured by any and all deeds of trust on the properties and agreed to assume the outstanding balance of at least $7000 on a certain unsecured note, without evidence of the fair market value of the tracts and without evidence of the balance due on the secured notes, tended to establish that legal consideration was given for the conveyances, but failed to establish that the legal consideration also constituted a fair and reasonable price for the property.

3. **Lis Pendens § 2— action to set aside fraudulent conveyance—lis pendens proper**

A claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to G.S. 39-15 *et seq.* constitutes an action affecting title to real property within the meaning of the *lis pendens* statute, G.S. 1-116, *et seq.*

Justices BRITT and BROCK took no part in the consideration or decision of this case.

Bank v. Evans

ON appeal by plaintiff to review the decision of the Court of Appeals affirming judgment of *Whedbee, J.*, entered 1 December 1976 in District Court, PITT County.

Plaintiff brought this action to recover $3,252.54 owed by defendants Evans and additionally alleged that defendants Evans had fraudulently conveyed their interests in three certain tracts of land to defendant Wooten in violation of G.S. 39-15. Plaintiff prayed that the conveyances be set aside. Contemporaneously with the filing of its amended complaint, plaintiff filed a notice of *lis pendens*, G.S. 1-116, which notice was served upon all defendants pursuant to G.S. 1-116.1.

Defendant Wooten filed a motion for partial summary judgment on the fraudulent conveyance claim and a motion to strike plaintiff's notice of *lis pendens*. Upon consideration of affidavits submitted by defendant Wooten and plaintiff, the trial court granted Wooten's motion for partial summary judgment and ordered plaintiff's notice of *lis pendens* stricken from the records.

On plaintiff's appeal the Court of Appeals affirmed, 35 N.C. App. 322, 241 S.E. 2d 379 (1978), with *Webb, J.*, dissenting. Plaintiff appeals to this Court pursuant to the provisions of G.S. 7A-30(2).

Other evidence pertinent to the decision will be noted in the opinion.

Everett & Cheatham by James T. Cheatham and Edward J. Harper II, attorneys for plaintiff appellant.

Williamson, Shoffner, Herrin & Stokes, by Robert J. Shoffner, Jr., attorneys for defendant appellee.

HUSKINS, Justice.

This appeal presents two questions: Did the trial court err in granting partial summary judgment for defendant Wooten? Did the trial court err in striking the notice of *lis pendens*?

The guiding principles applicable to summary judgment under Rule 56, Rules of Civil Procedure, have been discussed numerous times by this Court. *See, e.g., Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). An apt statement of these princi-

ples for the purposes of this appeal is found in *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974):

> "In ruling on a motion for summary judgment, the Court does not resolve issues of fact but goes beyond the pleadings to determine whether there is a genuine issue of material fact. The moving party has the burden of establishing the absence of any triable issue, and the Court in considering the motion carefully scrutinizes the papers of the moving party and, on the whole, regards those of the opposing party with indulgence. This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing. If a genuine issue of material fact does exist, the motion for summary judgment must be denied; the motion may be granted only where there is no such issue and the moving party is entitled to judgment as a matter of law. G.S. 1A-1, Rule 56(e), Rule 56(f) [other citations omitted]."

The legal principles with respect to fraudulent conveyances are set out in *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), as follows:

> "(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors,

it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

(4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid.

(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void."

Here, plaintiff contends the disputed conveyances were voluntary, *i.e.*, without adequate consideration, and that defendants Evans did not retain property fully sufficient and available to pay their existing debts. Alternatively, plaintiff contends the conveyances were voluntary and made by defendants Evans with the actual intent to defraud plaintiff, even though sufficient property was retained by defendants Evans to pay their existing debts.

Essential to both principles relied on by plaintiff is the element of voluntariness, *i.e.*, inadequate consideration. In support of his motion for partial summary judgment defendant Wooten submitted affidavits tending to show that the disputed conveyances were supported by an adequate consideration. The trial court found that Wooten's affidavits established that the element of inadequate consideration asserted in plaintiff's pleadings was nonexistent. Perceiving no genuine dispute of fact on the consideration issue, the trial court concluded that there was adequate consideration for the conveyances as a matter of law and granted Wooten's motion for partial summary judgment.

Plaintiff did not respond to defendant's affidavits with any evidence tending to show that the claim of inadequate consideration presented a genuine issue for trial. Even so, defendant still has the burden of showing that there is no triable issue of fact and that he is entitled to judgment as a matter of law. "Hence plaintiff may yet succeed in defending against the motion for summary judgment if the evidence produced by the movant and considered by the court is insufficient to satisfy the burden." *Page v.*

Sloan, 281 N.C. 697, 190 S.E. 2d 189 (1972). Thus, the precise question before us is whether defendant Wooten met his burden of establishing: (1) that the claim of inadequate consideration presented no triable issues of fact, and (2) that he was entitled to a judgment as a matter of law.

[1] In order to decide the precise question posed we must first determine what constitutes a valuable consideration in the law of fraudulent conveyances. Under the case law interpreting our statutes on fraudulent conveyances—G.S. 39-15 *et seq.*—"a determination that a conveyance was not made for valuable consideration means that the conveyance was 'voluntary.'" Comment, 50 N.C.L. Rev. 873, 878 (1972). A conveyance is deemed to be voluntary "when the purchaser does not pay a *reasonably fair price* such as would indicate unfair dealing and be suggestive of fraud." *Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E. 2d 23 (1968) (emphasis added).

A valuable consideration in the law of fraudulent conveyances is not the same as a valuable consideration in the law of contracts. *See Knight v. Bridge Co.*, 172 N.C. 393, 90 S.E. 412 (1916). This crucial distinction was explained by Chief Justice Ruffin in *Fullenwider v. Roberts*, 20 N.C. 420 (1839). Mere inadequacy of price is not sufficient to set aside a contract as between two parties for the reason that "if one will, without imposition, distress or undue advantage, make a bad bargain with his eyes open, *he* must stand to it. His agreement is sufficient, because his interests alone are affected by it." *Id.* However, different policy considerations come into play when the transaction involves the interests of a creditor who is not a party to the transaction. As against such creditors "the price must be sufficient in itself to sustain the deed, without the aid of their acceptance, for no such acceptance exists." *Id.* Since the creditor has no control over the amount of consideration which his debtor will accept in relinquishing assets, the law requires that the debtor receive "a *fair* and *reasonable* price, according to the common mode of dealing between buyers and sellers." *Id.* This does not mean that the debtor "should [be] paid every dollar the land was worth, but he should [be] paid a reasonably fair price—such as would indicate fair dealing, and not be suggestive of fraud." *Austin v. Staten*, 126 N.C. 783, 36 S.E. 338 (1900). Such a requirement prevents a debtor from placing his

assets beyond the reach of his creditors by transfers to friendly parties for nominal considerations.

[2] Thus for defendant Wooten to meet his burden of establishing that there is no triable issue of fact on the question of adequate consideration and that the conveyances to him were not fraudulent as a matter of law, he must demonstrate that he paid a "fair and reasonable price" to defendants Evans for the several tracts of land they conveyed to him. Due consideration of the affidavits offered by Wooten in support of his motion for partial summary judgment leads us to conclude that Wooten failed to meet this burden and that the granting of partial summary judgment by the trial court was erroneous.

The affidavits submitted by defendant Wooten tend to prove in pertinent part the following facts. In March of 1976 defendants Henry Thomas Evans and wife, Betty Lou Tripp Evans, conveyed to defendant Wooten all their interests in certain properties described in the deeds. As consideration for said conveyances Wooten agreed to assume all outstanding balances due on any and all notes secured by any and all deeds of trust on said properties in favor of First Federal Savings & Loan Association of Pitt County and to hold defendants Evans harmless on account of the notes. Further, defendant Wooten agreed to assume the outstanding balance on a certain unsecured note at Planters National Bank in Ayden, North Carolina, which defendants Evans had signed as makers and Wooten as an endorser. The outstanding balance on this note was at least $7000. The unpaid balance on this note has been paid in full by defendant Wooten.

We cannot determine from the evidence presented by defendant Wooten in support of his motion for summary judgment whether or not he paid a *reasonably fair price* for the property conveyed to him by defendants Evans. Wooten's evidence does not indicate the fair market value of the several tracts. Nor does it disclose the balance due on the secured notes payable to First Federal Savings & Loan. Wooten's evidence merely indicates that he paid $7000 plus other unspecified consideration for real property of unspecified value. At most, such evidence tends to establish that a legal consideration was given in return for the conveyances in question; but such evidence fails to establish that the legal consideration also constituted a *fair and reasonable* price for the

property. In this posture we hold that a genuine issue of material fact remains on the question of whether Wooten paid Evans a fair and reasonable price. Since the allegations in plaintiff's amended complaint present triable issues of fact, we conclude that summary judgment for defendant Wooten on the fraudulent conveyance claims was improvidently granted.

Since we hold that the affidavits submitted by Wooten did not entitle him to summary judgment, we need not determine whether portions of these affidavits were inadmissible.

Plaintiff filed a notice of *lis pendens* contemporaneously with the commencement of its action, and we must now determine whether the notice of *lis pendens* was properly stricken.

"The common law rule of *lis pendens* has been replaced in this State by the provision of G.S. 1-116 to G.S. 1-120.1. *Arrington v. Arrington*, 114 N.C. 151, 19 S.E. 351. Thus, there can be no valid notice of *lis pendens* in this State except in one of the three types of actions enumerated in G.S. 1-116(a), which reads as follows:

> '(a) Any person desiring the benefit of constructive notice of pending litigation must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117, in the following cases:
>
> '(1) Actions affecting title to real property;
>
> '(2) Actions to foreclose any mortgage or deed of trust or to enforce any lien on real property; and
>
> '(3) Actions in which any order of attachment is issued and real property is attached.'

Since it appears clearly from the plaintiff['s] statement of the nature of [its] action that it does not fall into Class 2 or Class 3, the alleged notice of *lis pendens* is not valid unless this is an action 'affecting title to real property.' " *Cutter v. Realty Co.*, 265 N.C. 664, 144 S.E. 2d 882 (1965).

Does a claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to G.S. 39-15 constitute an action "affecting title to real property" within the meaning of the *lis pendens* statute—G.S. 1-116, *et seq.*? The answer is yes.

In *Whitehurst v. Abbott*, 225 N.C. 1, 33 S.E. 2d 129 (1945), we construed the term "actions affecting title to real property" as embracing "all judicial proceednge affecting the title to real property or in which title to land is at issue." *Id.* Such is a proceeding by a creditor to set aside a conveyance as fraudulent. The object of such a proceeding is to set aside a conveyance or transfer in "which the owner of real or personal property has sought to place the land or goods beyond the reach of his creditors, or which operates to the prejudice of [the] legal or equitable rights [of creditors]." 37 Am. Jur. 2d, Fraudulent Conveyances, § 1. It follows that any action seeking to set aside a conveyance of real property as fraudulent "directly assails the validity of such conveyance and necessarily involves the title. Hence the filing of notice under the *lis pendens* statute is essential to give constructive notice to those who are not directly interested in the proceedings." *Whitehurst v. Abbott, supra.*

[3] We thus hold that a claim for relief by a creditor seeking to set aside a fraudulent conveyance pursuant to G.S. 39-15 *et seq.* constitutes an action "affecting title to real property" within the meaning of G.S. 1-116(a)(1). *Semble, Morgan v. Bostic*, 132 N.C. 743, 44 S.E. 639 (1903); *McRary v. Fries*, 57 N.C. 233 (1858). *Cf. Whitehurst v. Abbott, supra* (caveat proceeding constitutes action "affecting title to real property"). *Accord, Blitman Const. Corp. v. Denbel Realty & Const. Co.*, 13 Misc. 2d 888, 178 N.Y.S. 2d 249 (Sup. Ct. 1958). *See generally*, Annot., 74 A.L.R. 690 (1931).

For the reasons stated the decision of the Court of Appeals upholding the judgment of the district court is reversed. The case is remanded for further proceedings in accord with this opinion.

Reversed and remanded.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

JEANNIE RAPPAPORT v. DAYS INN OF AMERICA, INC.

No. 45

(Filed 4 January 1979)

Negligence § 57.10— fall in motel parking lot—sufficiency of evidence of negligence

In an action to recover damages for personal injuries sustained by plaintiff when she fell in the parking lot of defendant's motel, evidence was sufficient to permit but not to require the jury to find that plaintiff was an invitee on defendant's premises; that defendant failed to exercise ordinary care to provide adequate lighting for the parking lot designed for the use of defendant's invited guests; and that such failure was the proximate cause of plaintiff's fall resulting in injury to her. Furthermore, the mere fact that plaintiff attempted to go to her room in the darkness did not constitute contributory negligence as a matter of law.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

PLAINTIFF appeals from decision of the Court of Appeals, 36 N.C. App. 488, 244 S.E. 2d 487 (1978), affirming judgment of *Smith (Donald L.), J.*, entered 3 March 1977, ROBESON Superior Court.

Action to recover damages for personal injuries sustained by plaintiff on 25 March 1976 when she fell on the parking lot of defendant's motel in Lumberton.

Plaintiff's evidence tends to show that on 25 March 1976 she was eighty-two years of age and was traveling by automobile with her daughter and son-in-law from Maryland to Florida. At approximately 9 p.m. they stopped for the night at defendant's motel in Lumberton, North Carolina. None of them had been there previously. After registering, plaintiff's son-in-law drove to the rear of the motel where he had been directed to park for the second floor rooms to which they had been assigned. He parked the car on the asphalt paved parking lot with the front wheels near a concrete walkway which was adjacent to the motel building. This walkway was elevated six or seven inches above the level of the parking lot. The weather was clear but it was very dark. The only lights on the outside of the motel were those on the upper and lower porches but some obstruction prevented those lights from shining on the area where the car was parked. Two spotlights on the brick wall in the immediate vicinity of their

parked car were not burning. Before turning out the headlights plaintiff's son-in-law saw the six or seven inch step-up to the concrete sidewalk but made no comment about it to the other passengers in the car.

After parking the automobile and turning off its headlights plaintiff's son-in-law got out, opened the trunk, and took out three bags. He and plaintiff's daughter then walked toward their rooms carrying the bags with plaintiff's daughter walking in front. Plaintiff, who had been riding as a passenger in the rear seat, got out of the car and followed them, walking ten to fifteen feet behind her son-in-law. She fell in the darkness and was injured.

Additional pertinent portions of plaintiff's evidence will be narrated in the opinion.

At the close of plaintiff's evidence defendant moved for a directed verdict on the grounds that plaintiff's evidence failed to disclose any actionable negligence on defendant's part and showed contributory negligence as a matter of law. The motion was allowed, and plaintiff appealed to the Court of Appeals. That court affirmed with Judge Webb dissenting. Plaintiff thereupon appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2).

John C. B. Regan III attorney for plaintiff appellant.

Anderson, Broadfoot & Anderson by Hal W. Broadfoot, attorneys for defendant appellee.

HUSKINS, Justice.

The sole question presented by this appeal is whether plaintiff's evidence, considered in the light most favorable to her, is sufficient to repel the motion for a directed verdict and carry the case to the jury. We hold that it is.

We commence with the observation that an innkeeper is not an insurer of the personal safety of his guests but is required "to exercise due care to keep his premises in a reasonably safe condition and to warn his guests of any hidden peril." *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Barnes v. Hotel Corp.*, 229 N.C. 730, 51 S.E. 2d 180 (1949). The owner of the premises is liable for injuries resulting from his failure to exercise ordinary care to

keep in a reasonably safe condition that part of the premises where, during business hours, guests and other invitees may be expected. "The owner's duty extends to a parking lot provided by the owner for the use of the invitees." *Game v. Charles Stores Co.*, 268 N.C. 676, 151 S.E. 2d 560 (1966). A guest who enters upon the premises by invitation, express or implied, is an invitee. *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E. 2d 154 (1959). Plaintiff has the burden of showing negligence and proximate cause, *Hinson v. Cato's, Inc.*, 271 N.C. 738, 157 S.E. 2d 537 (1967), and allegations of negligence not supported by the evidence must be disregarded. *Garner v. Greyhound Corp.*, 250 N.C. 151, 108 S.E. 2d 461, 81 A.L.R. 2d 741 (1959).

Defendant's motion for a directed verdict under Rule 50(a) presents substantially the same question as formerly presented by a motion for judgment of nonsuit under former but now repealed G.S. 1-183. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). The question raised by such a motion is whether the evidence is sufficient to go to the jury. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973). In passing upon such motion the court must consider the evidence in the light most favorable to the non-movant. *Kelly v. Harvester Co.*, supra. That is, "the evidence in favor of the non-movant must be deemed true, all conflicts in the evidence must be resolved in his favor and he is entitled to the benefit of every inference reasonably to be drawn in his favor." *Summey v. Cauthen*, supra. It is only when the evidence is insufficient to support a verdict in the non-movant's favor that the motion should be granted. *Husketh v. Convenient Systems*, 295 N.C. 459, 245 S.E. 2d 507 (1978); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E. 2d 897 (1974).

With respect to contributory negligence as a matter of law, "[t]he 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." *Clark v. Bodycombe*, 289 N.C. 246, 221 S.E. 2d 506 (1976); *accord, Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973).

When tested by these rules what does the evidence show? Plaintiff's daughter testified that no parking spaces were available on the same side of the building where their rooms were located and her husband pulled into a parking space that was available "right behind the building"; that "the lighting conditions in the area where plaintiff fell was dark. I did not see any spotlight. The only lights that I saw was a dim glow from far away . . . but there was no light where we were. . . . When we arrived back from the hospital in the early morning we parked in the same spot and I noticed from the distance the bulbs or spots [spotlights] and it was not lighted. We continued registered in that motel for about a week after March 25th. I did not ever notice that light on at any other time and I don't remember lights on a post in that general vicinity. . . . You cannot see the motel porch from where we parked that night so I don't know whether the lights on the motel porch were on or not. I did not see a spotlight. . . . When I got out of the car it was dark. . . ."

Leon Sherman, plaintiff's son-in-law, testified that they "stopped in Lumberton at the Days Inn at approximately 9 p.m. on the 25th day of March. . . . It was nighttime and dark. . . . After I registered for two rooms I returned to the car and proceeded to the end of the motel to locate our rooms. When I arrived at the approximate location of our rooms there was only one space left and it was at the very end of the motel. . . . I parked immediately adjacent to the building. . . . My wife got out of the car . . . and walked ahead with the key to the room. . . . There at the place that I parked there were no lights on the outside of the motel except under the walkway of the rooms. . . . I do know that it was very very dark, and I noticed that when I had to maneuver my car into the parking space. As we proceeded toward our room I followed my wife with my mother-in-law behind me and as we proceeded to our rooms I heard my mother-in-law make an exclamation from approximately ten to fifteen feet behind me. . . . I dropped my suitcase and ran back to her and found her in a seated position on the pavement of the parking lot. . . . I seated her on one of the suitcases and my wife went to get the manager of the motel" who opened the door to Room 147 and helped carry her in. "We remained in the Days Inn or at the hospital for approximately seven or eight days . . . and during that time . . . did have one occasion to observe that same area

during the nighttime. The lighting conditions of that area on the 25th of March were dark, and on the day of the 26th of March I observed a spotlight on the brick wall in the immediate vicinity where my mother-in-law fell. That spotlight consisted of two spotlights in the center of a wall pointed in opposite directions. I would say that spotlight was approximately thirty feet from where I parked my car. On the night of the 26th of March I observed that spotlight and it was not lighted. . . . When I turned my headlights out after parking my car on the night of the 25th there was total darkness in that general area. I did see the step-up or rise in the concrete sidewalk before turning out my headlights but did not make any comments to the other passengers in the car about that rise. . . . At that spot there was no lighting except lighting that was on the motel porches, but that lighting was obstructed from where I parked my car. The lighting was on the upper and lower porches beyond the wall. It was very dark at the place where I parked my car, and I only noticed how dark it was after I turned the lights off inside of my automobile. . . . There were two spotlights on the side brick wall near where we were walking and I first saw them when I returned from the hospital that same night. . . . They were not lit. That was approximately three or four o'clock the following morning. . . ."

It was stipulated and agreed that the deposition of plaintiff, taken in Rockville, Maryland, would be offered into evidence. In her deposition plaintiff testified in pertinent part: "When I got out I realized that I was on hard surface, but there were no lights in that area. It was approximately nine o'clock and it was nighttime and dark. . . . I was walking and I made a step, I think, or it was so dark that I couldn't see what it was. And I must have put my foot on the little place there. All I know is that I fell back. . . . When I fell back I hit nothing but pavement. . . . In describing exactly what caused me to fall, all I can say is that it was dark and it must have been a step there that I missed, that I didn't see, and I fell back. . . . Mrs. Sherman did get out of the car and both of them went ahead of me. I followed them in the same direction. I could see them because they were right in front of me but it was so dark that I couldn't see where I stepped. That's when I fell back and I screamed. . . . I do not know what I fell over, and all I know is that I was trying to get up. I didn't know what was

there because it was dark and I fell back, and could not see what I fell on. . . . I fell as I was taking a step upward, but I am not sure whether it was upward or straight. I felt something there but I didn't know whether there was a step there or not but I knew that I didn't make it. . . . I just couldn't see it. I just couldn't see what was there. I thought it was all level. . . . There were no lights where I fell. . . . When I walked around the car it was pitch dark there. . . . At the time that I fell I was looking in front of me. I can't say that I was looking just straight ahead but I was walking like anybody walks. I didn't look at my feet, I was just walking."

The foregoing evidence, considered in the light most favorable to plaintiff, would permit but not require a jury to find that plaintiff was an invitee on defendant's premises; that defendant failed to exercise ordinary care to provide adequate lighting for the parking lot designed for the use of defendant's invited guests; and that such failure was the proximate cause of plaintiff's fall resulting in injury to her. Plaintiff's evidence, taken as true, tends to show that the parking lot was not only inadequately lighted but that it was in total darkness, *i.e.*, "pitch dark." Since the owner of premises is under a duty to exercise ordinary care to keep that portion of his premises designed for use by his invitees in a reasonably safe condition so as not to expose them unnecessarily to danger, *Wrenn v. Convalescent Home*, 270 N.C. 447, 154 S.E. 2d 483 (1967), and since the duty to keep the premises in a reasonably safe condition implies the duty to make reasonable inspection and to correct unsafe conditions which a reasonable inspection would reveal, *Grady v. Penney Co.*, 260 N.C. 745, 133 S.E. 2d 678 (1963), such breach of duty would constitute actionable negligence on defendant's part and would support a verdict in plaintiff's favor. *See generally*, 62 Am. Jur. 2d, Premises Liability, § 265.

Under the evidence in this case the mere fact that plaintiff attempted to go to her room in the darkness does not constitute contributory negligence *as a matter of law.* Reasonable men may differ as to whether plaintiff was negligent at all in attempting, despite the darkness, to reach the room to which she had been assigned. What would any reasonably prudent person have done under the same or similar circumstances? Only a jury may answer that question because the evidence, taken in the light most

favorable to plaintiff, fails to establish plaintiff's negligence so clearly that no other reasonable inference may be drawn therefrom. This is true because an invited guest, when confronted with inadequate lighting on a motel parking lot while on the way to her room in the nighttime, is not ordinarily required to elect whether to remain indefinitely in her car or, at her own peril, to grope in the darkness for walkways that perchance might lead to her assigned room. *See generally, Holliday v. Great A. & P. Tea Co.*, 314 F. 2d 682 (4th Cir. 1963); Annot., 23 A.L.R. 3d 441, Premises Liability—Darkness, § 13.

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court where it will be certified to the trial court for a new trial in accord with this opinion.

Reversed and remanded.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. FORNELL COX

No. 61

(Filed 4 January 1979)

1. **Criminal Law § 89.2— corroborative evidence—limiting instructions—necessity for request**

   Although the trial judge on three occasions gave limiting instructions when corroborative evidence was admitted, he was under no obligation to do so on other occasions absent a request for such instructions.

2. **Criminal Law § 50.2— lay opinion testimony—harmless error**

   In this prosecution for burglary and rape, the trial court erred in the admission of opinion testimony by the prosecutrix that her assailant took money and food stamps from her wallet; however, the admission of such testimony was harmless error in light of her further testimony that she did not actually see the assailant take such items and other evidence from which the jury could find that defendant did take the items.

3. **Criminal Law § 88.2— cross-examination—repetitious or argumentative questions**

   The trial court did not unduly restrict the cross-examination of a police officer when he refused to permit defense counsel to ask the officer repetitious or argumentative questions.

4. Criminal Law § 113.5— instructions on alibi—sufficiency

The trial court's instruction that evidence of alibi was to be considered like any other evidence "tending to disprove the evidence of the State" did not imply that the burden was placed upon defendant to prove his defense of alibi, since the very nature and effect of the defense of alibi negates such an implication. Furthermore, although the court's charge on alibi did not contain a specific instruction that defendant did not have the burden of proving his defense of alibi, the charge was sufficient where a contextual reading thereof made it plain that, in order to convict, the jury had to be satisfied upon a consideration of *all* the evidence that the State proved defendant's guilt beyond a reasonable doubt.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

APPEAL by defendant from *Smith (David I.), S.J.*, at the 17 April 1978 Criminal Session of EDGECOMBE County Superior Court.

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

The State's evidence tended to show that in the early morning hours of 17 December 1977, the prosecuting witness, Garvie Marable, was awakened and found a man standing by her bed. The man started choking her, and Mrs. Marable began to scream. He threatened to kill her if she did not shut up and continued to choke her until she was too weak to resist. He then raped her. Mrs. Marable identified defendant as her assailant based upon her recognition of his voice and her observation at the time of the assault.

There was testimony which showed that the glass was broken out of the back door and the screen was ripped, indicating forcible entry. Mrs. Marable testified that money and food stamps, which had been in her pocketbook when she went to bed, were missing when the police came. Blood samples of the blood types of both the prosecuting witness and defendant were taken from the bed sheets. When defendant was arrested, blood and semen stains were found on his clothes, and some money and food stamps were found in his wallet.

Defendant offered alibi testimony in his own behalf but presented no other witnesses in his defense.

The jury returned verdicts of guilty on both charges, and defendant was given concurrent sentences of life imprisonment.

Rufus L. Edmisten, Attorney General, by Leigh Emerson Koman, Assistant Attorney General, for the State.

H. Vinson Bridgers and Edward B. Simmons for defendant appellant.

BRANCH, Justice.

The first assignment of error deals with the trial judge's failure to give limiting instructions concerning corroborative evidence. Defendant cites six separate occasions during the trial when testimony concerning prior consistent statements by the prosecuting witness was admitted over his objection. On three of these occasions, the trial judge, without request, instructed the jury that such evidence was admitted for the sole purpose of corroborating the testimony of the prosecuting witness if it, in fact, did so. Defendant concedes that on those occasions there was no error.

[1] On the other three occasions when corroborative evidence was admitted, no request was made for limiting instructions and no such instructions were given. It is well settled in this State that when a defendant does not specifically request an instruction restricting the purpose for which corroborative evidence is admitted, its admission is not assignable as error. *State v. Bryant*, 282 N.C. 92, 191 S.E. 2d 745 (1972), *cert. denied*, 410 U.S. 958; *cert. denied*, 410 U.S. 987. Despite the fact that the trial judge instructed on corroborative evidence on three occasions, he was under no obligation to so instruct on other occasions absent a request to do so.

This assignment of error is without merit.

[2] Defendant next contends that the trial judge erred in refusing to strike testimony of the prosecuting witness concerning property taken from her home. Mrs. Marable testified that her assailant "took money and food stamps and my wallet." Defendant objected and made a motion to strike which objection was overruled and motion denied. The statement objected to amounted to an opinion by this lay witness that her assailant took the items from her pocketbook.

The practical test for receiving or rejecting the opinion of a lay witness is that when the jury can be put into a position of equal vantage with the witness to form an opinion, the witness may not ordinarily give opinion evidence. *Steele v. Coxe*, 225 N.C. 726, 36 S.E. 2d 288 (1945). Furthermore, testimony of a witness must ordinarily be confined to matters within his own knowledge and observation and may not include matters beyond his personal knowledge. *Robbins v. C. W. Myers Trading Post, Inc.*, 251 N.C. 663, 111 S.E. 2d 884 (1960). Application of these rules to the facts of instant case leads us to agree with defendant that the evidence was not competent. Prior to defendant's motion to strike, Mrs. Marable testified, "I did not see him take them, no." She subsequently testified on cross-examination:

> I don't know when the person that I saw in my bedroom took the things from my pocketbook. I didn't see it taken. It was in my pocketbook when I went to bed and was gone when the police came. But I didn't see anybody take anything.

This witness's clarifying testimony would tend to dispel any misapprehension which the jury might otherwise have had concerning what the witness actually saw. This evidence and other competent evidence presented by the State was sufficient to support the jury's finding that defendant took the missing items. Under these circumstances, we are unable to find prejudicial error in the trial judge's denial of defendant's motion to strike.

[3] Defendant contends that the trial judge erred in unduly restricting the cross-examination of police officer Horace Winstead. In North Carolina, the scope of cross-examination is left to the discretion of the trial judge and his ruling should not be disturbed unless prejudicial error is disclosed. *State v. Ross*, 275 N.C. 550, 169 S.E. 2d 875 (1969), *cert. denied*, 397 U.S. 1050. Furthermore, the trial judge may properly exclude testimony on cross-examination when it becomes merely repetitious or argumentative. *State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969); *State v. Maynard*, 247 N.C. 462, 101 S.E. 2d 340 (1958).

Several times during cross-examination of the witness Winstead, Judge Smith interrupted questioning by defendant's lawyer. The record indicates, however, that the questions were

repetitious or argumentative or both. Under these circumstances, we find no abuse of discretion in the trial judge's rulings or resulting prejudice that would warrant disturbing the verdicts in this case.

[4] Defendant's most serious assignment of error is that the trial judge erred in his instructions to the jury on alibi.

In this connection, Judge Smith charged:

> The defendant has introduced evidence which tends to show that he was not at 1501 Springbrook Drive at any time during the morning hours of December 17, 1977. That he did not enter the dwelling house of Garvie F. Marable and that he did not in fact have forcible sexual intercourse with Garvie Marable and is not guilty of these charges.
>
> The defendant has offered evidence tending to show that he was elsewhere during the early morning hours of December 17, 1977. Evidence of alibi is to be considered like any other evidence tending to disprove the evidence of the State. If, upon consideration of all the evidence in the case, including the defendant's evidence of alibi, you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

We think it pertinent to here note that in the initial portion of the charge, the court also instructed as follows:

> The defendant has entered a plea of not guilty to both charges. The fact that he has been indicted is not evidence of guilt. Under our system of justice when a defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent. The State must prove to you that the defendant is guilty beyond a reasonable doubt.

In *State v. Hunt*, 283 N.C. 617, 197 S.E. 2d 513 (1973), Chief Justice Bobbitt stated the rules governing instructions on the defense of alibi, to wit:

> An alibi is simply a defendant's plea or assertion that at the time the crime charged was perpetrated he was at another place and therefore could not have committed the crime. *State v. Malpass*, 266 N.C. 753, 147 S.E. 2d 180 (1966); *State v. Green*, 268 N.C. 690, 151 S.E. 2d 606 (1966).

> *Hereafter*, when a defendant offers evidence of alibi, he is entitled, *upon request*, to a charge substantially as follows: "An accused, who relies on an alibi, does not have the burden of proving it. It is incumbent upon the State to satisfy the jury beyond a reasonable doubt on the whole evidence that such accused is guilty. If the evidence of alibi, in connection with all the other testimony in the case, leaves the jury with a reasonable doubt of the guilt of the accused, the State fails to carry the burden of proof imposed upon it by law, and the accused is entitled to an acquittal." *State v. Minton*, 234 N.C. 716, 726-27, 68 S.E. 2d 844, 851 (1952); *State v. Spencer*, *supra*, at 489, 124 S.E. 2d at 177. When an instruction as to the legal effect of alibi evidence is given, whether by the court of its own motion or in response to request, such statement must be correct. . . .

Prior to the decision in *Hunt*, a defendant was entitled to an instruction on alibi without special request when the evidence supported that defense. *State v. Vance*, 277 N.C. 345, 177 S.E. 2d 389 (1970); *State v. Melton*, 187 N.C. 481, 122 S.E. 17 (1924). *Hunt* specifically overruled that well-embedded rule and held that thereafter a trial judge was not required to give an instruction on the defense of alibi absent a special request therefor.

Here there was no special request for an instruction on alibi, but since the trial judge, on his own motion, elected to give the instruction, we must determine whether it was so erroneous as to require a new trial. We conclude that it was not. At first glance, that portion of the charge stating that, "[e]vidence of alibi is to be considered like any other evidence *tending to disprove the evidence of the State*," might be said to imply that the burden of proof was placed upon defendant to prove his defense of alibi. [Emphasis ours.] However, the very nature and effect of the defense of alibi negates such inference. The State has the burden of proving beyond a reasonable doubt that a crime was committed and that the accused was the person who committed the crime. The defense of alibi has nothing to do with the elements of a crime but merely contradicts the State's evidence that defendant committed the crime by averring that defendant was not present when the crime was committed. If such evidence, when taken with *all* the evidence, raises a reasonable doubt in the minds of the jury, it would result in a verdict of not guilty under a

reasonable doubt instruction. *State v. Hunt, supra; State v. Hess,* 9 Ariz. App. 29, 449 P. 2d 46 (1969); *State v. Reitz,* 83 N.C. 634 (1880); *State v. Josey,* 64 N.C. 56 (1870).

Although the charge on alibi does not contain, in so many words, an instruction that defendant did not have the burden of proving his defense of alibi, a contextual reading of the charge makes it plain that, in order to convict, the jury must be satisfied upon a consideration of *all* the evidence that the State has proven defendant's guilt beyond a reasonable doubt. Such charge is in substantial compliance with our case law.

Although we find that the charge before us is substantially correct, we again commend to all trial judges the instruction hereinabove quoted from *Hunt* which was also approved in *State v. Vance, supra,* and *State v. Spencer,* 256 N.C. 487, 124 S.E. 2d 175 (1962).

After careful examination of this entire record, we conclude that defendant has been afforded a fair trial free from prejudicial error.

No error.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. STEFAN MICHAEL CAMPBELL

No. 4

(Filed 4 January 1979)

Criminal Law § 79.1— disposition of charges against codefendant—objections properly sustained—no prejudice

The rule that neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges was not violated in this case where the court sustained the objection of defendant to every question asked by the prosecutor with regard to the disposition of the charges against his codefendant, and defendant did not request the court to instruct the jury to disregard the questions; furthermore, defendant's failure to object to testimony by the codefendant which was identical to evidence which the district attorney had sought to elicit concerning the charges against the codefendant amounted to a waiver of his objections to such evidence.

Justice BROCK took no part in the consideration or decision of this case.

APPEAL by defendant from *Clark, J.*, at the 14 November 1977 Criminal Session of CUMBERLAND Superior Court.

Defendant was tried upon indictments, proper in form, which charged him with assault with a deadly weapon with intent to kill inflicting serious injury, crime against nature, armed robbery, kidnapping, and first-degree rape. Mrs. Marsha Pittman was the alleged victim and all of the offenses allegedly took place on the same day.

Evidence for the state, including the testimony of Danny Mincey, tended to show:

On the day in question Mrs. Pittman was walking to a bus stop in Hope Mills, N. C., where she intended to take a bus to Fayetteville to keep an appointment at a bank. Defendant and Danny Mincey rode by her in a borrowed car, stopped and offered her a ride. She accepted, thinking they would take her only as far as Hope Mills. After getting into the car, she engaged in conversation with defendant and Mincey. Finding that she intended to go to Fayetteville, defendant, who was driving, told her that he and Mincey would drive her there.

En route to Fayetteville on Interstate 95, defendant stopped at a service station to buy gas. Mrs. Pittman and the two men got out of the car and she bought soft drinks for all of them. When they resumed the trip, Mincey told defendant that he did not feel well and that he wanted to go home. Defendant continued driving on Interstate 95 for some distance and finally exited on a rural paved road. Telling prosecutrix that he was taking Mincey home, defendant continued along this rural road until the pavement ended. He then proceeded on a dirt road at a high rate of speed for several minutes. Finally, in an isolated spot, defendant stopped the car and pointed out a barely visible house as being Mincey's home. However, he said that he and Mincey were going to water some marijuana plants before going to the house. Defendant then restarted the automobile, turned around, drove back the way they had come and turned off of the dirt road onto a path leading into a field between some trees. He drove about 150 yards off of the dirt road before stopping the car.

When the car stopped this time, defendant and Mincey got out and walked about 100 yards farther into the woods. Prosecutrix, who had by this time become frightened, stayed in the car until the two men were out of sight and then got out of the car to look for a house or other place to which she could run. Seeing no such place, she went to the rear of the automobile to obtain its license number.

At this point Mincey and defendant returned. Defendant, who had a knife in his hand, grabbed prosecutrix by the arm and began pulling her toward the woods. Prosecutrix screamed and struggled; she told the men that she was pregnant and that she had seen the license number on the car. Defendant told her to "shut up" and slapped her on the face. He then dragged her into the woods out of sight of the car where he forced her to undress and then undressed himself. Meanwhile, Mincey had returned to the car. Defendant forced prosecutrix to perform oral sex on him and then forcibly had intercourse with her. He then called Mincey from the car and ordered him to have intercourse with prosecutrix. Defendant walked back to the car while Mincey pretended to have intercourse with Mrs. Pittman. Minutes later, defendant returned carrying a machete. After allowing prosecutrix to smoke a cigarette which he said would be her "last one" defendant forced Mincey to undress again and then ordered prosecutrix to perform oral sex on Mincey.

As defendant watched, prosecutrix began performing oral sex on Mincey. While doing so, she was struck in the back with the machete. Prosecutrix did not see who stuck the machete in her; she did hear defendant order Mincey to remove it from her back. Mincey refused and defendant began kicking prosecutrix to roll her over. When he had rolled her over, he pulled the knife out and Mincey then stabbed her under her left breast.

Defendant said he was sick on his stomach and grabbed prosecutrix's pocketbook and ran to the car with Mincey following him. Prosecutrix then heard defendant order Mincey to return and "finish her off". Mincey came back, told her he was not going to hurt her further and told her to scream as though he had stabbed her again. As she screamed, he wiped the knife across her back so that it would be covered with blood and returned to the car where defendant had waited. Unsatisfied that prosecutrix was

dead, defendant again ordered Mincey to finish killing her. Mincey went back into the woods to where prosecutrix lay partially paralyzed and pretended to stab her again. She begged him not to leave her to bleed to death, but he went back to the car and left with defendant. Prosecutrix waited a few minutes and then crawled to the dirt road where she was found by a man in a passing truck.

Evidence for defendant, including his own testimony, tended to show: He and Mincey saw the prosecutrix hitchhiking and offered her a ride. She told them she was going to Fayetteville and they agreed to take her there. Along the way, they stopped for gas and she bought all of them soft drinks. They invited her to go swimming in a rock quarry, and she agreed to go. When they reached the quarry, defendant and Mincey walked into nearby woods to water some marijuana plants growing there. When they returned to the car, defendant asked prosecutrix to go into the wooded area with him and she voluntarily did so. With her consent, defendant had intercourse with her. She also performed oral sex on him. Mincey, who had been at the car, walked up and insisted on having intercourse with the girl. She agreed. Defendant then went to the car and waited ten or twenty minutes. When he returned to where Mincey and prosecutrix were, prosecutrix again performed oral sex on defendant. Mincey and prosecutrix then argued over whether she would perform oral sex on him a second time. She refused and threatened to go to the police. Mincey became enraged and stabbed her in the back several times. Defendant panicked, ran to the car and did not see the prosecutrix again.

The jury found defendant guilty on all counts with which he was charged. From judgments imposed on the verdicts, he appealed. His motions to bypass the Court of Appeals on the charges of crime against nature and assault with a deadly weapon with intent to kill were allowed.

Attorney General Rufus L. Edmisten, by Associate Attorney Tiare Smiley Farris, and Special Deputy Attorney General David S. Crump, for the State.

Charles H. Burgardt for defendant appellant.

BRITT, Justice.

Defendant has brought forward a single assignment of error. By it he contends that the court erroneously allowed the district attorney to introduce evidence of codefendant Mincey's guilty plea and sentence. We find no merit in this assignment.

Defendant testified that Mincey stabbed the prosecutrix after both men had intercourse with her. He also testified that Mincey had made a "deal" with the district attorney and obtained a lighter sentence in exchange for his testimony against defendant. On cross-examination of defendant the following exchange took place:

"I don't know which detective Danny Mincey talked to. I know he talked to the police when he got locked up. I don't know what Danny told them. He did tell me that he had a deal with you that if he convicted me that you would cut his time. I know that some time ago Danny Mincey was tried in this courtroom. It was during the week of October 24, 1977. I know that Danny Mincey was convicted.

"Q. But he was convicted of aggravated kidnapping, wasn't he?

"MR. BURGARDT: Objection your Honor.

"COURT: Sustained.

"Q. You know that he was convicted of assault with the intent to commit rape?

"MR. BURGARDT: Objection your Honor.

"COURT: Sustained.

"Q. Now, —

"A. I also know, Mr. Gregory, I also know that each time that I did see him like in the chapel, he brung up the fact that he wasn't given no time because he made a deal with you. That's exactly what he said to me.

"Q. He got seventy years, didn't he—

"MR. BURGARDT: Objection your Honor.

"COURT: Sustained."

The clear rule is that neither a conviction, nor a guilty plea, nor a plea of *nolo contendere* by one defendant is competent as evidence of the guilt of a codefendant on the same charges. A defendant's guilt must be determined solely on the basis of the evidence presented against him, and it is improper to make reference to the disposition of charges against a codefendant. *State v. Jackson*, 270 N.C. 773, 155 S.E. 2d 236 (1967); *State v. Kerley*, 246 N.C. 157, 97 S.E. 2d 876 (1957).

This rule has not been violated in the case *sub judice*. The court sustained the objection of defendant to every question asked by the prosecutor with regard to the disposition of the charges against his codefendant. There is no answer in the record which reveals the answer the witness would have given if he had been allowed to respond. Ordinarily, the asking of the question alone will not result in prejudice to the defendant. *State v. Barrow*, 276 N.C. 381, 172 S.E. 2d 512 (1970); *State v. Butler*, 269 N.C. 483, 153 S.E. 2d 70 (1967); *State v. Williams*, 255 N.C. 82, 120 S.E. 2d 442 (1961); *State v. Hoover*, 252 N.C. 133, 113 S.E. 2d 281 (1960). In this case there was no evidence admitted *over objection* relative to the disposition of the charges against the codefendant stemming from the incidents in question. We also note that defendant did not request the court to instruct the jury to disregard the questions.

Furthermore, even had the trial judge admitted the evidence which the prosecutor sought to elicit in his cross-examination, we would be compelled to find that, on the record in this case, there was no prejudice to defendant. The State on rebuttal, and without objection by defendant, offered the testimony of Danny Mincey who stated that he had been convicted of kidnapping, assault with a deadly weapon, common law robbery, and assault with intent to commit rape. He further testified that he had been sentenced to seventy years imprisonment in connection with these charges. This is the same evidence which the solicitor sought to introduce by cross-examination of defendant. It is well established that the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character. *State v. Owens*, 277 N.C. 697, 178 S.E. 2d 442 (1971); *State v. Williams*, 274 N.C. 328, 163 S.E. 2d 353 (1968); 1 Stansbury's North Carolina Evidence § 30, p. 79 (Brandis Rev., 1973).

In defendant's trial and the judgments entered, we find

No error.

Justice BROCK took no part in the consideration or decision of this case.

DANIEL E. WILLIAMS v. CAROLINA POWER & LIGHT COMPANY

No. 52

(Filed 4 January 1979)

1. **Electricity § 5— power company's duty to insulate wires—issue of material fact—summary judgment improper**

In an action to recover for damages sustained by plaintiff when a ladder which he was handling came in contact with electrical wires maintained by defendant, there was a genuine issue as to a material fact relating to defendant's duty to insulate the wires, and summary judgment was improper on the ground that defendant was not negligent as a matter of law.

2. **Electricity § 7.1— ladder coming into contact with power lines—proximate cause—foreseeability**

Where plaintiff, while repairing a house gutter, sustained injuries when his ladder came in contact with electrical wires maintained by defendant, reasonable minds could differ as to whether it was foreseeable that plaintiff's injury could result from defendant's alleged negligence, and defendant was not entitled to summary judgment on the ground that its negligence, if any, was not the proximate cause of the plaintiff's injuries.

3. **Electricity § 8— ladder coming into contact with power lines—no contributory negligence of plaintiff as matter of law**

In an action to recover for damages sustained by plaintiff when a ladder which he was handling came in contact with electrical wires maintained by defendant where plaintiff offered evidence that he took due care to avoid the wires, that the ladder hit the wires due to an unavoidable accident, and that the ground at the scene of the accident was sloping, defendant was not entitled to summary judgment on the ground that the evidence showed that plaintiff was contributorily negligent as a matter of law.

Chief Justice SHARP dissents.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

THIS Court granted plaintiff's petition for discretionary review of the judgment of *Wood, J.* entered in the 28 February 1977 Session of ANSON County Superior Court.

The facts of the case are as follows:

On 22 January 1973 the plaintiff was hired by Frank Tucker to repair a piece of guttering that had come loose from the roof at the rear of his house. The plaintiff went to Mr. Tucker's house about noon that same day with a helper, Harold Vickery. He brought an aluminum ladder to enable him to get onto the roof to make the repairs.

The plaintiff and his helper laid the ladder on the ground and extended it. As it was still not long enough, they wired an additional section onto the ladder. The plaintiff noticed two electrical wires, one beneath the other, running near the roof of the house. Realizing that they were main wires, he warned his helper not to let the ladder hit the wires.

They placed the ladder against the house by "walking it up," and the plaintiff climbed onto the roof and repaired the piece of guttering. His helper was on the ground holding the ladder. Although there is some dispute over the following events, plaintiff's evidence is that he climbed down the ladder. Mr. Tucker came out of his house and was going to help the plaintiff and his assistant take the ladder down. The three of them got the ladder turned and balanced straight up in the air away from the house, ready to be "walked down."

Mr. Tucker was then called into the house to answer a telephone call. Before plaintiff and his helper started taking the ladder down, the plaintiff was knocked unconscious, evidently because the ladder hit the electrical wires. The Rescue Squad was called, and the plaintiff was taken to the hospital.

Other facts relevant to the decision will be included in the opinion below.

Henry T. Drake for the plaintiff.

Fred D. Poisson and E. Avery Hightower for the defendant.

COPELAND, Justice.

The only issue presented for review in this case is whether the entry of summary judgment in favor of the defendant was proper. The Court of Appeals held that it was. *Williams v. Carolina Power & Light Co.*, 36 N.C. App. 146, 243 S.E. 2d 143 (1978) (*Arnold, J.*, concurred in by *Morris* and *Martin, JJ.*). As this Court has determined that the motion was erroneously granted, we must reverse.

When a party moves for summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure, the court must first determine whether there are genuine issues as to any material facts and then whether the movant is entitled to judgment as a matter of law. *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971). We have emphasized that summary judgment is a drastic measure, and it should be used with caution. *Id.* This is especially true in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972).

The defendant first claims that it was entitled to summary judgment because the undisputed facts show it was not negligent as a matter of law. We cannot agree.

[1] The plaintiff alleged, *inter alia*, that the defendant was negligent by not insulating the wires running near Mr. Tucker's roof. While it is not negligence *per se* to use uninsulated wires, the rule in this jurisdiction was aptly stated in *Mintz v. Murphy*, 235 N.C. 304, 69 S.E. 2d 849 (1952).

> "That the duty of providing insulation should be limited to those points or places where there is reason to apprehend that persons may come in contact with the wires, is only reasonable. Therefore, the law does not compel companies to insulate . . . their wires everywhere, but only at places where people may legitimately go for work, business, or pleasure, that is, where they may be reasonably expected to go." *Id.* at 314, 69 S.E. 2d at 857 (quoting 18 Am. Jur. *Electricity* § 97 (1938)).

There is a discrepancy in the parties' evidence as to the distance between the wires and Mr. Tucker's roof. This factual determination would certainly have some bearing on the foresee-

ability of a person coming into contact with the wires. Thus, there is a genuine issue as to a material fact relating to defendant's duty to insulate the wires, and summary judgment is improper on the ground that defendant was not negligent as a matter of law.

[2] Defendant next contends that summary judgment was properly granted because the facts show that its negligence, if any, was not the proximate cause of plaintiff's injuries.

This Court has held that as a matter of law a power company's alleged negligence is sometimes not the proximate cause of injuries resulting from a person's contact with electrical wires. The test of proximate cause is whether the risk of injury, not necessarily in the precise form in which it actually occurs, is within the reasonable foresight of the defendant. *Davis v. Carolina Power & Light Co.*, 238 N.C. 106, 76 S.E. 2d 378 (1953); *Hall v. Coble Dairies, Inc.*, 234 N.C. 206, 67 S.E. 2d 63 (1951).

We have held it to be unforeseeable as a matter of law that a metal line, which came in contact with a power company's wires, would be used to fly a kite, *Pugh v. Tidewater Power Co.*, 237 N.C. 693, 75 S.E. 2d 766 (1953), or that a person would be electrocuted when he attempted to disengage electrical wires that had become tangled in a tree he had chopped down. *Deese v. Carolina Power & Light Co.*, 234 N.C. 558, 67 S.E. 2d 751 (1951).

However, it is only in exceptional cases, in which reasonable minds cannot differ as to foreseeability of injury, that a court should decide proximate cause as a matter of law. "[P]roximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case." W. Prosser, Torts § 45 (4th ed. 1971) (quoting *Healy v. Hoy*, 115 Minn. 321, 132 N.W. 208 (1911)). *See also Lynch v. Carolina Telephone and Telegraph Co.*, 204 N.C. 252, 167 S.E. 847 (1933).

These facts do not present such an exceptional case. It is not unforeseeable as a matter of law that the type of injury that occurred in this case would result from defendant's alleged negligence. Reasonable minds could differ; therefore, the question must be determined by the jury. Summary judgment is improper under this argument.

[3] The defendant's final argument is that it is entitled to summary judgment because the evidence shows that plaintiff was guilty of contributory negligence as a matter of law.

It has long been the law in this State that "[t]he burden of showing contributory negligence . . . is on the defendant, and the motion for nonsuit may never be allowed on such an issue where the controlling and pertinent facts are in dispute, nor where opposing inferences are permissible from plaintiff's proof, nor where it is necessary . . . to rely, in whole or in part, on evidence offered for the defense." *Battle v. Cleave & Rogers*, 179 N.C. 112, 114, 101 S.E. 555, 556 (1919). The motion for summary judgment and the motion for a directed verdict, formerly nonsuit, are functionally very similar. *Dendy v. Watkins*, 288 N.C. 447, 219 S.E. 2d 214 (1975).

It is well settled that when a person is aware of an electrical wire and knows that it is or may be highly dangerous, he has a legal duty to avoid coming in contact with it. *See, e.g., Floyd v. Nash*, 268 N.C. 547, 151 S.E. 2d 1 (1966); *Alford v. Washington*, 244 N.C. 132, 92 S.E. 2d 788 (1956). That does not mean, however, that a person is guilty of contributory negligence as a matter of law if he contacts a known electrical wire regardless of the circumstances and regardless of any precautions he may have taken to avoid the mishap. *See generally Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 196 S.E. 2d 789 (1973); *Lewis v. Barnhill*, 267 N.C. 457, 148 S.E. 2d 536 (1966). The following cases, *Floyd v. Nash, supra*, and *Bogle v. Duke Power Co.*, 27 N.C. App. 318, 219 S.E. 2d 308 (1975), *cert. denied*, 289 N.C. 296, 222 S.E. 2d 695 (1976) are distinguishable because in those cases there was no evidence of due care taken by plaintiffs' intestate to avoid the wires.

Furthermore, there is an inference raised by this plaintiff's evidence that the ladder hit the wires due to an unavoidable accident. "As a general rule, one who has capacity to understand and avoid a known danger and fails to take advantage of that opportunity . . . is chargeable with contributory negligence." *Presnell v. Payne*, 272 N.C. 11, 13, 157 S.E. 2d 601, 602 (1967).

Plaintiff testified through his deposition that the land behind Mr. Tucker's house was sloping. The plaintiff, his assistant and

Mr. Tucker were all balancing the ladder away from the house when Mr. Tucker was called away to answer a telephone call.

Defendant presented evidence to the contrary. Thus, a question of fact is raised which must be resolved by the jury. "If the evidence is conflicting on issues of negligence and contributory negligence, such are issues of fact and require jury determination. These issues may not be answered by the court as a matter of law." *Southern Railway Co. v. Woltz*, 264 N.C. 58, 60, 140 S.E. 2d 738, 739 (1965). The trial court's grant of summary judgment for the defendant was improper in this case.

For the reasons set out above, the opinion of the Court of Appeals is reversed, and the case is remanded for trial on the merits.

Reversed and remanded.

Chief Justice SHARP dissents.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

MILDRED P. MURRAY v. ALBERT L. MURRAY

No. 104

(Filed 4 January 1979)

1. Rules of Civil Procedure § 50— directed verdict in favor of party having burden of proof

A directed verdict generally may not be granted for the party with the burden of proof when his right to recover depends on the credibility of his witnesses; however, there may be rare occasions when credibility is compelled as a matter of law.

2. Divorce and Alimony § 16.6— abandonment—jury issue

In this action for alimony without divorce, the evidence presented a jury question as to whether defendant abandoned plaintiff where plaintiff testified that defendant packed many of his clothes into a car and told plaintiff he was going to play golf for a few days, three days later defendant called plaintiff and told her to get a lawyer, defendant never returned home except to pick up personal belongings, and plaintiff had no agreement with defendant that they

would separate; plaintiff admitted that the marriage had been deteriorating for a long time, the two of them saw little of each other, she had sought legal help in the past relating to the marriage, and previously both plaintiff and defendant had told each other to leave home; and defendant testified that when he left home to play golf he was planning to come back to the home to live, the marriage had been deteriorating for a number of years, separation and a division of property had been discussed, plaintiff had told him several times to get out and not come back, and he left home because he thought they had agreed to split up.

Justice BROCK took no part in the consideration or decision of this case.

Chief Justice SHARP dissenting.

APPEAL by plaintiff from a decision of the Court of Appeals, 37 N.C. App. 406, 246 S.E. 2d 52 (1978) (*Hedrick, J.*, concurred in by *Morris, J.*, with *Webb, J.* dissenting) which affirmed the judgment of Chief District Judge Johnson, entered in the 24 June 1977 Session of MECKLENBURG District Court.

Plaintiff and defendant had been married for over thirty-five years. After the defendant left home in June of 1976, plaintiff-wife brought this action for alimony without divorce and for possession of the house and automobile on the ground that defendant-husband abandoned her within the meaning of G.S. 50-16.2(4).

At trial plaintiff's evidence tended to show the following:

Plaintiff and defendant had been married since 5 November 1939 and had three daughters all of whom are grown and living away from home. The plaintiff had been a housewife throughout the marriage and depends on the defendant for her support.

On 20 June 1976 the defendant packed many of his clothes into the car and told the plaintiff he was going to play golf for a few days. Three days later defendant called plaintiff and advised her to get a lawyer, tell him what she wants and have her lawyer get in touch with his attorney. The defendant never returned to the home except to pick up a trailer and some personal belongings. The plaintiff claimed she did not have an agreement with the defendant that they would separate.

The plaintiff admitted that the marriage had been deteriorating "substantially" for a long time, and the two of them saw little of each other before defendant moved out. She had sought legal help in the past relating to the marriage. Previously both the plaintiff and the defendant had told the other to leave home, but they "had not really gone into a separation."

The defendant's evidence tended to show the following:

When defendant left in June of 1976 to play golf, he was planning to come back to the home to live. He decided later that week to leave for good.

The defendant testified that the marriage had been degenerating for a number of years and that the plaintiff had hired three attorneys in the past in connection with the problem. Separation had been discussed many times from the first of the year until June of 1976. The plaintiff and the defendant had even talked of dividing their assets. Several times the plaintiff had told him to "get out and don't come back." Defendant stated, "I left in June of 1976 because I thought it was an agreement that we would split up."

The plaintiff moved for a directed verdict at the close of all the evidence, which was denied. The jury found that defendant did not "wilfully abandon the plaintiff without just cause or provocation." Thereafter plaintiff moved for judgment notwithstanding the verdict pursuant to Rule 50 of the North Carolina Rules of Civil Procedure, which also was denied. The plaintiff appealed, and the Court of Appeals affirmed.

Lindsey, Schrimsher, Erwin, Bernhardt and Hewitt, P.A. by Lawrence W. Hewitt for the plaintiff.

Henderson, Henderson & Shuford by David H. Henderson and David L. Henderson for the defendant.

COPELAND, Justice.

The sole question for our consideration is whether the trial court erred in denying plaintiff's motions for a directed verdict at the end of all the evidence and for judgment notwithstanding the verdict. These motions can be considered together as they are controlled by the same standards and rules. *Dickinson v. Pake,*

284 N.C. 576, 201 S.E. 2d 897 (1974). After reviewing the evidence, we conclude that Judge Johnson was correct in leaving the decision of this case to the jury.

[1] The rule in this State is that a directed verdict cannot be granted for the party with the burden of proof when his right to recover depends on the credibility of his witnesses. *Cutts v. Casey*, 278 N.C. 390, 180 S.E. 2d 297 (1971). However, there may be rare occasions in which credibility seems compelled as a matter of law. *Id.* This case does not fall within that category.

The plaintiff has initiated this action for alimony under G.S. 50-16.2(4); therefore, she must show that she has been abandoned by the defendant, who she alleges is the supporting spouse. "One spouse abandons the other, within the meaning of [G.S. 50-16.2(4)], where he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without intent of renewing it." *Panhorst v. Panhorst*, 277 N.C. 664, 670-71, 178 S.E. 2d 387, 392 (1971). Thus, the plaintiff has the burden of proving, *inter alia*, that defendant left without her consent.

[2] The plaintiff testified that she had not concurred in defendant's decision to leave home for good. Defendant, on the other hand, stated that the two of them had discussed separation numerous times and that when he left in June of 1976, he thought they had agreed to split up. Although there was no evidence that plaintiff expressly agreed to the separation at the precise moment defendant left, that fact does not necessarily preclude a finding of consent. This concept was eloquently stated in defendant's brief.

> "[S]eparation by consent is rarely accomplished by lightning stroke. It is an erosion, a crumbling, a series of burst hopes and faded joys. There comes a culmination of small wars, and mutual surrenders, not to each other, but to the institution . . . . Consent, may indeed take days, or months or years."

The evidence presented at trial compels the conclusion that whether separation was consented to by both parties is a question of fact for the jury. In passing on a motion for directed verdict or judgment notwithstanding the verdict, the evidence is to be taken in the light most favorable to the non-moving party, and he is en-

titled to all reasonable inferences that can be drawn from it. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E. 2d 549 (1973).

The plaintiff argues that *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E. 2d 451 (1970), and other decisions from that court following *Burleson* create an "exception" to the rules set forth in *Cutts v. Casey, supra.* We note in passing that no decision of the Court of Appeals can carve out an "exception" to a rule of law laid down by this Court. *See State v. Colson*, 274 N.C. 295, 163 S.E. 2d 376 (1968) for some background on North Carolina's appellate system.

Furthermore, *Burleson* does not set forth an exception to the *Cutts v. Casey* rule that a motion for directed verdict cannot be granted in favor of the party with the burden of proof if the credibility of his witnesses affects his right to recover. Rather, the Court of Appeals' decision stands for the proposition that a directed verdict can be granted for the party with the burden of proof when his right to judgment is established by the *non-movant's* evidence. This Court has since qualified that holding. "Discrepancies and contradictions in the evidence, even though such occur in the evidence offered on behalf of [the non-movant], are to be resolved by the jury, not by the court." *Bowen v. Constructors Equipment Rental Co.*, 283 N.C. 395, 405, 196 S.E. 2d 789, 797 (1973). Therefore, credibility still is almost exclusively a question for the members of the jury. In this case, they have spoken.

For the reasons stated above, the decision of the Court of Appeals is

Affirmed.

Justice BROCK took no part in the consideration or decision of this case.

Chief Justice SHARP dissents for the reasons stated in the dissenting opinion of *Webb, J., Murray v. Murray*, 37 N.C. App. 406, 409, 246 S.E. 2d 52, 55 (1978).

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

A-S-P ASSOCIATES v. CITY OF RALEIGH

No. 131 PC.

Case below: 38 N.C. App. 271.

Petition and appeal by defendant for discretionary review under G.S. 7A-31 allowed 4 January 1979.

BANK v. BURNETTE

No. 116 PC.

Case below: 38 N.C. App. 120.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 January 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 4 January 1979. Petition by plaintiff for writ of certiorari to North Carolina Court of Appeals allowed 4 January 1979.

BANK v. HARWELL

No. 127 PC.

Case below: 38 N.C. App. 190.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979.

BUYERS CORP. v. UNDERWRITERS, INC.

No. 122 PC.

Case below: 38 N.C. App. 391.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 January 1979.

COVINGTON v. RHODES

No. 104 PC.

Case below: 38 N.C. App. 61.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 January 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

HOGAN v. MOTOR LINES

No. 137 PC.

Case below: 38 N.C. App. 288.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 January 1979.

HOLBROOK v. HOLBROOK

No. 134 PC.

Case below: 38 N.C. App. 303.
38 N.C. App. 308.

Petitions by Verna Holbrook for discretionary review under G.S. 7A-31 denied 4 January 1979.

IN RE BOYLES

No. 135 PC.

Case below: 38 N.C. App. 389.

Petition by respondent for discretionary review under G.S. 7A-31 denied 4 January 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 January 1979.

MANUFACTURING CO. v. MANUFACTURING CO.

No. 142 PC.

Case below: 38 N.C. App. 393.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 January 1979. Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 4 January 1979.

SIPE v. BLANKENSHIP

No. 141 PC.

Case below: 37 N.C. App. 499.

Petition by defendants for writ of certiorari to North Carolina Court of Appeals denied 4 January 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. BLACKMON

No. 140 PC.

Case below: 38 N.C. App. 620.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 January 1979.

STATE v. CLEMMONS

No. 144 PC.

Case below: 34 N.C. App. 101.

Application by defendant for further review denied 4 January 1979.

STATE v. COX

No. 154 PC.

Case below: 38 N.C. App. 743.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 January 1979.

STATE v. DORSEY

No. 152 PC.

Case below: 38 N.C. App. 242.

Application by defendant for further review denied 4 January 1979.

STATE v. GRACE

No. 120 PC.

Case below: 37 N.C. App. 723.

Application by defendant for further review denied 4 January 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. HOOKER

No. 119 PC.

Case below: 37 N.C. App. 457.

Application by defendant for further review denied 29 December 1978.

STATE v. JACKSON

No. 157 PC.

Case below: 38 N.C. App. 628.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979.

STATE v. McCOMBS

No. 125 PC.

Case below: 38 N.C. App. 214.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 4 January 1979.

STATE v. McDOUGALD

No. 126 PC.

Case below: 38 N.C. App. 244.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 January 1979.

STATE v. PILAND

No. 129 PC.

Case below: 38 N.C. App. 367.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 4 January 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. WATTS

No. 148 PC.

Case below: 38 N.C. App. 561.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 4 January 1979.

STATE v. WEBB

No. 139 PC.

Case below: 38 N.C. App. 628.

Petition by defendant for discretionary review under G.S. 7A-31 denied 4 January 1979.

TEAGUE v. ALEXANDER

No. 133 PC.

Case below: 38 N.C. App. 332.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 January 1979.

TELEGRAPH CO. v. HOUSING AUTHORITY

No. 149 PC.

Case below: 38 N.C. App. 172.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 4 January 1979.

TOWN OF HILLSBOROUGH v. BARTOW

No. 14.

Case below: 38 N.C. App. 623.

Motion of defendant to dismiss plaintiff's appeal for lack of substantial constitutional question allowed 29 December 1978.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

VICK v. VICK

No. 153 PC.

Case below: 38 N.C. App. 629.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 4 January 1979.

WALLPAPER CO. v. PEACOCK & ASSOC.

No. 123 PC.

Case below: 38 N.C. App. 144.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 January 1979.

WALLPAPER CO. v. PEACOCK & ASSOC.

No. 124 PC.

Case below: 38 N.C. App. 149.

Petition by defendants for discretionary review under G.S. 7A-31 denied 4 January 1979.

ROY SHELTON LLOYD, WILLIAM C. RAY, FRANK MILLER, FRANK PERRY, ERIC A. NEVILLE, EARNEST RIGSBEE, BRUCE RIGSBEE, CHARLES W. JOHNSTON, BEN GRANTHAM, AND SIMPSON L. EFLAND v. R. KENNETH BABB, MRS. W. E. HIGHSMITH, SIDNEY BARNWELL, MRS. CHARLES L. HERRING, JOHN L. STICKLEY, SR., EACH IN THEIR OFFICIAL CAPACITY AS A MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; JOSEPH L. NASSIF, EVELYN LLOYD, LILLIAN LEE, EACH IN THEIR OFFICIAL CAPACITY AS A MEMBER OF THE ORANGE COUNTY BOARD OF ELECTIONS; FLORENCE RICHTER, GLADYS M. HARRISON, LOUISE T. CREDLE, FRANCES T. PENDERGRASS, ALICE R. BENNETT, JACQUELINE CHAMBLEE, PEGGY W. TERRY, MILDRED H. WALKER, JOSEPHINE H. BARBOUR, MARIE K. McCULLOUGH, BETTY AGNES VANHOOKE, SARA A. CATO, DAZZIE LANE, ALBERTA NEELY, BARBARA P. PROCTOR, WILLIAM E. PARKER, ROBERT D. WILSON, WILLIAM K. BROOKS, ALMA G. McCHESNEY, LORETTA H. GREENE, EDWARD F. RODMAN, EVELYN M. HARRIS, RUTH T. ANDREWS, ADDIE L. PIERCE, VIRGINIA E. JULIAN, ELEANOR C. CARTER, BARBARA A. FINCKE, ILSE R. SONNER, FRANCES O. WELLMAN, JOAN F. LONG, SHELLEY HAUSLER, BETTY BENBOW SANDERS, JAYNE H. GEBUHR, CAROLYN M. FITZ-SIMONS, DELORES E. MOE, VERA SUE TERRELL, CAROLINE M. RILEY, MARY ALLISON McADOO, JENNIFER M. WINGARD, NANCY W. LASZLO, BARBARA M. SEAGO, JOAN T. HISKEY, JEANNE HARPER, JAN BOEKE, GEORGE WESLEY HARRIS, MARGARET P. PARKER, LYNN W. BECHARD, HELEN JANE WETTACH, SARAH CHAMBERLIN, JUSTEEN B. TARBET, KATHERINE D. SAVAGE, ALICE W. HOLLIS, MARY S. RECKFORD, MARIE C. BRADFORD, EMMA G. CLARKE, JOSEPHINE T. HOLMAN, MARGARET E. RICHARDS, WILLIAM H. McCORMICK, POLLY V. COMPTON, WILLIAM MELVIN WARD, KATIE B. BYRD, JEAN L. McDADE, CUMILLA WHITE, DWIGHT OAKLEY, LOUISE H. HEATH, MARGARET M. SHANKLIN, RUTH A. McBANE, SUSAN TRABKA, SUPHRONIA M. CHEEK, JANE G. POPE, JANICE FOWLER, H. M. LLOYD, JR., CATHERINE M. WOMBLE, CAROLINE N. CARTWRIGHT, REBA D. LANE, GAYLE RANCER, SHIRLEY J. MARTIN, RUTH LONG, LINDA E. ROSE, MARGARET K. COHAN, LAVERNE ANDERSON, LOUISE W. SPARROW, JOHN MICHAEL CROWELL, CHARLOTTE GARTH ADAMS, DOUGLAS THOMAS JOHNSON, HENRY S. WHITE, FRANK S. KESSLER, LAURIE S. RADFORD, BEULAH HACKNEY, AUBREY HARWARD, LUNA CRAWFORD, BARBARA BOOTH, PATRICIA A. WALL, MARGARET LLOYD, ALPHA F. PERRY, VIRGINIA S. PERRY, JEAN CRAWFORD, PAULINE WHITFIELD, BETSY KENNINGTON, CAROLYN W. GRIFFIN, LYNDA R. JENSEN, REGINE H. HAYES, JACQUELINE CREECH, BOBBIE STRICKLAND, CAROLYN BRAXTON, TERRIE JAMES, DAVE ROBERTS, MARION LANFORD HARKINS, VERGIE ARRINGTON, HELEN ALBERT, FRANCINE CLARK, KATHRYN DANIEL, BARBARA DAVIS, LUEDDIE MERRITT, KAYE CHEETE, EDNA DAWKINS, LOUISE

HAMLIN, EACH IN THEIR OFFICIAL CAPACITY AS ELECTION OFFICIALS OF THE ORANGE COUNTY BOARD OF ELECTIONS

No. 33

(Filed 5 February 1979)

1. **Administrative Law § 5— meaning of "contested case"**

There are two elements of a "contested case" as used in G.S. 150A-43: (1) an agency proceeding, (2) that determines the rights of a party or parties. G.S. 150A-2(2).

2. **Administrative Law § 5; Elections § 2.3— alleged voter registration irregularities—decision by State Board not to investigate further—no contested case—no appeal—action in superior court**

A decision by the State Board of Elections not to go forward with further investigation of alleged voter registration irregularities in Orange County, made after the Board conducted an informal public meeting to investigate charges of such irregularities, did not constitute a final agency decision in a "contested case." Therefore, plaintiffs' failure to appeal from the decision of the State Board did not require dismissal of their action instituted in the superior court for an injunction and writ of mandamus against the Orange County Board of Elections.

3. **Elections § 2.1; Injunctions § 2— voter registration of students—alleged continuing irregularities—purging of voter registrants—challenge procedure as adequate remedy**

The challenge procedure of Art. 8 of G.S. Ch. 163 did not provide an effective administrative remedy insofar as plaintiffs alleged continuing improprieties in the practices of the Orange County Board of Elections in registering students of the University of North Carolina who are not actually domiciled in Orange County. However, the challenge procedure did provide an effective administrative remedy for removing from the voting rolls those who had been improperly registered, even though plaintiffs alleged that between 6,000 and 10,000 voters had been improperly registered, that challenges may not be fairly heard by the Orange County Board, and that there is no appeal from such determinations by the Board, since domicile is necessarily a matter that must be heard on an individual basis, and judicial review of decisions in challenge hearings would be available in that mandamus would lie to correct any "clear abuse of discretion" in the Orange County Board's rulings. Therefore, plaintiffs' complaint stated a claim for relief for a mandatory injunction against the Orange County Board to prohibit continuing improprieties but failed to state a claim for relief for judicial purging of voter registrants.

4. **Injunctions § 3— preliminary mandatory injunction—when issued**

In order for a preliminary mandatory injunction to be issued, there must generally be "a clear showing of substantial injury to the plaintiff, pending the final hearing, if the existing status is allowed to continue to such a hearing."

5. Elections § 2.1— voter registration of college students—proof of domicile—preliminary mandatory injunction against board of elections—insufficient evidence to support findings

The evidence in the record was insufficient to support a finding by the trial court that the Orange County Board of Elections has not required students who apply for voter registration to prove their domicile, and the findings were therefore insufficient to support the court's issuance of a preliminary mandatory injunction requiring the Orange County Board of Elections to presume that a student has the same domicile as his parents, to require the student to rebut such presumption, and to ask the student a list of specified questions in making a determination of domicile.

6. Elections § 2— qualifications of voters—state regulations—basic propositions

In determining the validity of state regulations on access to the franchise, the following basic propositions apply: (1) any state law which tends to affect the right to vote by way of making classifications must be scrutinized for conformity with the Equal Protection Clause; (2) state laws which have the effect of denying certain classes the right to vote must have a compelling justification; (3) appropriately defined and uniformly applied bona fide residence requirements are permissible; and (4) otherwise eligible persons who reside in a community and are subject to its laws must be permitted to vote there even though their interests may differ from the majority of the community's residents.

7. Elections § 2.1— voter registration of students—domicile—inquiries of students not asked of others—constitutionality

Determination of domicile of a student for voting purposes from various kinds of direct and circumstantial evidence, including inquiries into the student's bank accounts, ownership and location of property, vacation plans and the like, does not constitute an unjustifiable intrusion into the private affairs of students seeking to register to vote and does not amount to an attempt to make unconstitutional classifications on the basis of wealth, travel and property ownership. Nor is it impermissible to make such inquiries of students when they are not routinely made of other would-be registrants since this additional screening procedure is not an attempt to "fence out" a segment of the community because of the way it may vote but is an attempt to determine who are the members of the relevant community.

8. Elections § 2.1— voter registration of college students—presumption that domicile is not in college town

The use of a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in the place where the college is located, thereby placing the burden of going forward with some proof of residence on a student seeking to register to vote, does not violate the Equal Protection Clause of the U. S. Constitution.

9. Elections § 2.1— registration of college students as voters—intent to remain in college town only until graduation

A student who intends to remain in his college community only until graduation should not for that reason alone be denied the right to vote in that

community. Insofar as *Hall v. Board of Elections*, 280 N.C. 600, may be interpreted to the contrary, it is modified accordingly.

10. Elections § 2.1— voter registration of college students—domicile

A student is entitled to register to vote at the place where he is attending school if he can show by his declarations and by objective facts that he (1) has abandoned his prior home, (2) has a present intention of making the place where he is attending school his home and (3) intends to remain in the college town at least as long as he is a student there and until he acquires a new domicile.

11. Elections § 2.1; Injunctions § 11— county board of elections—failure to require students to prove domicile—injunction—requiring use of specific questions

If evidence adduced at trial shows that the members and officials of the Orange County Board of Elections have failed to require students seeking to register to vote to prove their domicile to be in Orange County, the court may enjoin them from further registering students without doing so, and although the court also has the power to order the Board to use a specific set of questions in connection with registering students to vote, the court should use caution in the exercise of this power.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

APPEAL by defendants from an order by *Bailey, J.*, as Resident Superior Court Judge of WAKE County, granting a preliminary injunction. On 17 April 1978, pursuant to G.S. 7A-31, we ordered the case certified to this Court for review prior to a determination by the Court of Appeals.

Josey & McCoy, by C. Kitchin Josey and Robert A. Hanudel; Graham and Cheshire, by Lucius M. Cheshire, Attorneys for plaintiff appellees.

Coleman, Bernholz & Dickerson, by Alonzo B. Coleman, Jr., and Geoffrey E. Gledhill, Attorneys for defendant appellants.

Chambers, Stein, Ferguson & Becton, by Adam Stein, Attorneys for defendant appellant Kessler and applicant intervenors.

EXUM, Justice.

This is an action by registered voters in Orange County for an injunction, temporary and permanent, and a writ of mandamus against the Orange County Board of Elections (hereinafter Orange County Board) and its election officials. Plaintiffs allege, in essence, that defendants have systematically violated and are con-

tinuing to violate the state's election laws by registering as voters students at the University of North Carolina at Chapel Hill (hereinafter the University) who are not actually residents of Orange County. Defendants' appeal from an order, after hearing, granting a preliminary injunction raises these questions: (1) Whether the trial court lacked original jurisdiction inasmuch as plaintiffs are using this procedure as a substitute for what should have been an appeal from an earlier administrative decision of the State Board of Elections (hereinafter State Board). (2) Whether the complaint should have been dismissed for failure to state a claim on the ground that plaintiffs have effective legal and administrative remedies which they have not exhausted or alleged that they have exhausted. (3) Whether the trial court's findings of fact upon which the preliminary injunction was granted are sufficiently supported by the evidence. (4) Whether and to what extent we should continue to adhere to this Court's decision in *Hall v. Board of Elections*, 280 N.C. 600, 187 S.E. 2d 52 (1972). We conclude: The trial court did have original jurisdiction to proceed. The complaint states a claim upon which relief can be granted. There is not sufficient evidence in the record to support the preliminary injunction and it is hereby dissolved. Insofar as *Hall* generally sets out procedures to follow in registering student voters, we continue to adhere to it. We hold, however, that *Hall* should not be interpreted to give dispositive weight to the fact that as a student one intends to remain in the locality of his school only until graduation in determining his entitlement to vote in that locality.

This case arises out of a dispute of several years' duration as to who should properly be included on the voting rolls of Orange County. Plaintiffs, registered voters there, are members of the Orange Committee, an organization that has been particularly active in this dispute. An attempt to resolve this dispute administratively was begun in late 1976 or early 1977 with the submission of petitions to the State Board. At least seven of the ten plaintiffs in this action joined in these petitions, which expressed concern that there were large numbers of non-residents voting in Orange County and asked the State Board for relief.[1]

1. Specifically they requested of the State Board:

"1. That all students from outside Orange County be purged from the registration books, or in the alternative that a completely new registration be held for Orange County.

Responding to these petitions and, apparently, to requests through other channels, the State Board met on 30 March 1977. The purpose of this meeting, called upon the written application of two members of the State Board pursuant to G.S. 163-20(a), was to determine "[w]hether or not the elections officials in Orange County have complied with statutory provisions and guidelines issued by the State Board of Elections relative to the registration of voters in Orange County." In the course of this meeting, the State Board heard "remarks" from twelve persons. The substance of these remarks is not contained in the State Board's minutes. After deliberation, the State Board adopted the following motion:

> "The State Board of Elections, acting on general authority contained in G.S. 163-20, having met in Raleigh on March 30, 1977 to make inquiry into the registration procedures administered in Orange County, and having permitted interested parties to impart pertinent information to the Board, the State Board of Elections, after consideration of all the allegations contained in the documents submitted by the Petitioners and after consideration of all information provided by the Orange County Board of Elections, this Board concludes that no further proceedings on this matter are deemed appropriate."

No further action was taken before the State Board or in respect to its disposition.

On 16 February 1978 plaintiffs filed complaint in this case in Wake Superior Court. They joined as defendants members of the State Board[2] and members and officials of the Orange County Board. In alternative claims for relief, they allege (1) a failure of election officials to perform their statutory duties by failing to determine whether persons were residents of Orange County before allowing them to register to vote there, and (2) abuse by these officials of whatever discretion the election statutes permit by their failure even to inquire whether persons were residents

"2. That a new primary and election be held for the two seats on the Orange County Board of Commissioners that were filled in the November 6, 1976 election.

"3. That the State Board of Elections request the Superior Court to exercise its inherent power by appointing a special prosecutor to inquire into the question of whether or not the State election laws have been wilfully and deliberately violated in Orange County."

2. The action was dismissed as to these defendants on 7 March 1978.

of Orange County before allowing them to register to vote there. Plaintiffs ask for relief in various forms including both temporary and permanent injunctive relief and writs of mandamus. In essence they seek by this lawsuit three things: (1) purging of the voting rolls of Orange County and re-registration of all voters; (2) an order requiring that all registrars make full inquiry concerning the residence of any student seeking to register; and (3) an order requiring that certain specific questions be asked of each student seeking to register.

On 16 February 1978 Judge Bailey ordered defendants to appear and show cause why temporary injunctive relief should not be granted. At the hearing on 6 March 1978 he denied a motion to intervene by Steven J. Rose, Paul Howard Melbostad, Jonathan Drew Sasser, Gerald A. Cohen, James Michael Lane, Braxton Foushee, Ralph V. Aubrey, Jr., and Douglas Muir Sharer—all either students registered to vote or holders of or candidates for public office in Orange County. He also denied defendants' motions to dismiss for lack of original jurisdiction and for failure of plaintiffs to state a claim upon which relief could be granted.

On 7 March 1978 Judge Bailey, after hearing evidence, granted preliminary relief to plaintiffs. He found, among other things, that large numbers of students were registered to vote in Orange County who were not bona fide residents of the county and that the Orange County Board had failed to require students to carry the burden of proving they were bona fide residents of Orange County when they applied to register. On the basis of these and other findings Judge Bailey (1) ordered the Orange County Board to purge from voter registrations all persons who were enrolled at the University at Chapel Hill and who upon their most recent enrollment listed their home addresses as being outside Orange County; (2) ordered the Orange County Board to presume that any student applying to register was domiciled where his parents resided and to require that this presumption be rebutted by evidence in addition to the applicant's own statement of intention to reside permanently in Orange County; and (3) required the use by Orange County election officials and the maintenance on file for three years of a questionnaire.[3]

3. Judge Bailey required that the questionnaire be substantially as follows:

What is your occupation?

Defendant members of the Orange County Board, defendant Kessler and applicant intervenors appealed. On 22 March 1978 the Court of Appeals stayed execution and enforcement of Judge Bailey's order pending appellate review. On 17 April 1978 we denied plaintiffs' motion to stay the Court of Appeals' stay order and certified the case to this Court for decision prior to a determination by the Court of Appeals.

I

Defendants' first assignment of error challenges the trial court's exercise of original jurisdiction in this case. Defendants' initial contention is that plaintiffs' claim should have been dismissed because they did not appeal the State Board's 30 March 1977 action. This argument is essentially based on the familiar principle that "[a]n action for mandamus may not be used as a substitute for an appeal." *Snow v. Board of Architecture*, 273 N.C. 559, 570, 160 S.E. 2d 719, 727 (1968). Defendants maintain that the

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Did you leave your father's home for the temporary purpose of attending school or "of cutting loose from home ties"?

Do you keep your permanent possessions in the place you claim as your residence in Orange County, or do you keep there only enough for temporary needs?

If you were to fail at the university or were forced to discontinue your studies because of illness would you return to your parents' home?

Would you be living in the university town if the school were not there?

If tomorrow you were to transfer to a school in another town would you still consider your present residence in Orange County your home?

For what purposes other than attending school are you in this college town?

What occupation do you plan to follow upon graduation and where do you plan to follow it?

Where do you maintain church or lodge affiliations, if any?

Banking and business connections?

Do you have a car and where is it registered?

Whose name is it registered in?

What State is your driver's license registered in?

Have you listed taxes in Orange County? When:

Other statements made:

NAME: _____ _____
(Please Print) Signature

ADDRESS: _____

Sworn to before me this _____ day of _____, 19 _____.

_____
Registrar or other person
authorized to register voters

decision of the State Board was "a final agency decision in a contested case" and that it can only be reviewed by an appeal to the superior court pursuant to the North Carolina Administrative Procedure Act. See G.S. 150A-43 to 150A-52. Specifically, defendants point to G.S. 150A-43:

> "Any person who is aggrieved by a final agency decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of such decision under this Article, unless adequate procedure for judicial review is provided by some other statute, in which case the review shall be under such other statute. Nothing in this chapter shall prevent any person from invoking any judicial remedy available to him under the law to test the validity of any administrative action not made reviewable under this Article."

Relying on the absence of specific provisions in the election laws for judicial review of decisions of the State Board, defendants argue that G.S. 150A-43 is the only basis for such review and that the review procedure must be in accordance with G.S. 150A-45 and 150A-46. Plaintiffs have not followed the procedures set forth in these statutes. Therefore, defendants conclude, plaintiffs cannot invoke the original jurisdiction of the superior court to challenge the actions of the State Board. *See Ponder v. Joslin*, 262 N.C. 496, 138 S.E. 2d 143 (1964); *Axler v. City of Wilmington*, 25 N.C. App. 110, 212 S.E. 2d 510 (1975).

[1, 2] We cannot accept defendants' argument because we do not agree that the State Board's 30 March 1977 meeting was a "contested case." G.S. 150A-2(2) defines a "contested case":

> " 'Contested case' means any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing. Contested cases include, but are not limited to, proceedings involving rate-making, price-fixing and licensing. Contested cases shall not be deemed to include rule making, declaratory rulings, or the award or denial of a scholarship or grant."

Under this definition there are two elements of a "contested case": (1) an agency proceeding, (2) that determines the rights of a

party or parties. *See* Daye, *North Carolina's New Administrative Procedure Act: An Interpretive Analysis,* 53 N.C.L. Rev. 833, 868-72 (1975). Since the second element was missing from the State Board's 30 March 1977 meeting it was not a "contested case" within the meaning of the statute.

The State Board has investigatory, supervisory, and adjudicatory powers. Its 30 March 1977 meeting was held pursuant to the first two rather than the third. The State Board had received petitions purportedly signed by several hundred Orange County residents alleging registration irregularities and asking for relief. At the request of two of its own members, it held a public meeting to investigate these charges. The meeting was conducted informally. The State Board heard from a number of interested parties. After consideration of the allegations and information before it the State Board decided that further proceedings were not appropriate. This determination did not affect the rights of any of the parties. The petitioners remained free to pursue other appropriate administrative or judicial remedies. The State Board simply decided not to go forward with further *investigation* of alleged registration irregularities. A decision to end a preliminary inquiry is not "a final agency decision in a contested case." *Accord, Miller v. Alcoholic Beverages Control Comm.,* 340 Mass. 33, 162 N.E. 2d 656 (1959). There was nothing for plaintiffs to appeal so as to invoke the judicial review powers, or appellate jurisdiction, of the superior court. Plaintiffs' failure to appeal from the State Board, therefore, would not in itself warrant dismissal of this action.

II

[3] Defendants next argue that plaintiffs' claim should be dismissed for their failure to exhaust administrative remedies. The basis for this claim is plaintiffs' failure to resort to statutory procedures for challenging voters before filing this action. While testimony on this point is somewhat equivocal, a fair reading of the record establishes that prior to filing this complaint, plaintiffs had not used the challenge procedure provided by statute to correct the problems of which they complain.[4]

4. The record shows, however, that in the week before the hearing in this matter approximately 6000 challenges were filed against voters registered in Orange County by members of the Orange Committee and others.

Challenges are governed by Article 8 of Chapter 163 of the General Statutes. G.S. 163-85(a) states that other than on the day of a primary or general election "[a]ny registered voter of the county may challenge the right of any person to *register, remain registered or vote* in the county." (Emphasis supplied.) General Statute 163-85(b) establishes the procedure for such challenges:

> "Challenges shall be made to the county board of elections. Each challenge shall be made *separately*. The burden of proof shall be on the challenger in each case. Each challenge shall be made in writing and, if they are available, shall be made on forms prescribed by the State Board of Elections. Each challenge shall specify the reasons why the challenged voter is not entitled to be or remain registered or to vote." (Emphasis supplied.)

General Statute 163-86 provides for a hearing on the challenge before the county elections board at which the challenged registrant has a right to be present and witnesses may be heard. Challenges to the right of a person to vote may also be filed on the day of a primary or general election under the procedures set out in G.S. 163-87. Again under these provisions, determinations are to be made on an individual basis and an opportunity for hearing before the county elections board is provided.

Defendants contend that when there is an adequate, complete and appropriate statutory remedy, a challenge to voter registration is not cognizable in equity. *See Starkey v. Smith*, 445 Pa. 118, 283 A. 2d 700 (1971). They characterize Article 8 of Chapter 163 as such a remedy and urge that plaintiffs' complaint be dismissed. Plaintiffs respond by arguing that however complete the challenge procedure appears on its face, it is not an effective or adequate remedy in this case. First, plaintiffs say that the sheer number of unqualified voters makes use of the challenge method impractical. Second, they contend that the Orange County Board, whose members and officials they accuse of having registered students in violation of the law, would not properly determine challenges in hearings conducted by it for this purpose and that there is no appeal from such determinations by the Orange County Board.

A pleading that alleges inadequacy of administrative remedy states a claim upon which equitable relief may be granted if the

circumstances warrant it. *See* 2 Cooper, State Administrative Law 579 (1965). Plaintiffs here allege the failure of the Orange County Board and its officials to comply with state election law, and the presence of a large number of persons, allegedly between 6000 and 10,000, on the voting rolls who are not entitled to be registered. Added to these allegations at various points in the complaint is the legal conclusion that plaintiffs have no adequate remedy at law and must have redress, if at all, in equity.

This issue is before us on a motion to dismiss for failure to state a claim upon which relief could be granted. *See* G.S. 1A-1, Rule 12(b)(6). "'A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. For the purpose of the motion, the well-pleaded material allegations of the complaint are taken as admitted; but conclusions of law or unwarranted deductions of facts are not admitted.'" *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E. 2d 161, 163 (1970), *quoting* 2A Moore's Federal Practice § 12.08 (2d ed. 1968). Thus, while we are to treat as true plaintiffs' factual allegations, it is our task to determine whether these allegations as a matter of law demonstrate the adequacy, or lack thereof, of legal administrative remedies.

Our examination of prior law in this jurisdiction reveals only one case that has dealt with this precise issue. Plaintiffs in *Glenn v. Culbreth*, 197 N.C. 675, 150 S.E. 332 (1929), brought suit seeking an injunction against the use of a registration in a primary election and a mandamus for a new registration. They alleged that voters for a municipal election in Raleigh had been illegally registered. Among several alternative grounds for its holding that plaintiffs were not entitled to injunctive relief, the Court stated, *id.* at 679, 150 S.E. at 333-34:

> "Moreover, the plaintiff[s] had an adequate remedy at law. The charter of the city of Raleigh, Article VII, provides that every person who shall vote in the city primary 'shall be subject to the challenge made by any resident of the city of Raleigh under such rules as may be prescribed by the board of commissioners, and such challenge shall be passed upon by the judges of elections and registrars,' etc. The general election law provides the same remedy in C.S., 5972."

Glenn is factually distinguishable from the present case because plaintiffs there made no allegations that any of the voters im-

properly registered were not qualified to be registered, or as to the number of those improperly registered and their possible effect on the outcome of elections.

Glenn is, however, in accord with a number of decisions that when an *effective* administrative remedy exists, that remedy is exclusive. *See King v. Baldwin*, 276 N.C. 316, 172 S.E. 2d 12 (1970); *Church v. Board of Education*, 31 N.C. App. 641, 230 S.E. 2d 769 (1976); *Wake County Hospital v. Industrial Commission*, 8 N.C. App. 259, 174 S.E. 2d 292 (1970). Our inquiry must therefore be, taking plaintiffs' factual allegations as true, whether the challenge procedure is an effective administrative remedy for the wrongs of which they complain.

Plaintiffs seek to end what they allege to be illegal practices on the part of Orange County election officials and to have guidelines laid down for the future. In this plaintiffs are essentially attempting to require election officials to perform their legal duties. Plaintiffs' standing to make such a claim has not been challenged. Nor should their failure to make challenges preclude them from seeking this kind of relief. If plaintiffs' allegations are true, the challenge procedure would not provide an effective remedy. The challenge procedure might correct past wrongs by removing from the voting rolls those who had been improperly registered. It could do nothing, however, to halt ongoing improprieties nor could it prevent future ones. In summary, insofar as plaintiffs allege continuing improprieties in the registration practices of the Orange County Board and its officials they have stated a claim upon which relief can be granted.

The relief which can be granted is, however, more restricted than that which plaintiffs seek. Judicial purging of voter registrants is not an available remedy here. It is duplicative of the challenge process. Plaintiffs argue nevertheless that they may seek a judicial remedy that is virtually identical to an administrative remedy because of the number of voters involved and because of the possibility that challenges may not be fairly heard by the Orange County Board. We find both arguments unpersuasive. Notwithstanding the practical difficulty in challenging individually a large number of registrants, there is in this case no other proper course. Domicile is necessarily a matter that must be determined on an individual basis; there is no ap-

propriate way to make a group determination. As Justice Sharp, now Chief Justice, said in *Hall v. Board of Elections, supra*, 280 N.C. at 607-08, 187 S.E. 2d at 56:

> "The question whether a student's voting residence is at the location of the college he is attending or where he lived before he entered college, is a question of fact which depends on the circumstances of each individual's case."

No one fact is determinative of domicile. In addition, proof of improper registration practices by the Orange County Board is not proof that voters so registered were not domiciled in Orange County.

Finally, judicial review of decisions in challenge hearings would be available in that mandamus would lie to correct any "clear abuse of discretion" in the Orange County Board's rulings. *See Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E. 2d 97, 99 (1971); *Insurance Co. v. Ingram, Comr. of Insurance*, 34 N.C. App. 619, 240 S.E. 2d 460 (1977).

Because plaintiffs will be entitled to some of the relief they seek if they prove their allegations, Judge Bailey was correct in denying defendants' motion to dismiss. Judge Bailey included, however, the following provision in his 7 March 1978 order:

> "The defendants, Joseph L. Nassif, Evelyn Lloyd and Lillian Lee, in their official capacity as members of the Orange County Board of Elections and their successors in office be, and they are hereby directed to purge from the voter registration books of Orange County the names of all persons now registered to vote who are enrolled as students at the University of North Carolina at Chapel Hill and who upon their most recent enrollment gave their home address as a place outside of Orange County, North Carolina."

Plaintiffs as we have pointed out are not entitled to this relief under any showing they could make. It was therefore error to grant it.

III

Defendants' next assignments of error go to the granting of preliminary injunctive relief in plaintiffs' favor. We now examine

the remaining portions of the 7 March 1978 order to determine whether there was sufficient evidence to support them. These portions of the order are:

> "NOW, THEREFORE, IT IS ORDERED that:
>
> . . . .
>
> "2. That in making a decision as to whether an applicant for registration is domiciled in Orange County and is thus qualified to register and vote in Orange County, the defendant, Orange County Board of Elections, and all persons authorized by them to register voters, shall presume that any applicant who is enrolled at the University of North Carolina at Chapel Hill, is domiciled in the place of residency of such student's parents and shall require such applicant to rebut that presumption by evidence in addition to the applicant's own statement that he or she intends to reside permanently in Orange County.
>
> "3. That any person applying for registration to vote in Orange County after the date of the signing of this Order shall be required by the defendant, Orange County Board of Elections, and all election officials who are now or who may hereafter be appointed by the said Board of Elections to register voters, to answer a series of questions and sign his or her name to such questions, which questions shall be on a form substantially as set forth in Exhibit A of this Order which Exhibit is made a part hereof and such statement or form of questions shall be preserved by the defendant, Orange County Board of Elections, for no less than three years after such application for registration is made; and such written statement or form shall be made available by the Orange County Board of Elections for inspection by the public during normal office hours."[5]

[4] This order amounts to a preliminary mandatory injunction. Our courts have power to enter such an order, *see Woolen Mills v. Land Co.*, 183 N.C. 511, 112 S.E. 24 (1922), provided it is supported by the evidence. In order for a preliminary mandatory injunction to be issued, there must generally be "*a clear showing* of *substantial injury* to the plaintiff, pending the final hearing, if the

5. The questions referred to are set forth in note 3, *supra*.

existing status is allowed to continue to such a hearing." *Huggins v. Board of Education*, 272 N.C. 33, 40, 157 S.E. 2d 703, 707 (1967). (Emphasis supplied.)

[5] Defendants have excepted to all Judge Bailey's findings of fact. We need discuss only the fifth one here, which is:

> "That the defendant, Orange County Board of Elections, has not placed the burden of proof upon students who apply for registration to demonstrate that the bona fide domicile of such students is Orange County."

This is the crucial finding upon which the relief granted in the portion of the order now under consideration rests. If there is no evidence to support this finding, then these portions of the order cannot stand. Even if there is some evidence in the record to support the finding, we are not bound by it. "On appeal from the order of a superior court judge granting or refusing a preliminary injunction the Supreme Court is not bound by the findings of fact of the hearing judge but may review and weigh the evidence and find the facts for itself." *Setzer v. Annas*, 286 N.C. 534, 537, 212 S.E. 2d 154, 156-57 (1975).

Plaintiffs presented testimony from ten witnesses. Raymond E. Strong testified that in the spring semester of 1978, there were 19,139 students enrolled at the University, 15,102 of whom were North Carolina residents and 4037 of whom were from outside the state. James O. Cansler testified as to the number of students living in university housing, private dormitories, fraternities and sororities, and gave the location of these housing units. Frederick A. Russ testified that a survey of the student body indicated that 14.8% of those responding were registered to vote in Orange County. William C. Ray, William C. Dorsett, John T. Walker and Frank Miller testified that their examination of the voting rolls in several precincts revealed that a substantial percentage of the persons registered to vote in those precincts were students. In sum, all of the testimony by these witnesses tended to establish the number of students at the University, where they lived and, to an extent, how many of them were registered to vote. None of it tended to show that the Orange County Board had registered students in violation of the law.

Plaintiffs next examined two students, Winston Earl Lane III and Jimmy Warren Adcock. Both were undergraduates and were

registered to vote in Orange County. Both were asked various questions apparently intended to determine whether they were actually entitled to be registered in Orange County. Neither could remember whether they were asked any specific questions about their domicile when they registered.

Plaintiffs' last witness was William Melvin Ward, who testified on direct examination that he was and had been for 20 years the Democratic Judge in Carr Precinct. He had attended all meetings called by the Orange County Board for election officials. According to Mr. Ward the Board gave no instructions regarding registration of student voters before 1977. At a meeting in 1977 instructions were given by Mr. Lonnie Coleman to the effect that "if a student went to a registrar and was asked if his dormitory was his personal residence, if he said yes, that the registrar must register him." Mr. Ward recalled no instructions as to questions of a more specific nature about a student's domicile.

On cross-examination, the following exchange took place between Mr. Ward and Mr. Coleman, attorney for defendants:

"Q. Mr. Ward, you say you do recall attending an instruction seminar in 1977?

A. Yes, sir.

Q. Do you recall me, sir, reading to that—to you and to other members who were there instructions that had been sent to the County Board of Elections by the State Board of Elections? Do you recall that, sir?

A. I think you said it was—the legislature had—had passed this law is the way I understood it.

Q. Do you recall me, sir, reading to you and to other people who were there instructions that the State Board of Elections had sent that came out of the case entitled Hall versus Board of Elections? Do you recall that, sir?

A. No, I do not.

Q. Do you recall me, sir, reviewing the facts of that case, Hall versus Elections?

A. No.

Q. Board of Elections? You don't recall that?

A. No, I don't. *Well, see, I—I wasn't from Chapel Hill and—and I—I wasn't too interested, I mean too concerned about it, because I knew I wouldn't be involved in it.*

Q. I see. Do you recall, sir, me reading a list of questions that the Supreme Court had said were appropriate questions to ask of anyone who may be a student seeking to register? Do you recall those questions?

A. No, sir.

. . . .

Q. Do you recall, sir, signing your name as a participant in the—in the seminar that night? Do you recall signing your name when you came in the door?

A. Um huh. Yes, sir.

Q. And—and do you recall receiving a—a brown envelope, a package that had some materials in it?

A. Oh, the registrar—I'm a judge. The registrar gets that.

Q. Do you recall getting one of those?

A. . . . .?

Q. Um huh.

A. Naw. I probably—I probably did, but I don't recall it. I don't say that I didn't get it.

COURT: It's a lost cause.

Q. Mr. Ward, what was the statement, sir, that you said that I made that night?

A. To the best of my knowledge, you said if a student went to a registrar to ask to register that the registrar was required to ask him if he called his dormitory his permanent residence and if he said yes you—you were supposed to register him.

Q. All right. Do you recall other questions that I referred registrars that night to to ask people who were attempting to register?

A. Not offhand, I don't.

Q. That's the only question you recall, sir?

A. Yes, sir." (Emphasis supplied.)

At the conclusion of Mr. Ward's testimony, Mr. Coleman stated that he could present witnesses whose testimony would tend to show (1) that registrars had been instructed in accordance with a State Board memorandum relating to conformity with *Hall v. Board of Elections, supra*, 280 N.C. 600, 187 S.E. 2d 52, and (2) that many, if not all, registrars in fact made inquiry into the domicile of those seeking to register. To this offer of proof, Mr. Cheshire, attorney for plaintiffs, replied:

"If your Honor please, I think we would be willing to stipulate probably that their witnesses would testify essentially to what Mr. Coleman said they would testify to without conceding that they're telling the truth about it."

On oral argument, counsel for plaintiffs argued that Mr. Cheshire did not actually concede such testimony would be forthcoming, making much of the word "probably." This argument seems patently frivolous. Clearly Mr. Cheshire stipulated the existence but not the veracity of such testimony. The substance of the proferred testimony, as given by Mr. Coleman, should be weighed along with the remainder of the evidence in determining the sufficiency of the evidence to support Judge Bailey's fifth finding.

The evidence set out above constitutes all that was before Judge Bailey relative to this issue. We find it inconclusive. The testimony of the first seven witnesses relates only to the number of students registered and where they were registered. The testimony of the two students shed no light on registration practices, since neither of them remembered what, if any, questions he had been asked. Mr. Ward's testimony on direct examination tended to show either that Orange County registrars had not been instructed about proper registration practices or had been instructed incorrectly. On cross-examination, however, he

remembered few details of the meeting at which the alleged incorrect instruction was given and admitted that he was not paying close attention when the matters he was testifying to were discussed. Balanced against Mr. Ward's statements is Mr. Coleman's offer of testimony that would tend to show that the registrars had been properly instructed and that they were complying with the law.

On the basis of this evidence, it was error for Judge Bailey to have made his fifth finding. The evidence simply failed to show sufficiently that the Orange County Board had not required students to prove their domicile. Without this showing the second and third parts of Judge Bailey's order cannot stand. For this reason and the reasons stated in part II above, we vacate Judge Bailey's order of 7 March 1978 except insofar as it dismisses the action against members of the State Board.

IV

Defendant Kessler, along with applicant intervenors, next asks us to modify substantially our decision in *Hall v. Board of Elections, supra*, 280 N.C. 600, 187 S.E. 2d 52. They contend the principles governing registration of student voters set out in *Hall* are in conflict with the Equal Protection Clause of the United States Constitution. In order to evaluate this claim, it is necessary first to examine the requirements of *Hall* and then to determine precisely what the Equal Protection Clause requires in this area.

Hall was decided in 1972, shortly after the ratification of the Twenty-Sixth Amendment to the United States Constitution gave eighteen year olds the right to vote. It was the first case in which this Court dealt with the issue of a student's "residence" for purposes of registering to vote. The Court in *Hall* first concluded that "residence" as used in our election statutes meant "domicile." *Id.* at 606, 187 S.E. 2d at 55. Then, drawing on our law of domicile and on cases from other jurisdictions, the Court enunciated the following principles, *id.* at 607-09, 187 S.E. 2d at 56-57: (1) A student's residence for voting purposes is a question of fact dependent upon the circumstances of each individual case. (2) Domicile may be proved by both direct and circumstantial evidence. (3) There is a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in

the place where the college is located. (4) An adult student may acquire a domicile in the place where his college is located if he regards that place as his home and intends to remain there indefinitely.

These principles were rooted in the law of domicile. Since *Hall*, however, there has been a substantial volume of litigation in student voting cases in which traditional concepts of domicile and the means of implementing them were challenged on the grounds that they deny would-be student voters equal protection of the laws. *See* Annotation, Residence of Students for Voting Purposes, 44 A.L.R. 3d 797. These challenges have been described as a "second generation of voting rights cases." *Newburger v. Peterson*, 344 F. Supp. 559, 561 (D.N.H. 1972).

Some of these cases and their holdings may be summarized as follows. In *Wilkins v. Bentley*, 385 Mich. 670, 189 N.W. 2d 423 (1971), the Michigan Supreme Court struck down a statute that had been interpreted to create a rebuttable presumption that students were not residents of the locality where they were attending an institution of learning. In addition, the court held that no special forms, questions, identifications or the like could be required of students if they were not required of others. In *Worden v. Mercer County Board of Elections*, 61 N.J. 325, 294 A. 2d 233 (1972), the New Jersey Supreme Court held that students seeking to register could not be subjected as a class to questioning beyond that to which other applicants were subjected. In addition, the court held that all bona fide student residents had to be allowed to register including "(1) those who plan to return to their previous residences, as well as (2) those who intend to remain permanently in their college communities, (3) those who plan to obtain employment away from their previous residences, and (4) those who are uncertain as to their future plans." *Id.* at 348, 294 A. 2d at 245. In *Newburger v. Peterson, supra*, 344 F. Supp. 559, a three-judge court struck down as unconstitutional a New Hampshire statute that had been interpreted as making "an intention to remain permanently or indefinitely in a particular town as essential to the acquisition of domicile" for voting purposes. *Id.* at 560. In other words, the *Newburger* court held that if a person had the other requisites for domicile, he must be allowed to vote even if he had an intention to leave at a fixed time in the future. In *Ramey v. Rockefeller*, 348 F. Supp. 780 (E.D.N.Y. 1972), a

three-judge court held that "in determining bona fide residence for a person physically present, the state cannot constitutionally go further than . . . [requiring] that he 'must intend to make that place his home for the time at least.'" *Id.* at 788. Lastly, in *Whatley v. Clark*, 482 F. 2d 1230 (1973), *cert. denied*, 415 U.S. 934 (1974), the United States Court of Appeals for the Fifth Circuit held that a Texas statute which created a rebuttable presumption that a student was not a resident for voting purposes of the place where he attended school was violative of the Equal Protection Clause.

[9] As our analysis below will show we disagree with the extent to which many of these cases have carried the Equal Protection Clause in student voting cases. The United States Supreme Court cases in this area, the "first generation" voting rights cases upon which the foregoing decisions are based, do not require us to retreat from *Hall* insofar as *Hall* established the factors which might be considered and the procedure to be used in determining domicile. These United States Supreme Court cases, however, and other persuasive authorities do impel us to hold now that a student who intends to remain in his college community only until graduation should not for that reason alone be denied the right to vote in that community. Insofar as *Hall* may be interpreted to the contrary, it is modified accordingly.

These cases begin with *Carrington v. Rash*, 380 U.S. 89 (1965). Petitioner in *Carrington*, a sergeant in the United States Army, challenged a provision of the Texas Constitution which prevented a member of the armed services from another state who moved to Texas from acquiring domicile there while he or she remained on military duty. Texas argued that the provision should be upheld because it served two valid state purposes: (1) "immunizing its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community"; and (2) "protecting the franchise from infiltration by transients." *Id.* at 93. The Supreme Court conceded that the states have the power to impose reasonable regulations on access to the franchise:

> "Texas has unquestioned power to impose reasonable residence restrictions on the availability of the ballot. . . . There can be no doubt either of the historic function of the States to establish, on a non-discriminatory basis, and in ac-

cordance with the Constitution, other qualifications for the exercise of the franchise." *Id.* at 91.

The Court concluded, however, that there was no reasonable basis for the classification Texas had made and struck it down as violative of the Equal Protection Clause. In reply to Texas' first argument, the Court stated: " 'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Id.* at 94. As to the second argument, the Court agreed that Texas could take "reasonable and adequate steps" to deal with the special problems presented by soldiers and other transient populations, but it found the irrebuttable presumption used in the case of military personnel not sufficiently "precise . . . to determine the bona fides of an individual claiming to have actually made his home in the State long enough to vote." *Id.* at 95.

Carrington represented a departure from prior treatment of state classifciations for voting. Before *Carrington* and the reapportionment cases decided at about the same time, *e.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964), it had been thought "that the Equal Protection Clause was not intended to touch state electoral matters." *Carrington v. Rash*, *supra*, 380 U.S. at 97 (Harlan, J., dissenting). *Carrington* and its contemporaries evidenced a new concern on the part of the Supreme Court that the right to vote, "a fundamental political right, because preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), be shared equally by all citizens. This concern has been apparent in a number of cases striking down barriers that prevented a significant number of citizens from voting. Three of these cases have particular relevance to the issues under consideration here.

In *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969), the Court invalidated a New York law limiting the electorate in school district elections to those owning property in the district and those with children enrolled in the local schools. *Kramer* is noteworthy for the test it articulates for measuring voting classifications against the requirements of the Equal Protection Clause: "[I]f a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." *Id.* at 627.

In *Evans v. Cornman*, 398 U.S. 419 (1970), the Court upheld an injunction barring Maryland officials from denying residents at the National Institutes of Health, a federal enclave, the right to vote in the state. Maryland argued that it was necessary to exclude residents of this enclave from voting in order "to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them." *Id.* at 422. The Court rejected this argument, finding that residents of the enclave had as much stake[6] in Maryland elections as other Maryland residents notwithstanding the state's jurisdiction over them was limited in certain respects.

Lastly, in *Dunn v. Blumstein*, 405 U.S. 330 (1972), the Court struck down Tennessee's requirement that in order to vote one must have been a resident of the state for one year and of the county where one was registering for three months. The Court emphasized "that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.* at 336. It also made it clear that state laws which had the effect of "totally denying . . . the opportunity to vote" must be justified by "a substantial and compelling reason." *Id.* at 335. The Court was able to discern no such justification for Tennessee's lengthy residency requirement.

The most important aspect of Dunn for our purposes, however, is the careful distinction it drew between durational residence requirements and bona fide residence requirements:

> "We emphasize again the difference between bona fide residence requirements and durational residence requirements. We have in the past noted approvingly that the States have the power to require that voters be bona fide residents of the relevant political subdivision. An *appropriately defined and uniformly applied requirement of bona fide residence* may be necessary to preserve the basic conception of a politi-

6. The Court noted, *id.*, at 424:

> "[I]f elected representatives enact new state criminal laws or sanctions or make changes in those presently in effect, the changes apply equally to persons in NIH grounds. . . . Further, appellees are as concerned with state spending and taxing decisions as other Maryland residents, for Congress has permitted the States to levy and collect their income, gasoline, sales, and use taxes—the major sources of state revenues—on federal enclaves. . . . State unemployment laws and workmen's compensation laws likewise apply to persons who live and work in federal areas. . . . Appellees are required to register their automobiles in Maryland and obtain drivers' permits and license plates from the State; they are subject to the process and jurisdiction of state courts; they themselves can resort to those courts in divorce and child adoption proceedings; and they send their children to Maryland public schools."

cal community, and therefore could withstand close constitutional scrutiny. But durational residence requirements, representing a separate voting qualification imposed on bona fide residents, must be separately tested by the stringent standard." Id. at 343-44. (Citations omitted and emphasis supplied.)

[6] *Carrington, Kramer, Evans* and *Dunn* read together, establish these basic propositions: (1) any state law which tends to affect the right to vote by way of making classifications must be scrutinized for conformity with the Equal Protection Clause; (2) state laws which have the effect of denying certain classes the right to vote must have a compelling justification; (3) *appropriately defined* and *uniformly applied* bona fide residence requirements are permissible; and (4) otherwise eligible persons who reside in a community and are subject to its laws must be permitted to vote there even though their interests may differ from the majority of the community's residents.

[7] Applying these propositions to the principles set out in *Hall*, we see no difficulty with the proposition that domicile can be proved by various kinds of direct and circumstantial evidence. Three types of arguments have been advanced against the type of evidentiary inquiry endorsed by *Hall*. Defendant Kessler and applicant intervenors argue that it is an unjustifiable intrusion into the private affairs of students seeking to register to vote. Elsewhere, it has been argued that inquiries into bank accounts, ownership and location of property, vacation plans and the like (all of which were approved by *Hall*) amount to attempts to make unconstitutional classifications on the basis of wealth, travel and property ownership. *See Wilkins v. Bentley, supra*, 385 Mich. 670, 189 N.W. 2d 423. Lastly, defendants argue at least by implication that it is not permissible to make such inquiries of students when they are not made of others.

Taking these arguments in turn, we regret that there is ever a need for the state to interfere in the private affairs of citizens, but minimal intrusions are often a price we must pay for living in an organized society. The power of the state to require that voters be bona fide residents is unquestioned. *Dunn v. Blumstein, supra*, 405 U.S. 330; *Carrington v. Rash, supra*, 380 U.S. 89. A corollary must be that the state has authority to determine whether

a person is a bona fide resident. To hold otherwise would mean the state is bound by a would-be registrant's declaration of residency. Such a result is not constitutionally required.

Turning to the second argument, we do not agree that asking the kind of questions approved by *Hall* amounts to the making of impermissible classifications on the basis of wealth, property ownership, etc. This contention results from a misunderstanding of the purpose of these questions. No one factor can be determinative of domicile. Each factor referred to in *Hall* has some relevance to domicile. The presence or absence of any one of them, or even a combination of them, may not be conclusive. Thus the inquiries approved in *Hall* are reasonably calculated to determine domicile. They do not result in the claimed, and obviously impermissible, classifications.

Defendants' strongest argument on this point is that it is impermissible to make such inquiries of students when they are not routinely made of other would-be registrants.[7] A number of courts have accepted this contention. *See, e.g., Worden v. Mercer County Board of Elections, supra,* 61 N.J. 325, 294 A. 2d 233 (1972); *Sloane v. Smith,* 351 F. Supp. 1299 (M.D. Pa. 1972); *Shivelhood v. Davis,* 336 F. Supp. 1111 (D. Vt. 1971); *Bright v. Baesler,* 336 F. Supp. 527 (E.D. Ky. 1971). Our view is that the requirements of the Equal Protection Clause do not go so far.

Defendant Kessler and applicant intervenors argue that we must apply the "compelling state interest" test of *Kramer* and *Dunn* and, upon doing so, must find that the practice of asking students questions not asked of others is unconstitutional. *Kramer* and *Dunn* are not, however, controlling here. They, along with *Carrington* and *Evans,* involved practices that deprived bona fide residents of the right to vote. Involved here is a determination whether a person is a bona fide resident. In both *Carrington* and *Dunn,* the Supreme Court made it clear that the states could classify persons as residents and non-residents and forbid non-residents from voting. We are here dealing only with the methods of making that classification and not with the deprivation of the

7. Perhaps we could avoid this question by noting that Judge Bailey ordered *all* persons seeking to register to vote to fill out the form set forth in note 3 *supra.* Upon examination, however, it is clear that the questions are taken from *Hall* and that they are for the most part meaningless when applied to anyone except college students. Casting wide a net that could catch only one classification of voters may still be a violation of the Equal Protection Clause.

right to vote of one who is or could be determined to be a resident. Such methods should be upheld if they are reasonable.

With the issue thus stated, we find nothing improper in making special inquiries of students as to their domicile.

> "There is nothing wrong or even suspect in registration officials asking college boarding students, whose permanent addresses are outside the county, certain questions to determine residency and their qualifications." *Dyer v. Huff*, 382 F. Supp. 1313, 1316 (D.S.C. 1973), *aff'd without opinion*, 506 F. 2d 1397 (4th Cir. 1974).

By nature of the activities they are engaged in, students are a transient group. Many retain ties to their prior homes which are far stronger than any they have in their student community. In short, their characteristics as individuals make them as a group a special problem for election officials. Moreover, students are one of the few, if not the only, markedly mobile groups of sufficient numbers to have a decisive impact on elections.

These factors make it reasonable for election officials to inquire of students seeking to register more thoroughly than of other persons. "It is not a violation of equal protection to select for individual inquiry categories of citizens presenting the most obvious problems . . . as long as the ultimate standard is the same for all. . . ." *Ramey v. Rockefeller*, *supra*, 348 F. Supp. at 786. This additional screening procedure is not an impermissible attempt to "fence out" a segment of the community because of the way they may vote. It is instead a permissible attempt to determine who are the members of the relevant community.

Lastly, we do not agree with the argument raised by defendants that the standards to be applied in making inquiries are so vague that their use is a violation of due process. The basis for this argument is that "inconsistent results" may follow the use of questions. Such is the case any time determinations based on individual circumstances are made. It is also the only way that individual determinations can be made. A person aggrieved by a decision made in his case may appeal to the county board of elections and from there to the courts. *See* G.S. 163-75 through 163-77.

[8] Moving to the next of *Hall's* principles that has been called into question here, we find no denial of equal protection in the

use of a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in the place where the college is located. Two courts in Texas and Michigan have found similar rebuttable presumptions unconstitutional. *Whatley v. Clark, supra*, 482 F. 2d 1230; *Wilkins v. Bentley, supra*, 385 Mich. 670, 189 N.W. 2d 423. We do not reach the same result, however, because we view the effect of the presumption here differently than did those courts. The rebuttable presumption approved in *Hall* does not treat students differently from the rest of the population. It is merely a specialized statement of the general rule that the burden of proof is on one alleging a change in domicile. *See Reynolds v. Cotton Mills*, 177 N.C. 412, 99 S.E. 240 (1919). The decision as to domicile is based solely on the evidence adduced, with the student like any other person bearing the ultimate burden of persuasion. We find no constitutional violation in the use of this procedure.

[9] Despite the fact that special inquiries and rebuttable presumptions are valid on their faces, they may be applied to work as effectively, if more subtly, the same kind of discriminatory deprivation of the right to vote as the irrebuttable presumption of *Carrington* or the durational residency requirement of *Dunn*. Such a result occurs when, in effect, a different standard of domicile is applied to students than to other segments of society. This may be the inevitable consequence of the rule in *Hall* governing how a student may acquire domicile in a college town, 280 N.C. at 608, 187 S.E. 2d at 57:

> "An adult student may acquire a domicile at the place where his university or college is situated, if he regards the place as his home, or intends to stay there indefinitely, and has no intention of resuming his former home. If he goes to a college town merely as a student, intending to remain there only until his education is completed and does not change his intention, he does not acquire a domicile there."

The second quoted sentence may be interpreted to mean that a student must intend to stay in a college town not only until he graduates but also until some indefinite time beyond that date. So interpreted the rule makes it effectively more difficult for a student to establish a new domicile than for other members of the population. It would not then be an "appropriately defined and

uniformly applied requirement of bona fide residence" under *Dunn*. We do not believe the sentence should be so interpreted. So long as a student intends to make his home in the community where he is physically present for the purpose of attending school *while* he is attending school and has no intent to return to his former home after graduation, he may claim the college community as his domicile. He need not also intend to stay in the college community beyond graduation in order to establish his domicile there.

The requisites for domicile are legal capacity, physical presence and intent to acquire domicile. Restatement Second, Conflict of Laws § 15. An intent to acquire domicile requires both an intent to abandon one's prior domicile and an intent to remain at the new domicile. *Hall v. Board of Elections, supra* at 608-09, 187 S.E. 2d at 57. Abandonment of one's prior domicile and adoption of a new domicile may be shown by both declarations of the registrant and objective facts. The latter should be obtained by appropriate inquiries directed to the registrant by the registrar. *Hall* requires that the statement of intent to remain be that the student intend to stay "indefinitely."

An intent to remain indefinitely has firm roots in the law of domicile and is incorporated in part in our voting statute. *See* G.S. 163-57(5). "Indefinitely," however, is a term susceptible to many meanings. The meaning applied in *Hall* suggests that one does not have the requisite intent to remain indefinitely in a place for purposes of establishing that place as his domicile if he plans to leave at the happening of some specified future event such as graduation. Other cases, by contrast, have been satisfied that there was an intent to stay indefinitely when there was simply not an intention to leave presently. *Berry v. Wilcox*, 44 Neb. 82, 62 N.W. 249 (1895); *Putnam v. Johnson*, 10 Mass. 488 (1813); *Chomeau v. Roth*, 230 Mo. App. 709, 72 S.W. 2d 997 (1934).

We are convinced this latter definition is routinely applied to persons other than students who seek to register to vote. Ours is an increasingly mobile society. In 1970, for example, 40.7% of the population of North Carolina 5 years old and older were living in a house different from the one they lived in in 1965. Statistical Abstract of the United States, at 37, table 47 (1977). If searching inquiry were made and if the proper questions were posed, pros-

pective voters in other walks would respond that they planned to stay until they were promoted, until they got a new or different job, until they retired, until a contract was finished, until a term of office was over, until an election was won or lost, and so on. "Graduation" is no more or less certain to occur than these other events. Neither, quite often, are students' plans after graduation more or less certain than plans of others pending the occurrence of one of these other events. But questions are not asked and people who would admit to plans to leave are routinely registered to vote. Such questions are, however, asked of students. The result cannot help but be discriminatory even if the intent is otherwise:

> "[I]n these days of an increasingly mobile society, it would be the rare citizen who could swear honestly that he intended to reside at his present address permanently; even if the test of indefinite intention is different, there would undoubtedly be many citizens with 'definite' hopes of moving to better job opportunities, more pleasant climates, and the like. If such a test were in fact imposed on all citizens, it would go too far in restricting the vote to the more immobile elements of the populace; it would penalize, perhaps irrationally, those who make definite plans, while allowing the drifters who have uncertain plans to vote. And if the test [is] in fact only applied to students, then it [is] an impermissible discrimination against them." *Ramey v. Rockefeller, supra*, 348 F. Supp. at 788.

Many courts which have struggled with the issue of where students reside for voting purposes have interpreted their law of domicile to permit them to claim their student community as their domicile even though they intended to remain only until graduation. The earliest such case we could find was *Putnam v. Johnson, supra*, 10 Mass. 488, which was decided in 1813. Plaintiff in *Putnam* was a student in Andover, Massachusetts, who had clearly severed all ties with his prior home. Defendants refused to allow him to vote in Andover because he was there only for the purpose of receiving an education. The Massachusetts Supreme Court ordered that he be allowed to vote in Andover and used the following noteworthy language, *id.* at 501:

> "In this new and enterprizing country it is doubtful whether one half of the young men, at the time of their emancipation,

> fix themselves in any town with an intention of always staying there. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position, if they should be disappointed. *Nevertheless they have their home in their chosen abode while they remain. . . . [H]abitation fixed in any place, without any present intention of removing therefrom, is the domicil.* At least, this definition is better suited to the circumstances of this country."

In *Berry v. Wilcox, supra*, 44 Neb. 82, 62 N.W. 249, the Nebraska Supreme Court stated the test for determining domicile as follows:

> "[A person] resides where he has his established home, the place where he is habitually present and to which when he departs he intends to return. The fact that he may at a future time intend to remove will not necessarily defeat his residence before he actually does remove. It is not necessary that he should have the intention of always remaining, but there must coexist the fact and the intention of making it his present abiding place, and there must be no intention of presently removing." *Id.* at 88-89, 62 N.W. at 251.

Applying this test to the following facts, the Court held that it was proper for students to vote in the place where their college was located:

> "Now in the case before us these students came to the University Place, their main purpose being to attend the university. They were emancipated from their parents, apparently with no intention of returning to the home of their parents; they regarded University Place as their home, leaving it during vacation and going wherever they could obtain employment, with the intention of returning to University Place at the close of the vacation. They were uncertain as to their course upon graduation and therefore had no particular future residence in view." *Id.* at 89, 62 N.W. at 251.

In *Chomeau v. Roth, supra*, 230 Mo. App. 709, 72 S.W. 2d 997, the Missouri Court of Appeals held that students at a Lutheran seminary were entitled to vote in local elections at the place

where the seminary was located. The Court articulated a test for domicile that was very similar to the general test set out in *Hall*:

> "A temporary removal for the sole purpose of attending school, without any intention of abandoning his usual residence, and with the fixed intention of returning thereto when his purpose has been accomplished, will not constitute such a change of residence as to entitle the student to vote at his temporary abode. But conversely, an actual residence, coupled with the intention to remain either permanently or for an indefinite time, without any fixed or certain purpose to return to the former place of abode, is sufficient to work a change of domicile." *Id.* at 718, 72 S.W. 2d at 999.

Applying this test, however, the Court found that students who entered a seminary with the intent of abandoning their prior home and who intended to remain there only until they completed their education, thereafter to go where their church sent them, were qualified to vote in the seminary community. The Court found a sufficiently indefinite nature in the duration of their stay because of the uncertainty as to exactly how long it would take them to complete their education.

The Restatement Second of Conflict of Laws states the rule as follows:

> "To acquire domicile of choice in a place, a person must intend to make that place his home for the time at least." Restatement Second, Conflict of Laws § 18.

The meaning of this rule is made clear by the following comment, *id.* at 70:

> "There must be a present intention to make a home. One must be able to say, 'This is now my home,' and not, 'This is to be my home.' If there is an intention to make a home at present, the intention is sufficient although the person whose domicile is in question intends to change his home upon the happening of some future event."

The common feature of *Putnam*, *Berry*, *Chomeau* and the Restatement position is the care with which they balance the need for certainty in the law of domicile against the interests of a mobile population in being able to call the place they live their

home and in exercising full rights as citizens there. All of them clearly require that in order for a person to establish a new domicile in a place (1) he must have abandoned his prior home and (2) he must have a present intention to make that place his new home. As to the requirement of duration of the intended stay, they diverge semantically but reach the same end result. *Putnam* and *Berry* require only the absence of an intention to leave presently. *Chomeau* retains the "intent to stay indefinitely" test but applies it by recognizing that the exact time at which some future event such as graduation will happen is always uncertain. The Restatement requires only an intention to make that place one's home "for the time at least." No matter how they state it, they all agree that a plan to leave upon the happening of a future event does not preclude one from acquiring domicile. This view was well summarized recently in *Hershkoff v. Board of Registrars*, 366 Mass. 570, 321 N.E. 2d 656 (1974). Plaintiffs there were students denied the right to vote in Worcester, Massachusetts because they did not plan to remain beyond graduation. The Court affirmed an order that they be allowed to register, saying, *id.* at 578, 321 N.E. 2d at 664:

> "As to the intended duration of residence, we have often said that domicil is the place of one's actual residence 'with intention to remain permanently or for an indefinite time and without any certain purpose to return to a former place of abode.' 'Expressions such as these should not be taken literally.' The requisite intention is to make the place one's home for the time at least. If young people have such an intention, even if they intend to move later on, nevertheless 'they have their home in their chosen abode while they remain.' " (Citations omitted.)

We now think the approach of these cases and the Restatement is constitutionally required insofar as the law of domicile relates to the right to vote. *Dunn v. Blumstein, supra*, stated, 405 U.S. at 343-44: "An *appropriately defined*, and *uniformly applied* requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could meet close constitutional scrutiny." (Emphasis supplied.) Such scrutiny involves a determination whether "the exclusions [from voting] are necessary to promote a compelling state interest." *Kramer v. Union Free School District No. 15, supra*, 395 U.S. at

627. The test of domicile for voting purposes must therefore exclude only those whose exclusion is necessary "to preserve the basic conception of a political community." We think the extent to which a state may limit access to the right to vote by virtue of its law of domicile is as was stated by Judge Friendly writing for a three-judge court in *Ramey v. Rockefeller, supra*, 348 F. Supp. at 788:

> "[T]he only constitutionally permissible test is one which focuses on the individual's present intention and does not require him to pledge allegiance for an indefinite future. *The objective is to determine the place which is the center of the individual's life now, the locus of his primary concern.* The determination must be based on all relevant factors; it is not enough that a student, or any other former nondomiciliary, would find that the place of his presence is more convenient for voting or would enable him to take a more active part in political life. The state may insist on other indicia, including the important one of abandonment of a former home." (Emphasis supplied.)

[10] We therefore hold that a person has domicile for voting purposes at a place if he (1) has abandoned his prior home (2) has a present intention to make that place his home, and (3) has no intention presently to leave that place. Applying this rule to the more specific case of students we hold that a student is entitled to register to vote at the place where he is attending school if he can show by his declarations and by objective facts that he (1) has abandoned his prior home, (2) has a present intention of making the place where he is attending school his home and (3) intends to remain in the college town at least as long as he is a student there and until he acquires a new domicile.

In dealing with this aspect of the case, we are not inadvertent to the decision of the United States Supreme Court in *Symm v. United States*, 39 CCH S.Ct. Bull., p. B724 (January 15, 1979), *summarily aff'g, United States v. Texas*, 445 F. Supp. 1245 (S.D. Tex. 1978). *Symm* was a suit brought by the United States alleging that Leroy Symm, the Tax Assessor-Collector of Waller County, Texas, had in the course of his duties as chief election registration official of the county denied students at Prairie View A&M University the right to register to vote in violation of the

14th, 15th and 26th Amendments. Also joined as defendants were the State of Texas and Waller County.

The evidence offered in the case showed that Symm required students seeking to register to fill out a detailed questionnaire, set out at 445 F. Supp. 1262-63. He also presumed that all students seeking to register were not residents of Waller County, thus applying a presumption that was declared unconstitutional in *Whatley v. Clark, supra*, 482 F. 2d 1230. Lastly, Symm testified as to the test for domicile he applied, "that generally students are not regarded by him as residents unless they do something to qualify as permanent residents, such as marrying and living with their spouse or obtaining a promise of a job in Waller County when they complete school. He does not regard a dormitory room as a permanent residence, and regards a permanent residence only as a place with a refrigerator, stove and furniture." 445 F. Supp. at 1251.

A three-judge court in the Southern District of Texas found that Symm had engaged in a pattern of conduct that violated the 26th Amendment. The court also found that Symm had violated Texas law in failing to obey a directive of the Secretary of State to cease using the questionnaire. The court then entered a detailed permanent injunction against Symm, prohibiting him from, among other things, using a presumption of nonresidency, requiring students to fill out a special questionnaire, and not registering students "on the same basis and by application of the same standards and procedures, without reference to whether such students have dormitory addresses, whether or not they resided in Waller County prior to attending school, and whether or not they plan to leave Waller County after graduation." No judgments were entered in the case against either the State of Texas or Waller County.

Defendant Symm appealed to the United States Supreme Court. Five of the justices joined in summarily affirming the lower court decision. Justice Rhenquist, joined by Chief Justice Burger, dissented, arguing that the three-judge court did not have jurisdiction to enter a judgment against Symm. Justice Blackmun would have noted probable jurisdiction in the case. Justice Powell would have dismissed the appeal for want of a properly presented federal question.

We do not think the Supreme Court's decision in *Symm* precludes us from approving the use of a questionnaire or from allowing our registrars to apply a presumption of nonresidency in order to place the burden of producing some evidence of residency upon the person seeking to register. The district court in *Symm* disapproved of a pattern of conduct aimed at preventing students from registering to vote. It carefully avoided holding the use of a questionnaire per se unconstitutional, distinguishing its situation from *Ballas v. Symm*, 494 F. 2d 1167 (5th Cir. 1974), which it read as approving the use of a questionnaire in making voter registration determinations so long as it was not used as a device to prevent legal residents from voting. The practices we have approved under the guidelines we have set out are clearly not devices to keep students who are legal residents from voting. They are instead designed to help registrars obtain the necessary facts to determine whether a student is entitled to vote in a particular locality. Lacking a more definite signal to the contrary from the United States Supreme Court, we hold that their use is permissible.

V

Finally, we touch briefly on applicant intervenors' motion to intervene and on the relief available at trial on remand. Applicant intervenors are, or were, students registered to vote in Orange County or holders of or candidates for public office in Orange County. They argue that they were entitled to intervene in the action as of right under G.S. 1A-1, Rule 24(a) or, alternatively, that they should have been permitted to intervene under Rule 24(b). We do not pass on the merits of their arguments. Because of the nature of our decision here, especially as regards the illegality of an order purging students from the voting rolls, the matters in controversy at the trial on remand will differ significantly from their apparent posture at the time Judge Bailey ruled on their motion. We therefore think it appropriate simply to vacate his order and allow applicant intervenors, if they desire, to resubmit their motion at subsequent proceedings below.

[11] On remand if evidence adduced at trial shows that the members and officials of the Orange County Board have failed to require students seeking to register to vote to prove their domicile to be in Orange County, the court may enjoin them from

further registering students without doing so. Although the court also has the power to order the Orange County Board to use a specific set of questions in connection with registering students to vote, the court should use caution in the exercise of this power.

Plaintiffs have asked for both a writ of mandamus and a mandatory injunction against the Orange County Board. The writ of mandamus is an ancient and carefully circumscribed extraordinary remedy. Normally, it will not lie to control the manner of performance of a public official's duties. Ferris & Ferris, Extraordinary Legal Remedies § 208 (1926). For this treason, we doubt that use of a specific set of questions could be required by a writ of mandamus.[8] Moreover, a suit for a mandatory injunction against a public official is practically identical to a request for a writ of mandamus. *Sutton v. Figgatt*, 280 N.C. 89, 185 S.E. 2d 97 (1971); *Carroll v. Board of Trade*, 259 N.C. 692, 131 S.E. 2d 483 (1963); *Hospital v. Wilmington*, 235 N.C. 597, 70 S.E. 2d 833 (1952). Here, however, there is a difference between them. If the evidence shows that registration officials have consistently failed to comply with the law in the past and that unless they are required to use a particular set of questions there is reasonable certainty they will continue to do so, then the court may in the exercise of its inherent equitable powers require them to do so.

Even so the court should be aware of its own limitations. As was said by another court when confronted with this same issue:

> "It is doubtful that any court has the wisdom to compose a list of questions which could be used by a registration board in determining every issue of residency that might be presented." *Dyer v. Huff, supra*, 382 F. Supp. at 1316.

If a list of questions seems necessary, we suggest that the better practice would be to draw on the expertise of the Orange County Board to prepare a list for submission to and approval by the court.

In order to assist the trial court on remand and for the guidance of local boards of elections, we summarize the aspects of

8 *Hall* did not require the use of a particular set of questions. It suggested a number of appropriate inquiries that might be made. Normally, it will be better to keep the inquiry flexible so that the circumstances of each individual's case can be carefully considered. There is no legal duty to formulate and use a particular questionnaire. Mandamus is available only when there is a clear legal right to the remedy. *Snow v. Board of Architecture, supra*, 275 N.C. 559, 169 S.E. 2d 719.

our opinion dealing with the registration of student voters as follows:

1. A student's residence for voting purposes is a question of fact dependent upon the circumstances of each individual's case. There is no permissible manner for making group determinations of residence.

2. A person is a resident of a place for voting purposes if he (1) has abandoned his prior home, (2) has a present intention to make that place his home, and (3) has no intention presently to leave that place. Applying this test to a student, he may vote in a college town if he (1) has abandoned his prior home, (2) has a present intention of making the college town his home, and (3) intends to remain in the college town at least as long as he is a student there and until he acquires a new domicile.

3. In order to determine whether in fact a student has abandoned his prior home and presently intends to make the college town his home and intends to remain in the college town at least as long as he is a student there, a registrar should make inquiry of students more searching and extensive than may generally be necessary with respect to other residents. The kind of questions that should be asked are generally set out in *Hall*. A registrar is not limited, of course, to these questions. One that should be asked of all persons seeking to register is "Are you now registered to vote, and, if so, where?" A registrar is not bound by a student's mere statements as to his intent, no more than he is bound by the statements of anyone seeking to register to vote. According to G.S. 163-72:

> "After being sworn, the applicant shall state as accurately as possible his name, age, place of birth, place of residence, political party affiliation, if any, under the provisions of G.S. 163-74, the name of any municipalities in which he resides, and any other information which may be material to a determination of his identity and qualification to be admitted to registration. The applicant shall also present to the registrar written or documentary evidence that he is the person he represents himself to be. *The registrar, if in doubt as to the right of the applicant to register, may require other evidence satisfactory to him as to the applicant's qualifications.*" (Emphasis supplied.)

If necessary to ensure that registrars comply with the law and make the necessary inquiries a court may order that these inquiries be in the form of a questionnaire to be devised by the court or by the county board of elections under the court's supervision.

4. There is a rebuttable presumption that a student who leaves his parents' home to go to college is not a resident for voting purposes of the place where the college is located. The effect of this presumption is to place the burden of going forward with some proof of residence on a student seeking to register to vote. As with other persons the student has the burden of persuasion on the issue.

Except for that portion of the order below dismissing the action against the State Board, which we affirm, the order of the trial court is vacated and the case remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; vacated in part; remanded.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ROBERT EDWARD WADE, JR.

No. 22

(Filed 5 February 1979)

1. **Criminal Law § 53— medical expert testimony—information relied on to form opinion admissible**

A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence, and, if his opinion is admissible, the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion.

2. **Criminal Law § 63— evidence of defendant's insanity—conversations between defendant and psychiatrist admissible**

A psychiatrist's findings and diagnosis as to defendant's mental state should have been admitted into evidence and the psychiatrist should have been

allowed to testify as to the content of his conversations with defendant in order to show the basis for his diagnosis, since defendant was sent to the psychiatrist as a patient for treatment, thus lending reliability to the statements made by defendant to the doctor; the doctor's examination was a thorough, carefully designed attempt to gain an understanding of defendant's state of mind; and conversation, and its interpretation and analysis by a trained professional, is superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. Because testimony concerning defendant's conversations with the doctor was not substantive evidence, there was thus no conflict between its introduction and the rule that a criminally accused's declarations to third parties generally to show his state of mind are not admissible as an exception to the hearsay rule.

3. Criminal Law § 63— insanity of ancestors—requirements for admission of evidence

In order for insanity among a person's ancestors or relatives to be relevant, it must first be shown that (1) there is independent evidence of insanity on the part of the person, (2) the same type of mental disorder is involved, and (3) the mental disorder is hereditary in character.

4. Criminal Law § 73.3— statements not made in contemplation of crime—admissibility to show state of mind

Declarations made by defendant to various other persons before the date and not in contemplation of the killings with which he was charged were admissible as tending to show defendant's state of mind.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

BEFORE *Tillery, J.*, at the 16 January 1978 Criminal Session of CARTERET Superior Court and on bills of indictment proper in form, defendant was tried and convicted of three counts of second degree murder and was sentenced to three concurrent terms of life imprisonment. He appeals under G.S. 7A-27(a).

Rufus L. Edmisten, Attorney General, by Isaac T. Avery III, Assistant Attorney General, for the State.

Glen B. Bailey, attorney for defendant appellant.

EXUM, Justice.

Defendant's assignments of error raise a number of questions relating to the admissibility of evidence that he was insane at the time of the killings. We find that the trial court improperly limited testimony by a psychiatric expert concerning his examination, findings and diagnosis of defendant, and on this ground we

order that defendant receive a new trial. For guidance of the court on remand, we will also discuss defendant's assignments of error regarding exclusion of evidence of hereditary insanity and declarations by defendant to third parties as to his state of mind.

The uncontradicted evidence showed that on 20 August 1977 defendant killed his wife and two children and then stabbed himself. Defendant did not deny that he committed the killings but instead tried to show that he was insane. To this end he produced evidence that he had been a good husband and father and a steady worker and that he had had a good reputation in the community. For some two or three weeks prior to the killings, however, he had been depressed and had problems with his job. Lastly, according to two psychiatrists who examined him, defendant's mental condition at the time of the killings was such that he did not know the difference between right and wrong.

The first psychiatric witness on defendant's behalf was Dr. Eugene Douglas Maloney, who was employed at the Neuse Mental Health Center and who was duly qualified as an expert in the field of psychiatry. Before the jury Dr. Maloney was permitted to testify that defendant was his patient[1] and that he had seen him on three different occasions in 1977: 21 September, 30 September, and 4 November. He also testified about his method of establishing a rapport with and gaining defendant's confidence and about his method of examination.[2] Finally after seven record pages of quibbling among the trial court, the district attorney, and defense counsel over the form of the question and the form of the witness' response, the doctor was barely permitted to tell the jury that in his opinion at the time of the killings defendant "was incapable on that night of distinguishing between right and wrong."

1. In the jury's absence Dr. Maloney testified that defendant had been referred to him for treatment by Dorothea Dix Hospital where "they found he had a psychiatric problem."

2. "And in a psychiatric exam it's divided into different categories. I'll review each as I go. The first thing I determined is what I call his general attitude and behavior, how he looks, how he was acting, whether or not he displayed any peculiarities. The patient was dressed in denim pants and shirt, was wearing tennis shoes without laces, laid on bunk throughout in a small cell, talked to examiner moving very little, very few facial expressions and few facial movements. Next part is how he elaborated, how he said what he did. I can determine the type of mental illness from the way a patient talks, connection of thoughts. The patient elaborated, would elaborate very little. Talked with difficulty. At times thoughts were not connected one to another. The third part is what he says and how he says it and in this part I'm trying to determine whether or not he hears imaginary voices, whether or not he suffers from delusions which is abnormal belief that cannot be changed by reason or logic and this is called the mental trend.

. . . .

Most of Dr. Maloney's testimony took place out of the hearing of the jury in order for defendant to place into the record testimony to which objections were lodged by the state and sustained by the trial judge. In summary this testimony consisted of conversations Dr. Maloney had with defendant, his medical findings, and his medical diagnoses all of which led ultimately to his opinion regarding defendant's sanity in a legal sense. Dr. Maloney would have testified, had he been permitted, that defendant expressed ideas that on the day of the killings people were after him, that he was being watched, and that they wanted to "hurt me and my family." Defendant said further that just before the killings one of his children brought in a glass of something to drink and he "thought it was for me to poison myself." Defendant told Dr. Maloney that when he stabbed his wife, "I lost all senses at that time. I was protecting her, I didn't want them to hurt her. I was crying, they were going to hurt me and my family. Everybody was watching." With regard to stabbing himself defendant said, "They were not going to get my family because I had just killed them and they were not going to get me . . . for some reason I . . . went to the bedroom with my family and laid down so I could die with my family." Defendant then made similarly bizarre statements concerning a "pacemaker" which had been installed in his heart so that he could not die and would be able to stand trial, and to the effect that at Dorothea Dix Hospital "they took my glands out to keep me from mating with other people . . . they took my birthright so I wouldn't have to die, by taking away my glands."

Dr. Maloney would have further testified, had he been permitted, that on 4 November 1977 he found defendant to be "highly disturbed . . . dangerous to himself or others . . . angry, frightened" and that he "paced the floor, looked behind curtains, looked behind desks, looked behind file cabinets."

Finally Dr. Maloney would have told the jury, had he been permitted, that he diagnosed defendant as paranoid and

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"All right, essentially at the mental trend, that point which I talked to him in depth about what he was thinking and feeling to make determinations as to whether or not he was suffering from delusions or hallucinations or depression or other mental disorders.

. . . .

"Well, there's one other part of the examinations that you must determine whether or not the patient is thinking clearly and whether his mind is operating properly. Whether or not he knows where he is, what he's doing there, the circumstances surrounding his ability to calculate, ability to recall, his memory; so that was another part of the test."

psychotic. He would have explained "paranoid" as involving "delusions of persecutions" and a "delusion" as being "a false belief that cannot be changed by reason or logic." He would have explained a psychotic person as one who suffers "from delusions which I have defined, and hallucinations. Hallucinations being seeing things, hearing voices not there, feeling things that are not there."

[2] We think all of this testimony was erroneously excluded to defendant's prejudice. The error is not cured by Dr. Maloney's being permitted to give his ultimate conclusion regarding defendant's ability to distinguish right from wrong. The defendant was entitled to have the jury know the bases for this conclusion as well as the conclusion itself.

Dr. Maloney's findings resulted from his personal examination and observation of defendant. His diagnosis resulted from this and listening to and analyzing defendant's conversation. It is a well-settled rule that an expert may give an opinion based on facts within his personal knowledge without resort to a hypothetical question. *State v. DeGregory*, 285 N.C. 122, 203 S.E. 2d 794 (1974); 1 Stansbury's North Carolina Evidence § 136 (Brandis rev. 1973) (hereinafter Stansbury). Clearly Dr. Maloney's findings are admissible under this rule. Problems arise, however, when a physician's opinion is derived in whole or in part through information received from another, as Dr. Maloney's diagnosis was here, because of a second rule articulated in our cases that in general "an expert witness cannot base his opinion on hearsay evidence." *Cogdill v. Highway Commission*, 279 N.C. 313, 327, 182 S.E. 2d 373, 381 (1971). Resolution of this conflict has been especially difficult in cases involving the physician-patient relationship, because communication between the two is often an essential, if not the only, way for the physician to form an intelligent opinion.[3]

3. Judge Tillery recognized this conflict in making his ruling on whether or not Dr. Maloney could give an opinion on the issue of defendant's sanity. After discussion with counsel, he commented:

> "Well, I think for the record I would say this, the cases which deal with this subject certainly leave something to be desired as far as clarity is concerned. I take the view and I'm going to rule that this witness may give his opinion despite the fact that it is largely based upon statements which were made to him by the defendant. The Court's position being that in no other way I can think of can a psychiatrist go about his business. If he's required to observe objective symptoms and leave out any subjective findings based upon what that man has said, I cannot see how he can perform any useful function so far as the Court is concerned."

After struggling with the issues involved here ourselves, we find his remarks well taken.

Cases in this area have dealt with two major issues. The first is the admissibility of the expert opinion when it is based on an out-of-court communication. The second is, assuming the opinion is admissible, to what extent the expert may repeat what was told him out of court in order to show its basis. Here we are faced with both issues. We conclude that Dr. Maloney's opinion, in the form of his diagnosis, was admissible. We also conclude that on retrial he may recount his out-of-court conversations with defendant in order to explain his diagnosis to the jury.

One of the earliest significant cases on the principles involved here was *State v. Alexander*, 179 N.C. 759, 103 S.E. 383 (1920). Defendant in *Alexander* offered into evidence the answers he had given an expert (a physician) during an examination from which the expert had formed an opinion as to defendant's sanity. The trial court allowed the expert to give his opinion but prevented him from recounting certain declarations by defendant. This Court, through Chief Justice Clark, affirmed, giving its view of the case as follows, *id.* at 765, 103 S.E. at 386:

> "His Honor in these rulings was drawing a distinction between facts drawn out in Doctor Hall's conversation with the defendant, which tended to show the state of defendant's mind and those which did not. Conversation with one alleged to be insane is, of course, one of the best evidences of the present state of his mind. If, however, there is incorporated in the conversation self-serving declarations which in themselves do not throw any light upon the present condition or the past condition of the man's mind, then these declarations are not admissible."

Because of the trial court's ruling, the court in *Alexander* was not squarely presented with the issue of the admissibility of an expert opinion based in part on out-of-court conversations. Insofar as admitting the conversations themselves was concerned, *Alexander* imposed a limit only to the extend that they "do not throw any light upon the present condition or the past condition of the [defendant's] mind."

In *Penland v. Coal Co.*, 246 N.C. 26, 97 S.E. 2d 432 (1957), a physician testifying at a workmen's compensation proceeding gave an opinion as to the plaintiff's physical condition. On cross-examination, however, he stated that he had discovered no objec-

tive symptoms and that his opinion was based on subjective statements by the plaintiff.[4] On appeal defendants contended that the opinion should have been disregarded and an award to plaintiff disallowed as not based on competent evidence. This Court disagreed, stating, *id.* at 31, 97 S.E. 2d at 436:

> "As to this contention, the rule is that ordinarily the opinion of a physician is not rendered inadmissible by the fact that it is based wholly or in part on statements made to him by the patient, if those statements are made, as in the present case, in the course of professional treatment and with a view of effecting a cure, or during an examination made for the purpose of treatment and cure. 'In such cases statements of an injured or diseased person, while not admissible as evidence of the facts stated, may be testified to by the physician to show the basis of his opinion.' " Quoting, 20 Am. Jur., Evidence § 86 at 729.

Penland thus (1) allowed in evidence an opinion when it was reasonable to assume that the information upon which it was based was reliable and (2) held that testimony about that information was proper to show the basis for the opinion.

Subsequently, *Seawell v. Brame*, 258 N.C. 666, 129 S.E. 2d 283 (1963), made the reliability element mentioned in *Penland* a prerequisite for admissibility of the opinion. In *Seawell* a physician testified that in his opinion the cause of plaintiff's asthmatic attacks and ulcer was his being struck by a machine operated by defendant. He based his opinion on conversations with plaintiff's wife, other members of his family and his former employee, all of whom said that plaintiff had not had such problems before the accident. This Court held his opinion inadmissible. *Seawell* is distinguishable from *Penland* as involving communications outside the physician-patient relationship. When a patient seeks treatment, "it is reasonable to assume that the information which [he] gives the doctor will be the truth, for self-interest requires it." *State v. Bock*, 288 N.C. 145, 163, 217 S.E. 2d 513, 524 (1975). The

4. We think it appropriate to refer to *Penland* and other cases not involving mental state here, because in general "evidentiary rules as to the admissibility of medical testimony concerning physical injuries apply to a psychiatrist's testimony pertaining to his patient's emotional trauma or illness." *Gonzales v. Hudson*, 91 Idaho 330, 332, 420 P. 2d 813, 815 (1966).

law makes no such assumption with regard to the communications of others to physicians.[5]

In *State v. DeGregory, supra*, 285 N.C. 122, 203 S.E. 2d 794, this Court was called on to determine whether a psychiatrist's opinion that defendant was sane was improperly admitted. The psychiatrist testified that he had seen defendant for about three hours on three different occasions and that he had formed his opinion on the basis of this examination and information supplied him by members of his staff. Defendant argued that the opinion should have been excluded because it was based in part "on information obtained by someone else, which information was inadmissible in evidence." *Id.* at 132, 203 S.E. 2d at 801. In making this argument, defendant relied on the following quotation from *State v. David*, 222 N.C. 242, 254, 22 S.E. 2d 633, 640 (1942): "There are two avenues through which expert opinion evidence may be presented to the jury: (a) Through testimony of the witness based on his personal knowledge or observation; and (b) through testimony of the witness based on a hypothetical question . . . ." The Court, thorugh Justice Huskins, rejected defendant's argument, finding his reliance on the "personal knowledge or observation" rule misplaced:

> "Defendant's interpretation of the quotation from *State v. David, supra*, is too limited. The quotation states that an expert may base his testimony on facts within his personal knowledge or observation, or may base his opinion on facts presented in a hypothetical question, but it does not purport to limit facts and information within the personal knowledge of an expert to knowledge *derived solely* from matters personally observed. As demonstrated in opinions of this Court since *State v. David, supra*, an expert witness has wide latitude in gathering information and may base his opinion on evidence not otherwise admissible." 285 N.C. at 132, 203 S.E. 2d at 801. (Emphasis original.)

In the course of its examination of relevant authorities, the Court quoted with approval from *Birdsell v. United States*, 346 F. 2d 775, 779-780 (5th Cir.), *cert. denied*, 382 U.S. 963 (1965): "With the increased division of labor in modern medicine, the physician mak-

5. An assumption of truthfulness might, however, apply in the case of one unable to speak for himself as, for example, when a parent communicates a small child's condition to a physician.

ing a diagnosis must necessarily rely on many observations and tests performed by others and recorded by them; records sufficient for diagnosis in the hospital ought to be enough for opinion testimony in the courtroom." Using this analysis, the *DeGregory* court concluded that it was proper for the expert to base his opinion "upon both his own personal examination and other information contained in the patient's official hospital record." 285 N.C. at 134, 203 S.E. 2d at 802.

The most recent of our cases in this area is *State v. Bock*, *supra*, 288 N.C. 145, 217 S.E. 2d 513. Defendant in *Bock* complained of the exclusion of testimony by an expert witness that in his opinion defendant had amnesia concerning the events surrounding the killing with which he was charged. The expert's opinion had been elicited by way of a hypothetical question that did not refer to defendant's history of excessive drinking followed by blackout spells or periods of amnesia because there was no evidence before the jury of these events. The expert was aware of this history through conversations with defendant, his family and friends. Defendant had not gone to the expert, a psychiatrist, for diagnosis and treatment. Instead the psychiatrist had only seen him for about two hours two days prior to trial for the purpose only of preparing himself to testify. On these facts, the court held that the expert did not have the requisite personal knowledge of defendant's history to give his opinion without the use of a proper hypothetical question.

[1] Although none of these cases articulates any sort of universally applicable rule, the pattern of their holdings supports the following propositions: (1) A physician, as an expert witness, may give his opinion, including a diagnosis, based either on personal knowledge or observation or on information supplied him by others, including the patient, if such information is inherently reliable even though it is not independently admissible into evidence. The opinion, of course, may be based on information gained in both ways. (2) If his opinion is admissible the expert may testify to the information he relied on in forming it for the purpose of showing the basis of the opinion. *Penland v. Coal Co.*, *supra*, 246 N.C. 26, 97 S.E. 2d 432.

[2] Applying the first of these propositions to the present case, we find two grounds supporting the admission of Dr. Maloney's

diagnosis. There is uncontradicted evidence that defendant was sent to Dr. Maloney as a patient for treatment. Under *Penland v. Coal Co., supra*, this lends reliability to the statements made by defendant to the doctor. Secondly, we find a sufficient indication of the reliability of these statements in the nature of Dr. Maloney's entire examination. The examination, as described in note 2, *supra*, was a thorough, carefully designed attempt to gain an understanding of defendant's state of mind. Dr. Maloney did not rely for his conclusions on any one statement by defendant or on any particular fact he disclosed. Instead he took into account the entirety of what defendant said together with his own interpretation and analysis of it and the objective manifestations that accompanied it. The assertion of *State v. Alexander, supra*, 179 N.C. at 765, 103 S.E. 2d at 386, that "[c]onversation with one alleged to be insane is, of course, one of the best evidences of his present state of mind" is still true. Conversation, and its interpretation and analysis by a trained professional, is undoubtedly superior to any other method the courts have for gaining access to an allegedly insane defendant's mind. When it is conducted with the professional safeguards present here, it provides a sufficient basis for the introduction of an expert diagnosis into evidence.

For the reasons stated, Dr. Maloney's findings and diagnosis as to defendant's mental state should have been admitted into evidence. It follows also from what we have said that on retrial Dr. Maloney should be allowed to testify as to the content of his conversations with defendant in order to show the basis for his diagnosis. The reason for allowing such testimony and the safeguards that should accompany it were well stated by the Arizona Supreme Court in *State v. Griffin*, 99 Ariz. 43, 49, 406 P. 2d 397, 401 (1965):

> "In the same vein to allow a psychiatrist as an expert witness to answer without any explanation . . . would impart a meaningless conclusion to the jury. The jury must be given an opportunity to evaluate the expert's conclusion by his testimony as to what matters he took into consideration to reach it. Therefore the psychiatrist should be allowed to relate what matters he necessarily considered as a 'case history' not as to indicate the ultimate truth thereof, but as one of the bases for reaching his conclusion, according to ac-

> cepted medical practice. The court should therefore exercise care in the manner in which such testimony is elicited, so that the jury may understand that the case history does not constitute factual evidence, unless corroborated by other competent evidence."

We emphasize again that such testimony is not substantive evidence. Thus there is no conflict between its introduction and the rule that a criminally accused's declarations to third parties generally to show his state of mind are not admissible as an exception to the hearsay rule. *See* Stansbury, *supra*, § 161 at 541, discussed below.

The questions presented by two of defendant's assignments of error are likely to recur at trial on remand. We therefore discuss them briefly here.

[3] Defendant attempted through several witnesses to show evidence of mental illness in his maternal ancestors. The trial court properly excluded this testimony. While it is true that evidence of hereditary insanity has been held admissible, *State v. Christmas*, 51 N.C. 471 (1859), there was not an adequate foundation for its admission here. In order for insanity among a person's ancestors or relatives to be relevant, it must first be shown that (1) there is independent evidence of insanity on the part of the person, (2) the same type of mental disorder is involved, and (3) the mental disorder is hereditary in character. *In re Will of Kemp*, 236 N.C. 680, 73 S.E. 2d 906 (1953); *State v. Cunningham*, 72 N.C. 469 (1875). Defendant offered no evidence at trial on the second and third points. Without such a showing, any evidence of hereditary insanity was irrelevant.

Finally, several witnesses on defendant's behalf were not allowed to testify about declarations by defendant that would have tended to show his state of mind. We cannot tell if these exclusions were prejudicial, because defendant had only a few of the answers put in the record and those are inconclusive. The first of these exclusions occurred in the following exchange during the testimony of defendant's grandfather, James Iredell Wade:

> "A.: . . . he [the defendant] was down and out and I asked him what was—seemed to be his trouble and he asked me, he said—

MR. BARKER: Objection.

THE COURT: Sustained, I'm sorry you can't tell what your son said to you."

Also while Wade was on the stand, an objection was sustained to the question, "Did Robbie indicate to you at any time he was troubled with his work because of having to go to Jacksonville?" During the testimony of Timothy Edwards Penny, statements made by defendant in a conversation the day before the killings, in which he apparently indicated he was having problems, were excluded. Lastly, the court sustained objections to a number of questions asked of Clifton Edwards, defendant's former employer.[6] The substance of these questions and the answers Edwards would have given were later placed in the record as follows:

"(Q. Mr. Edwards, was there ever an occasion that this defendant followed you home to complain about treatment received at his work?)

(A. Yes.)

(Q. Would you describe that occasion?)

(A. This was the time when I had given him a directive to come to work the following work day in a clean uniform, cleanly shaven; he objected to this directive and was very angry. After talking with him the anger subsided and he came to work on the following work day with a completely different attitude, everything was fine.)

(Q. Now, Mr. Edwards, was there ever an occasion that this defendant told you and I quote, 'You are not treating me right?')

(A. This was some time during the last week of his employment and I did think that rather strange because I hadn't said anything to him to cause this answer. And he had a wild or strange look in his eye which I have never seen before. And I did think something of it even before this happened.)"

6. In sustaining one of the objections, the court gave the following instruction:

"THE COURT: Members of the jury the Court will instruct you there is a rule of law which has to do with what we call self-serving declarations. The rule of evidence is that these self-serving declarations may not be introduced into evidence in that fashion so don't consider that an answer, it is not competent."

[4] In each instance the declarations by defendant and the other testimony that was excluded would have tended to show defendant's state of mind. Declarations of a person as to his state of mind are in general admissible as an exception to the hearsay rule. *See McRae v. Malloy*, 93 N.C. 154 (1885); Stansbury, *supra*, § 161. The trial judge, as we understand his comments set forth in note 6, *supra*, apparently thought that this exception does not apply to defendants in criminal cases. The state argues he was correct, citing *State v. Scott*, 8 N.C. 24 (1820), and Stansbury, *supra*, § 161 at 541, which states: "Even statements of an existing emotion or other mental state, when uttered by an accused person and offered on his behalf, are generally excluded, on the ground that to receive them would permit the accused to make evidence for himself." We think this statement has been interpreted too broadly by the state. Examination of the cases from which it was derived shows in each instance that the statements excluded were made after the commission of the crime. *State v. Moore*, 104 N.C. 743, 10 S.E. 183 (1889); *State v. Hildreth*, 31 N.C. 440 (1849); *State v. Scott, supra. But cf.*, VI Wigmore on Evidence § 1732 at 161-62 (Chadbourn rev. 1973) (arguing strongly that statements of existing state of mind should be admitted even when made by accused after commission of crime). All the declarations defendant sought to introduce here were made before the date and not in contemplation of the killings. They should have been admitted.

Defendant's other assignment of error is not likely to present a problem on remand. For the reasons stated, we order that he receive a

New trial.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

FLOYD MOORE v. FIELDCREST MILLS, INC.

No. 43

(Filed 5 February 1979)

1. Carriers § 8.1— alleged negligence in loading of goods—failure to give warning—summary judgment

The trial court properly entered summary judgment for defendants in an action to recover for personal injuries received when several large bales of acrylic fiber loaded on a trailer by defendant shipper fell on plaintiff while he was marking the bales inside the trailer at defendant consignee's unloading dock where depositions offered by defendants, including one by plaintiff himself, established a lack of negligence on the part of both defendants, and plaintiff offered no opposing materials.

2. Rules of Civil Procedure § 56.6— summary judgment—negligence cases

It is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and ordinarily the jury should apply it under appropriate instructions from the court. Even so, where the motion for summary judgment is supported by evidentiary matter showing a lack of negligence on the part of the movants and there is no question as to the credibility of witnesses and no evidence is offered in opposition thereto, no issue is raised for the jury to consider under appropriate instructions.

Justice COPELAND dissenting.

Justice EXUM joins in the dissenting opinion.

PLAINTIFF appeals from decision of the Court of Appeals, 36 N.C. App. 350, 244 S.E. 2d 208 (1978), affirming judgment of *Gaines, J.*, entered 17 January 1977 in WILSON Superior Court.

Plaintiff brought this action to recover damages for personal injuries, alleging in pertinent part the following:

1. Plaintiff was injured on 5 May 1975 at a storage warehouse under the control of Fieldcrest Mills, Inc. (Fieldcrest) when several bales of acrylic fiber weighing approximately 500 pounds each fell on him.

2. The bales had been loaded by Monsanto Company (Monsanto) at its place of business in Decatur, Alabama. The trailer into which the cargo was loaded was sealed by Monsanto and the seal was intact when the trailer was turned over to Fieldcrest for unloading at the Fieldcrest storage warehouse in Greenville, Pitt County, North Carolina.

3. The trailer containing the bales of fiber was parked on an inclined concrete ramp at the storage warehouse, the rear of the trailer near or against the unloading dock and the floor of the trailer slightly lower than the level of the warehouse floor.

4. William Marvin Boyd, the employee of Fieldcrest who was responsible for unloading and storing the cargo in the warehouse, knew that other shippers of bales of the same or similar fiber loaded the bales with their length running with the length of the trailer; and further knew that where the length of the bales ran with the width of the trailer, as Monsanto had loaded these bales, the stacks of bales were unstable and would tumble over.

5. Without warning plaintiff of this hazard, the defendant Fieldcrest, through its employee William Marvin Boyd, "invited" plaintiff to mark Fieldcrest's code numbers on the bales in the trailer so Boyd would not have to do it and the unloading would be expedited.

6. Fieldcrest was negligent in that (a) it failed to provide plaintiff with a safe place to work, (b) it negligently failed to warn plaintiff of existing dangers known to it, (c) it negligently failed to provide reasonably safe premises, and (d) it negligently continued to receive from Monsanto materials improperly loaded.

7. The defendant Monsanto was negligent in that (a) it failed to exercise reasonable care in the loading of the cargo, (b) it failed to load the cargo in a manner reasonably safe for unloading, and (c) it allowed the cargo out of its possession and control when it knew or should have known the cargo to be dangerous because of its propensity to fall over and failed to give any warning or notice of such danger.

8. The negligence of each defendant was a proximate cause of plaintiff's injuries and damages.

9. As a result of being struck by the bales plaintiff suffered a fracture of his left clavicle, a fracture of his right acetabulum, a fracture of his right humerus and ilium and a contusion of his lung. Plaintiff had other injuries and was hospitalized for a long period of time, has been and is unable to work and alleges his injuries are permanent. He seeks $475,000 damages to cover his medical expenses, lost earnings, pain and suffering and permanent impairment of his health.

Each defendant denied the material allegations of the complaint, moved for dismissal under Rule 12 of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted, pled contributory negligence of plaintiff and alleged that plaintiff voluntarily assumed the risk with full knowledge of the entire situation.

Pursuant to Rule 56, Rules of Civil Procedure, each defendant moved for summary judgment on the negligence issue raised by the pleadings and submitted the depositions of William M. Boyd and plaintiff Floyd Moore in support of the motions, contending the depositions showed no breach of any duty owed by either defendant to the plaintiff and further established that plaintiff's own negligence was a proximate cause of any injury he received. The contents of these depositions will more fully appear in the opinion.

Plaintiff filed no opposing affidavits or other evidentiary material permitted by Rule 56(c).

The trial court, being of the opinion that there was no genuine issue as to any material fact and that defendants were entitled to a judgment as a matter of law, allowed the motion of each defendant for summary judgment. The Court of Appeals affirmed with Martin, J., dissenting. Plaintiff thereupon appealed to the Supreme Court as of right pursuant to G.S. 7A-30(2).

Narron, Holdford, Babb, Harrison & Rhodes, P.A., by William H. Holdford, attorneys for plaintiff appellant.

Young, Moore, Henderson & Alvis by R. Michael Strickland, attorneys for Fieldcrest Mills, Inc., defendant appellee.

Connor, Lee, Connor, Reece & Bunn by John M. Reece, attorneys for Monsanto Company, defendant appellee.

HUSKINS, Justice.

Legal principles applicable to summary judgment are discussed in *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E. 2d 823 (1971), and have been applied in many cases by this Court. Authoritative decisions, both state and federal, interpreting and applying Rule 56 hold that the party moving for summary judgment has the burden of "clearly establishing the lack of any

triable issue of fact by the record properly before the court. His papers are carefully scrutinized; and those of the opposing party are on the whole indulgently regarded." 6 Pt. 2 Moore's Federal Practice, § 56.15[8], at 642 (2d ed. 1976); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E. 2d 400 (1972). "This burden may be carried by movant by proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim. If the moving party meets this burden, the party who opposes the motion for summary judgment must either assume the burden of showing that a genuine issue of material fact for trial does exist or provide an excuse for not so doing." *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E. 2d 795 (1974).

The language of the rule itself conditions the rendition of summary judgment upon a showing by the movant that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The court is not authorized by Rule 56 to decide an issue of fact. It is authorized to determine whether a genuine issue of fact exists. The purpose of summary judgment is to eliminate formal trials where only questions of law are involved by permitting penetration of an unfounded claim or defense in advance of trial and allowing summary disposition for either party when a fatal weakness in the claim or defense is exposed. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E. 2d 379 (1975). "The device used is one whereby a party may in effect force his opponent to produce a forecast of evidence which he has available for presentation at trial to support his claim or defense. A party forces his opponent to give this forecast by moving for summary judgment. Moving involves giving a forecast of his own which is sufficient, if considered alone, to compel a verdict or finding in his favor on the claim or defense. In order to compel the opponent's forecast, the movant's forecast, considered alone, must be such as to establish his right to judgment as a matter of law." 2 McIntosh, N.C. Practice and Procedure, § 1660.5 (2d ed. Phillips Supp. 1970). "If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied. . . ." 3 Barron and Holtzoff, Federal Practice and Procedure, § 1234 (Wright ed. 1958).

We now determine the propriety of summary judgment for defendants in this case by applying these legal principles to the record properly before us.

Was plaintiff injured by the negligence of the defendants or either of them? This is the overriding issue of fact which plaintiff must establish at trial in order to prevail on his cause of action. To support their motions for summary judgment and establish the nonexistence of negligence on the part of either defendant, movants offered the depositions of William M. Boyd and plaintiff Floyd Moore.

Boyd stated in his deposition that it was his duty to unload the trailer; that he used a Clark tow-motor, squeeze type, to lift the bales and transport them from the trailer into the warehouse; that plaintiff Floyd Moore delivered the load of acrylic fiber bales on 5 May 1975 and backed the tractor-trailer into the ramp which slopes downward to the unloading dock; that when the vehicle came to rest the rear of the trailer was approximately level with the unloading dock but lower than the front end of the trailer due to the incline on which it rested; that the cargo consisted of Monsanto fiber in bales about three feet wide, three and one-half feet long, and weighing 490 to 525 pounds; that each bale was wrapped in a clear plastic fiber; that the trailer was sealed and the seal was broken immediately before the unloading began; that the Clark tow-motor had a guard rail over the top of the man operating it to protect him from bales that might fall off the tow-motor; that a view of the cargo after the seal was broken and the trailer opened revealed that the bales had been loaded "longways on one side of the trailer and the other side was crossways"; that the trailer was full from bottom to top, *i.e.*, each row was four bales high, and the length of the bales on one side was perpendicular to the length of the trailer while the length of the bales on the other side was parallel to the length of the trailer; that a Fieldcrest lot number was assigned to this cargo and the number had to be stamped or stenciled on each bale as it was unloaded and taken into the warehouse; that after deponent Boyd had unloaded five or six bales with the tow-motor and affixed the lot number on each bale himself, plaintiff Floyd Moore suggested that he would put the lot numbers on the bales to speed up the unloading process and entered the trailer for that purpose; that some of the bales fell on plaintiff while deponent Boyd was in the

warehouse; that deponent was not present when the bales fell and did not know what, if anything, plaintiff did to cause them to fall; that the rescue squad was summoned and Mr. Moore was taken to the hospital.

William M. Boyd further stated in his deposition that some companies load the bales with their length perpendicular to the sides of the trailer while others load the bales with the length of the bales parallel to the sides of the trailer—"some load it different ways"; that in his experience from working on the first shift the only shipper loading bales in the manner the 5 May 1975 shipment was loaded—*i.e.*, lengthwise on one side of the trailer, crosswise on the other—was Monsanto; that he didn't know how bales were loaded on the second and third shifts; that bales of acrylic fiber with the plastic exterior coating are a little slippery; that the occasion when plaintiff was injured on 5 May 1975 was the first time any bales had fallen at the warehouse; that plaintiff was in the trailer putting the lot numbers on the bales, or at least was in there for that purpose, when the bales fell on him—"the purpose of having Mr. Moore put the lot numbers on the bales was to speed up the unloading process, that was Mr. Moore's suggestion."

Plaintiff Floyd Moore in his deposition stated in pertinent part that he had worked for Thurston Motor Lines for 28-29 years; that he picked up the sealed trailer at Thurston Motor Lines in Wilson, took it to the Fieldcrest warehouse in Greenville, North Carolina, and backed it down the ramp to the unloading dock; that after the seal was broken he observed the way the bales were stacked and saw nothing unusual about it; that William M. Boyd, the Fieldcrest employee in charge of unloading the trailer, handed him a stencil pencil and said "if you'll mark those bales for me, it'll probably rush up unloading"; that he walked into the trailer for that purpose and started marking the bales that were lengthwise along the right side; that he had marked two or three bales loaded parallel to the length of the trailer when several bales fell on him and he could not say whether the bales that fell "were lengthways bales or crossways bales"; that he could not say which stack of bales fell; that he noticed nothing unusual about the tow-motor going in and out or in the amount of vibration caused by the tow-motor; that he did not see any bales out of line with each other; that he noticed

nothing unusual "about the position of any bale as far as its alignment with the bales above it or below it . . . . I do not know what caused the bales to fall. . . . I have seen this type of cargo before. I'd seen it before at Fieldcrest Mills. I had delivered this type of bales to Fieldcrest on prior occasions a couple of times I know. . . . I was asked to put numbers on the bales. . . . It was not part of my regular job to unload bales of this type"; that the bales in this trailer were stacked some lengthwise and some crosswise; that "I have seen other trucks with other bales in it loaded all lengthwise, I've seen them with all lengthwise and I've seen them loaded both ways. I've seen them all loaded the long ways in a trailer and I've seen them all loaded crossways in a trailer."

[1] When the two depositions offered by defendants in support of their motions for summary judgment are viewed in the light most favorable to plaintiff, the "evidentiary forecast" offered by defendants is such that, if offered by plaintiff at the trial, without more, would compel a directed verdict in defendants' favor. The two depositions, one by plaintiff himself, establish a lack of negligence on the part of either defendant and entitle both defendants to judgment as a matter of law unless forestalled by a forecast of evidence by plaintiff sufficient to counter the effect of the two depositions by showing some negligent act on the part of one or both defendants proximately causing plaintiff's injury. Plaintiff offered nothing—no counter-affidavits, admissions in pleadings, depositions, answers to interrogatories, or any other evidentiary materials permitted by Rule 56(c). In that factual context we are constrained to hold that the supporting evidence offered by defendants establishes that there is no genuine issue as to any material fact and that defendants are entitled to a judgment as a matter of law. *Kessing v. Mortgage Corp., supra*; *Caldwell v. Deese, supra*; *Zimmerman v. Hogg & Allen, supra*; *Page v. Sloan*, 281 N.C. 697, 190 S.E. 2d 189 (1972); *Koontz v. City of Winston-Salem*, 280 N.C. 513, 186 S.E. 2d 897 (1972).

[2] As a general proposition, issues of negligence are ordinarily not susceptible of summary adjudication either for or against the claimant "but should be resolved by trial in the ordinary manner." 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 946 (2d ed. 1976). Hence it is only in exceptional negligence cases that summary judgment is appropriate because the rule of the prudent man, or other applicable standard of care, must be applied, and

ordinarily the jury should apply it under appropriate instructions from the court. *Caldwell v. Deese, supra*; Gordon, The New Summary Judgment Rule in North Carolina, 5 Wake Forest Intra. L. Rev. 87 (1969). Even so, where, as here, the motion for summary judgment is supported by evidentiary matter showing a lack of negligence on the part of the movants and there is no question as to the credibility of witnesses and no evidence is offered in opposition thereto, no issue is raised for the jury to consider under appropriate instructions. *See* 6 Pt. 2 Moore's Federal Practice, § 56.17[42] at 948-49 (2d ed. 1976). The result is summary judgment for the movants.

The decision of the Court of Appeals upholding summary judgment for defendants is

Affirmed.

Justice COPELAND dissenting.

In his complaint the plaintiff alleged, *inter alia*, that the bales of fiber were negligently loaded by Monsanto Company. He claimed that other companies loaded similar bales with the length running with the length of the trailer whereas the shipment in question was loaded with the length of some of the bales running with the width of the trailer. When loaded this unusual way, plaintiff claimed "the stacks of bales were unstable and would tumble over."

William Boyd had been employed by Fieldcrest Mills for twenty-four years. His job primarily entailed spotting and unloading tractor-trailers, and he received all the shipments coming to Fieldcrest Mills on the day shift. He testified by deposition that "[i]n my experience the only carrier loading bales in the manner that these bales in the May 5, 1975 shipment from Monsanto were loaded was Monsanto."

Considering the length of time Mr. Boyd had been dealing with such shipments, surely his testimony is evidence that the bales in question were loaded in a manner contrary to ordinary custom and usage. Although deviation from custom is not controlling, it constitutes some evidence of negligence. *See Woodall Flying Service, Inc. v. Thomas*, 27 N.C. App. 107, 218 S.E. 2d 203

(1975). *See also* W. PROSSER, TORTS § 33 (4th ed. 1971); 57 Am. Jur. *Negligence* §§ 77 *et seq.* (1971) and cases cited therein.

The defendants moved for summary judgment in this case; therefore, the burden is on them to show that there is no genuine issue as to a material fact and that they are not negligent as a matter of law. They did not meet this burden.

The testimony of Mr. Boyd constituted some evidence of the defendants' negligence. They brought forth no evidence at all that the unusual method used in loading this shipment of heavy bales was reasonably safe. Thus, defendants did not meet their initial burden. If such evidence had been presented, perhaps the plaintiff would then have had to come forth with evidence to the contrary in order to show that there was a genuine issue for trial. The trial court's grant of summary judgment for the defendants was improper in this case. For this reason, I would reverse the decision of the Court of Appeals.

Justice EXUM joins in this dissent.

IN THE MATTER OF: MICHAEL W. SARVIS, WILLIAM E. FURR, WADE H. RABON, RALPH A. McCRAY, CLAY I. CALL, MIKE H. KIVETT, BOBBY W. RABON, JAMES K. BURCHETT, HARRISON E. EMMERT, ARNOLD B. SMITH, ROBERT J. CAMP, CHARLES W. CLARK, JR., H. T. VARNUM, HOWARD D. PEEL, MIRLIN H. PEEL, EUGENE C. McCRAY, EMPLOYEES; HIGH POINT SPRINKLER COMPANY, EMPLOYER; AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

No. 97

(Filed 5 February 1979)

1. Master and Servant § 109— unemployment compensation—striking employees replaced—strike ended—disqualification for unemployment benefits lifted

An employer's inability to reinstate previously replaced employees after they abandoned their strike and unconditionally offered to return to work changed the cause of unemployment from a labor dispute in active progress to unavailability of work and thus lifted the disqualification for unemployment compensation.

2. **Master and Servant § 109— unemployment compensation—striking employees replaced—strike ended—labor dispute not extended by proceedings before NLRB**

The pendency of an unfair labor practices charge and an election petition before the National Labor Relations Board did not keep employees' labor dispute in "active progress" after they terminated their strike so as to disqualify them for unemployment compensation, since an unfair labor practice charge filed by employees and an election petition filed by a union, though labor disputes, cannot legally cause unemployment, and the disqualification in G.S. 96-14(5) applies solely to those active labor disputes which cause unemployment.

3. **Master and Servant § 109— labor dispute—definition unnecessary in unemployment compensation case**

Since a comprehensive definition of "labor dispute" is not necessary for resolution of this case, the Supreme Court neither adopts nor rejects the definition found in the Norris-LaGuardia Act, 29 U.S.C. § 113 (1970).

4. **Master and Servant § 109; Constitutional Law § 1— striking employees replaced—withholding of unemployment benefits not required by Supremacy Clause**

The Supremacy Clause, U.S. Const. Art. VI, cl. 2, did not require that unemployment benefits be withheld from employees who were replaced by employer before they abandoned their strike and offered unconditionally to return to work, since payment of unemployment benefits by N.C. under the circumstances of this case would not impermissibly infringe upon the arena of economic warfare delineated by Congress in which the balance of power between labor and management is determined solely by the economic strength of the parties, as benefits would be awarded after both parties had fully exerted their economic strength against each other and determined that the balance of power favored employer.

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

ON petition for discretionary review of decision of the Court of Appeals, 36 N.C. App. 476, 245 S.E. 2d 176 (1978), remanding the case to the Employment Security Commission for further findings of fact and entry of an order consistent with its decision.

This is a proceeding before the Employment Security Commission (hereafter Commission) for the *sole* purpose of determining whether certain employees (hereafter Employees) of High Point Sprinkler Company (hereafter Employer) were disqualified to receive unemployment compensation benefits by the "labor dispute in active progress" test contained in G.S. 96-14(5). It should be noted that resolution of this issue in favor of Em-

ployees does not automatically entitle them to unemployment benefits. Employees must demonstrate in further proceedings before the Commission that they have satisfied the remaining statutory prerequisites and are therefore entitled to unemployment benefits. Those proceedings are not part of this appeal.

The record discloses that Employees participated in a strike which began on 27 February 1976. The strike was precipitated by a dispute over economic benefits and Employer's decision to transfer one of the Employees. On 6 March 1976 Employees abandoned their strike by notifying Employer of their unconditional offer to return to work immediately. At that point two of the strikers returned to work. The remaining strikers were not reinstated by Employer because it had hired replacements for them and no longer had work available.

The labor dispute which led to the strike of 27 February 1976 also gave rise to certain proceedings before the National Labor Relations Board (hereafter NLRB). The proceedings before the NLRB were initiated on 2 March and 9 March 1976 and remained pending long after the termination of the strike on 6 March 1976. The proceedings before the NLRB were resolved by 22 October 1976.

On 9 April 1976 a Special Appeals Deputy with the Commission found facts and concluded that pursuant to G.S. 96-14(5) Employees were disqualified for benefits from 27 February 1976 to 6 March 1976 and that said disqualification was lifted effective 7 March 1976. The full Commission affirmed the Special Appeals Deputy and Employer appealed to superior court.

The superior court held that the facts found by the Special Appeals Deputy and adopted by the Commission were supported by competent evidence but reversed the Commission's conclusions of law, holding that Employees' disqualification for benefits continued during pendency of the election petition and the unfair labor practices charge before the NLRB. Employees and Employer both appealed to the Court of Appeals.

On 6 June 1978 the Court of Appeals held, in pertinent part, that one of the proceedings pending before the NLRB on 6 March 1976—the election petition filed 2 March 1976 for certification of a union as bargaining agent at Employer's premises—if related to

the dispute which led to the strike of 27 February 1976, would keep the labor dispute in active progress beyond termination of the strike and thus extend the disqualification for benefits until 22 October 1976—the date said petition was resolved. The Court of Appeals remanded the case to the Commission for findings of fact as to whether the election petition was related to the labor dispute which arose 27 February 1976 and for entry of an order consistent with the court's decision.

Both Employer and Employees appealed to the Supreme Court on constitutional grounds and, in the alternative, petitioned for discretionary review of the decision of the Court of Appeals.

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

Smith, Patterson, Follin, Curtis, James & Harkavy, by Henry N. Patterson, Jr.; Michael K. Curtis and Jonathan R. Harkavy, attorneys for Employee appellants.

Turner, Enochs, Foster & Burnley, P.A., by C. Allen Foster and Eric P. Handler, attorneys for Employer appellant.

Howard G. Doyle; Garland D. Crenshaw; Thomas S. Whitaker; Gail C. Arneke and V. Henry Gransee, Jr., by Thomas S. Whitaker, attorneys for Commission appellee.

HUSKINS, Justice.

Our unemployment compensation statute, in pertinent part, disqualifies an individual for benefits "[f]or any week with respect to which the Commission finds that his total or partial unemployment is caused by a labor dispute in active progress . . . at the factory, establishment or other premises at which he is or was last employed. . . ." G.S. 96-14(5).

In order for the labor dispute disqualification to apply, the Commission must find the unemployment in question was "caused by a labor dispute in active progress." The central issue in this appeal is whether Employees' unemployment after the termination of their strike on 6 March 1976 was caused by a labor dispute in active progress.

Employees went on strike from 27 February to 6 March 1976. All parties to this appeal are agreed that this strike—a labor dispute in active progress—was the original cause of unemploy-

ment and that Employees were disqualified to receive unemployment benefits for the duration of the strike—27 February to 6 March 1976.

On 3 March 1976 Employer hired permanent replacements for the striking Employees. On 6 March 1976 Employees abandoned their strike by notifying Employer of their unconditional offer to return to work immediately. Employer, however, could reinstate only two of the Employees since it had previously hired permanent replacements to fill the jobs left vacant by the strikers.

[1] Employees contend that after 6 March 1976 their unemployment was no longer caused by a labor dispute in active progress but, rather, was caused by Employer's inability to provide jobs for them. Employer contends there was no change in the cause of unemployment after 6 March 1976. Thus, the first question presented for review is whether Employer's inability to reinstate previously replaced Employees after they abandoned their strike and unconditionally offered to return to work changed the cause of unemployment and lifted the disqualification for benefits.

The question is a matter of first impression in our jurisdiction. *But cf., Employment Security Com. v. Jarrell*, 231 N.C. 381, 57 S.E. 2d 403 (1950) (recognizing under earlier version of G.S. 96-14(5) that abandonment of dispute by employees effected change in cause of unemployment so as to lift disqualification). We have examined cases from other jurisdictions which have confronted this issue under substantially similar statutory language. These cases hold that an abandonment of the strike and unconditional offer to return to work by employees who were replaced during the pendency of the strike lifts the labor dispute disqualification. Under such circumstances, reason the cases, the cause of unemployment is no longer a labor dispute in active progress; rather, it is the lack of available work. *Bailey v. Tennessee Dept. of Employment Security*, 212 Tenn. 422, 370 S.W. 2d 492 (1963); *Special Products Co. of Tennessee v. Jennings*, 209 Tenn. 316, 353 S.W. 2d 561 (1962); *Colee v. Employment Division*, 25 Or. App. 39, 548 P. 2d 167 (1976); *Skookum Co., Inc. v. Employment Division*, 24 Or. App. 271, 545 P. 2d 914 (1976); *cf. Ruberoid Co. v. California Unemployment Ins. App. Bd.* 59 Cal. 2d 73, 27 Cal. Rptr. 878, 378 P. 2d 102 (1963); *Baugh v. United Tel. Co.*, 54

Ohio St. 2d 419, 377 N.E. 2d 766 (1978) (mere replacement of strikers by employer, without abandonment of dispute by strikers, sufficient to lift labor dispute disqualification). *See generally, Johnson v. Wilson & Co.*, 266 Minn. 500, 124 N.W. 2d 496 (1963); *Rice Lake Creamery Co. v. Industrial Comm.*, 15 Wis. 2d 177, 112 N.W. 2d 202 (1962); *T. R. Miller Mill Co. v. Johns*, 261 Ala. 615, 75 So. 2d 675 (1954).

We think the results and reasoning in the Tennessee and Oregon cases cited above are in accord with the concerns which prompted the General Assembly to incorporate a labor dispute disqualification into our law. The major purpose of our Employment Security law, G.S. 96-1 *et seq.*, is "to provide a fund by systematic accumulation during periods of employment to be retained and used for the benefit of persons furloughed from their jobs through no fault of their own." *In re Abernathy*, 259 N.C. 190, 130 S.E. 2d 292, *appeal dismissed*, 375 U.S. 161 (1963). See G.S. 96-2. In light of this purpose " 'it was not considered wise to permit the fund to be used to finance or subsidize workers engaged in trade disputes because it was feared that if benefits were available to all workers unemployed as a result of a trade dispute, they would be encouraged to suspend work in furtherance of their position in the dispute, thereby imposing an unfair burden upon the employer and working injury upon the national economy and the public at large.' " *In re Abernathy*, supra, *quoting* Haggart, *Unemployment Compensation During Labor Disputes*, 37 Neb. L. Rev. 668, 686 (1958). Additionally, " 'it was feared that payment of benefits when unemployment was due to a labor dispute might cause a severe drain upon the funds available, thereby defeating the primary purpose for which the fund was created—the payment of benefits when unemployment was due to fluctuations in trade.' " *Id.*

We conclude that the concerns which prompted enactment of the labor dispute disqualification—the reluctance to force employers to finance a strike against themselves and the fear of disastrous depletion of the unemployment fund—no longer exists when striking employees renounce their strike and unconditionally offer to return to work. At such juncture "the public policy against interference in a strike or labor dispute [dissolves] and the policy of alleviating hardships resulting from unemployment [becomes] applicable." *Johnson v. Wilson & Co., supra.* Conse-

quently, a court applying G.S. 96-14(5) does no violence to the legislative intent when it recognizes that an employer's inability to reinstate previously replaced employees after they abandon their strike and unconditionally offer to return to work changes the cause of unemployment so as to lift the disqualification of employees for benefits.

We thus hold in this case that the labor dispute disqualification was no longer applicable to Employees after 6 March 1976—the date they renounced their strike and unconditionally offered to return to work. After that date unemployment was no longer caused by a labor dispute in active progress. *Accord, Bailey v. Tennessee Dept. of Employment Security, supra; Special Products Co. of Tennessee v. Jennings, supra; Colee v. Employment Division, supra; Skookum Co., Inc. v. Division, supra;* cf. *Employment Security Com. v. Jarrell, supra.*

[2] The labor dispute which led to the strike of 27 February 1976 also gave rise to certain proceedings before the NLRB. On 2 March 1976 the Upholsterer's International Union of North America filed an election petition with the NLRB for certification as bargaining agent at the premises of Employer. On 9 March 1976 Employees filed an unfair labor practice charge against Employer with the NLRB, alleging Employer had unlawfully denied reinstatement to Employees following the strike. The unfair labor practice charges were settled on 25 June 1976, and the certification petition was resolved on 22 October 1976.

Employer contends that, notwithstanding Employees' offer to return to work on 6 March 1976, the labor dispute remained in active progress as long as proceedings were pending before the NLRB. According to Employer, Employees should be disqualified to receive benefits until 22 October 1976, the date the certification proceeding was resolved. Employees contend that the disqualification should be lifted as of 6 March 1976 since the labor dispute which *caused* their unemployment—the strike—was no longer in active progress after that date. The second question presented for review, then, is whether the pendency of the unfair labor practices charge and the election petition before the NLRB kept the labor dispute in "active progress" after 6 March 1976.

We think the plain meaning of the statutory language compels a conclusion that the matters pending before the NLRB did

not keep the labor dispute disqualification in effect after 6 March 1976. For the disqualification provisions of G.S. 96-14(5) to apply, the Employment Security Commission must find that "total or partial unemployment *is caused* by a labor dispute in active progress." (Emphasis added.) Thus, the only type of active labor dispute which keeps the idle worker disqualified for benefits is one which causes unemployment.

We recognize that an unfair labor practice charge filed with the NLRB by an employee, or an election petition filed by a union with the NLRB, are forms of labor disputes; however, these types of disputes between employer and employee cannot legally cause unemployment. *See* R. Gorman, Labor Law, Chapter 7, §§ 3, 4 (1976). The National Labor Relations Act makes it illegal for an employer to discharge or otherwise discriminate against an employee for filing an unfair labor practice charge or for supporting an election petition filed by a union. *NLRB v. Scrivener*, 405 U.S. 117, 31 L.Ed. 2d 79, 92 S.Ct. 798 (1972); *NLRB v. Lester Brothers, Inc.*, 301 F. 2d 62 (4th Cir. 1962).

This being true, it follows that subsequent to 6 March 1976 the cause of Employees' unemployment was employer's inability to reinstate them and not the proceedings pending before the NLRB. Accordingly, the labor dispute disqualification ceased after 6 March 1976. The decision of the Court of Appeals is reversed insofar as it holds that the election petition of 2 March 1976 could or might keep the labor dispute in active progress for purposes of applying the labor dispute disqualification.

Additionally, we note that the interpretation of G.S. 96-14(5) urged by Employer would likely be contrary to the Supremacy Clause, U.S. Const., art. VI, cl. 2, under the holding in *Nash v. Florida Industrial Commission*, 389 U.S. 235, 19 L.Ed. 2d 438, 88 S.Ct. 362 (1967). In *Nash* the United States Supreme Court held it was improper for a state to deny a claimant unemployment benefits on the ground that her filing of an unfair labor charge against her former employer indicated that her unemployment was due to a labor dispute in active progress. The Court reasoned that under the Supremacy Clause a state cannot "defeat or handicap a valid national objective by threatening to withdraw state benefits from persons simply because they cooperate with the [Federal] Government's constitutional plan." *Id.* Similarly, the in-

terpretation urged by Employer in this case would result in a denial of benefits to claimants who file an unfair labor practice charge or support an election petition on grounds that arguably violate the Supremacy Clause. Such a result is constitutionally suspect under the holding in *Nash*. It is well settled that a statute will not be construed so as to raise a serious question as to its constitutionality if a different construction which will avoid the question of constitutionality is reasonable. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E. 2d 548 (1967). The interpretation we give G.S. 96-14(5) avoids the constitutional difficulties inherent in the views urged by Employer.

[3] The Employment Security Commission and the Court of Appeals adopted the definition of "labor dispute" found in the Norris-LaGuardia Act, 29 U.S.C. § 113 (1970), as the proper definition of that term as it is used in G.S. 96-14(5). In our view a comprehensive definition of "labor dispute" is not necessary to resolution of this case and, for that reason, we neither adopt nor reject the Norris-LaGuardia definition. The term "labor dispute" embraces a large spectrum of disputes, some of which cause unemployment and some of which do not. Here, we are concerned only with (1) a strike, (2) an election petition filed with the NLRB for certification of a union as bargaining agent for Employer's premises and (3) an unfair labor practice charge against Employer filed by Employees. Since we hold that the strike alone caused the unemployment of Employees, we leave the comprehensive definition of "labor dispute" to another day. In this case we determine only that the disqualification in G.S. 96-14(5) applies solely to those active labor disputes which *cause unemployment*.

[4] Finally, Employer contends the Supremacy Clause, U.S. Const., art. VI, cl. 2, requires that unemployment benefits be withheld in this case. Employer argues that payment of unemployment benefits by the State to workers who have lost their jobs and are no longer striking alters the economic balance in a labor dispute in Employees' favor and therefore conflicts with the federal labor policy favoring the free play of economic forces in a labor dispute.

At the outset we recognize Congress intended that conduct by labor and management which is neither protected nor prohibited by the National Labor Relations Act be left unregulated

by the states to the extent such conduct does not interfere with the interest of the State in public safety and order. *Compare Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 49 L.Ed. 2d 396, 96 S.Ct. 2548 (1976), *with Youngdahl v. Rainfair, Inc.*, 355 U.S. 131, 2 L.Ed. 2d 151, 78 S.Ct. 206 (1957). Such conduct is left "'to be controlled by the free play of economic forces.'" *Machinists v. Wisconsin Emp. Rel. Comm'n*, supra, *quoting NLRB v. Nash-Finch Co.*, 404 U.S. 138, 30 L.Ed. 2d 328, 92 S.Ct. 373 (1971). Thus, in formulating federal labor policy Congress purposefully refrained from regulating certain activities of labor and management, preferring instead that both be free to utilize economic pressure devices in the settlement of their disputes. By its silence as to such conduct Congress intentionally struck a balance between labor and management, allowing them to use against each other the economic weapons at their disposal. *See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1352 (1972). *Accord, Machinists v. Wisconsin Emp. Rel. Comm'n*, supra. We note however that the "federal law governing labor relations does not withdraw 'from the States . . . power to regulate where the activity regulated [is] a merely peripheral concern of the Labor Management Relations Act.'" *Machinists v. Wisconsin Emp. Rel. Comm'n, supra, quoting San Diego Unions v. Garmon*, 359 U.S. 236, 3 L.Ed. 2d 775, 79 S.Ct. 773 (1959).

Would payment of unemployment benefits by North Carolina under the circumstances of this case impermissibly infringe upon the arena of economic warfare delineated by Congress in which the balance of power between labor and management is determined solely by the economic strength of the parties? We think not because benefits would be awarded after both parties had fully exerted their economic strength against each other and determined that the balance of power favored Employer. An award of unemployment benefits under such circumstances would only be of peripheral concern to federal labor policy.

Analysis of this labor dispute indicates that both sides made full, unflinching use of the economic weapons at their disposal. Employees struck and Employer retaliated. Ultimately Employer proved to have the stronger hand. Employees abandoned their strike and unconditionally offered to return to work but lost their jobs to the replacements already hired by Employer. Thus, the balance of power between labor and management was determined

solely by the economic strength of the parties. When Employees abandoned their strike and offered to return to work, the federal and state policies of noninterference in a labor dispute were no longer pertinent and the state policy of alleviating the hardships of unemployment again became applicable. Accordingly, benefits may be awarded in this case without raising concerns that the economic balance between labor and management struck by Congress is being altered. *See Machinists v. Wisconsin Emp. Rel. Comm'n, supra* (Powell, J., concurring).

In sum, the preemption created by federal labor legislation does not preclude the award of unemployment benefits in this case. The fact that such an award "may have an incidental effect on relative bargaining strength," *id.* (Powell, J., concurring), does not constitute sufficient interference with national labor policy to warrant application of the preemption doctrine. *See* Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1355-56 (1972); *cf. New York Tel. Co. v. New York Dept. of Labor*, 566 F. 2d 388 (2d Cir. 1977), *cert. granted*, 435 U.S. 941 (1978) (payment of unemployment benefits to striking employees does not violate Supremacy Clause).

In light of our disposition of this case it is unnecessary to remand to the Employment Security Commission for findings of fact as to whether the 2 March 1976 election petition filed by the Upholsterer's International Union of North America related to the labor dispute which arose 27 February 1976. The decision of the Employment Security Commission disqualifying Employees for benefits from 27 February 1976 to 6 March 1976 and lifting said disqualification effective 7 March 1976 was correct and must be reinstated.

The decision of the Court of Appeals, insofar as it conflicts with this opinion, is reversed. The case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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

TRIDYN INDUSTRIES, INC. v. AMERICAN MUTUAL INSURANCE COMPANY

No. 101

(Filed 5 February 1979)

Appeal and Error § 6.2— partial summary judgment determining liability—issue of damages reserved for trial—appeal premature

An order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was not appealable.

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

ON defendant's petition for further review of an order of the Court of Appeals, filed 13 July 1978, dismissing, without opinion, defendant's appeal to that court from an order of *Wood, J.*, entered on 3 May 1978 in GUILFORD Superior Court.

Turner, Enochs, Foster & Burnley, P.A., by James R. Turner and E. Thomas Watson, Attorneys for plaintiff appellee.

Smith, Moore, Smith, Schell & Hunter by Bynum M. Hunter, Ben F. Tennille, and Michael E. Kelly, Attorneys for defendant appellant.

EXUM, Justice.

The question presented is whether an order of the trial court allowing plaintiff's motion for partial summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment is appealable. We hold that it is not. The Court of Appeals correctly allowed plaintiff's motion to dismiss defendant's appeal. Its order is affirmed.

Plaintiff Tridyn is a North Carolina corporation which manufactures and sells polyvinyl chloride pipes and pipe couplings for use in fresh water supply systems. Defendant is a corporation registered and doing business in North Carolina. On 10 December 1971 it issued to plaintiff a comprehensive general liability insurance policy which was in force at all times material to this dispute. On 17 November 1975 plaintiff filed an amended complaint in which it alleged that defendant was obligated under

this insurance policy to defend plaintiff against and, ultimately, to pay certain claims made against plaintiff by two construction firms, namely, Pierce Ditching Company and Satterfield Construction Company. Defendant answered, admitting the issuance of its insurance policy but denying that this policy afforded coverage to plaintiff for the claims made against it by Pierce and Satterfield.

The insurance policy in question and the claims filed against plaintiff by Pierce and Satterfield were attached to and made a part of Tridyn's complaint. The two claims were similar. They in essence alleged that Tridyn had furnished defective couplings which, in turn, caused water systems which the two companies, respectively, had installed to leak. Both Pierce and Satterfield alleged they sustained substantial damages in replacing the defective couplings and repairing the water systems. Pierce ultimately recovered judgment against Tridyn on its claim in the sum of $30,011.92. Satterfield's claim against Tridyn was settled for $26,446.59.

Both plaintiff and defendant moved for summary judgment. The single dispute on the question of defendant's liability was whether the terms of the insurance policy covered the types of claims made against Tridyn. Plaintiff contended that the policy afforded coverage to it for the claims brought against it by Pierce and Satterfield. Defendant contended that no coverage was provided for these claims. Plaintiff at first sought summary judgment on all issues, presenting to the court the sums which it had expended in paying the Pierce judgment and settling the Satterfield claim. Ultimately, however, plaintiff moved only for partial summary judgment on the issue of liability.

The trial court, having before it the pleadings, the insurance policy, the claims filed against Tridyn by Pierce and Satterfield, and the amounts allegedly spent by Tridyn to satisfy these claims, concluded as a matter of law that the Pierce and Satterfield claims were covered by defendant's policy and that defendant's refusal to defend these claims was a breach of its insurance contract. The trial court further concluded that plaintiff was entitled to recover against defendant the reasonable attorneys' fees it incurred in defense of these claims together with the amounts plaintiff had paid on the claims "which was for damage to the [respective] water system[s], in an amount to be determined." In

the decretal portion of its judgment, the court ordered that plaintiff "is entitled to a declaratory judgment in its favor as a matter of law on the issue of liability." It then allowed plaintiff's motion for partial summary judgment "on the issue of liability;" denied defendant's motion for summary judgment; and ordered that "the amount of damages suffered by plaintiff by reason of reasonable attorneys' fees, costs, expenses, and judgment and settlement amounts incurred and paid by plaintiff as a result of said claims for damages to said water system" be determined. The trial court further recited, "this is a final judgment and there is no just reason for delay."

Defendant appealed this judgment to the Court of Appeals. That court, on plaintiff's motion, dismissed the appeal. We allowed defendant's petition for further review of the Court of Appeals' ruling.

Judicial judgments, orders and decrees are "either interlocutory or the final determination of the rights of the parties." G.S. 1A-1, Rule 54(a). The difference between the two was stated in *Veazey v. Durham*, 231 N.C. 357, 361-62, 57 S.E. 2d 377, 381 (1950): "A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." Justice Ervin, writing for the Court in *Veazey*, then set out the rules regarding appeals, *id.* at 362, 57 S.E. 2d at 381-82:

> "1. An appeal lies . . . from a final judgment . . . .
>
> "2. An appeal does not lie . . . from an interlocutory order . . . unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment.
>
> "3. A nonappealable interlocutory order . . . which involves the merits and necessarily affects the judgment, is reviewable . . . on appropriate exception upon an appeal from the final judgment in the cause. . . . An earlier appeal from such an interlocutory order is fragmentary and premature, and will be dismissed."

These rules derive in part from G.S. 1-277[1] and are embodied in part in the more recently enacted G.S. 7A-27.[2]

"The reason for these rules is to prevent fragmentary, premature and unnecessary appeals by permitting the trial divisions to have done with a case fully and finally before it is presented to the appellate division. 'Appellate procedure is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment.' *Raleigh v. Edwards*, 234 N.C. 528, 529, 67 S.E. 2d 669, 671 (1951)." *Waters v. Personnel, Inc.*, 294 N.C. 200, 207-08, 240 S.E. 2d 338, 343 (1978). "There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey v. Durham, supra*, 231 N.C. at 363, 57 S.E. 2d at 382.

In addition to the foregoing, Rule 54(b) of the Rules of Civil Procedure provides:

> "(b) Judgment upon multiple claims or involving multiple parties.—When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or

1. "§ 1-277. *Appeal from superior or district court judge.*—(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

2. "§ 7A-27. *Appeals of right from the courts of the trial division:*

. . . .

(b) From any final judgment of a superior court . . . appeal lies of right to the Court of Appeals.

(c) From any final judgment of a district court in a civil action appeal lies of right directly to the Court of Appeals.

(d) From any interlocutory order or judgment of a superior court or district court in a civil action or proceeding which

(1) Affects a substantial right, or

(2) In effect determines the action and prevents a judgment from which appeal might be taken, or

(3) Discontinues the action, or

(4) Grants or refuses a new trial, appeal lies of right directly to the Court of Appeals.

(e) From any other order or judgment of the superior court from which an appeal is authorized by statute, appeal lies of right directly to the Court of Appeals."

more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes. Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

Rule 54(b) modifies the traditional notion that a case could not be appealed until the trial court had finally and entirely disposed of it all. *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E. 2d 797 (1976). The rule should be seen as a companion to other rules of procedure which permit liberal joinder of claims and parties. See particularly G.S. 1A-1, Rules 13, 14, 17-24. In multiple claim or multiple party cases the trial court may enter a judgment which is final and which fully terminates fewer than all the claims or claims as to fewer than all the parties. Rule 54(b) permits the trial judge by determining in such a judgment that "there is no just reason for delay" to release it for immediate appeal before the litigation is complete as to all claims or all parties. *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Whether a case involves multiple parties is not difficult to determine. In a case involving only two parties, however, it is important in applying Rule 54(b) to distinguish the true multiple claim case from the case in which only a single claim based on a single factual occurrence is asserted but in which various kinds of remedies may be sought. *See Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976); *Bogosian v. Gulf Oil Corp., supra*, 561 F. 2d 434.

The decree of the trial court in this case is properly denominated a partial summary judgment rendered on the issue of liability alone, the court determining that there was a genuine issue as to the amount of damages. Such a judgment is authorized

by Rule 56(c) of the Rules of Civil Procedure which provides, "[a] summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages." Thus the rule authorizing such a judgment denominates it interlocutory. Since further action is required by the trial court in order to determine both of plaintiff's claims this judgment would be interlocutory as to both under our traditional rules were it not so defined in Rule 56. Defendant does not seriously contend that the judgment is other than interlocutory.

That the trial court declared it to be a final, declaratory judgment does not make it so. This is not an action for a declaratory judgment but a claim by plaintiff for damages. Even if we considered this a multiple claim lawsuit within the meaning of Rule 54(b) inasmuch as plaintiff has asserted two claims against defendant, the judgment in this case is not final as to either claim. Rule 54(b) does not purport to define a final judgment. It simply provides for (1) the entry of such a judgment as to fewer than all of the claims in a multiple claim or multiple party lawsuit and (2) a procedure whereby such final judgments on "one or more but fewer than all of the claims or parties" are immediately appealable. We have held that Rule 54(b) cannot limit an appellant's right to appeal when the decree was appealable under other statutory provisions, namely, G.S. 1-277 and G.S. 7A-27(d). *Newton v. Insurance Co.*, 291 N.C. 105, 229 S.E. 2d 297 (1976); *Nasco Equipment Co. v. Mason*, 291 N.C. 145, 229 S.E. 2d 278 (1976); *Oestreicher v. Stores, supra*, 290 N.C. 118, 225 S.E. 2d 797. Neither can a trial judge by denominating his decree a "final judgment" make it immediately appealable under Rule 54(b) if it is not such a judgment. *Liberty Mutual Insurance Co. v. Wetzel, supra*, 424 U.S. 737.

The decree, furthermore, is not appealable on the theory that it affects a substantial right of defendant and will work injury to it if not corrected before an appeal from the final judgment. If this partial summary judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages. In holding that a denial of defendant's motion for summary judgment is not ap-

pealable by the defendant inasmuch as it is an interlocutory order by which defendant is not deprived of any substantial right, we said in *Waters v. Personnel, Inc., supra*, 294 N.C. at 208, 240 S.E. 2d at 344:

> "Defendant's rights here are fully and adequately protected by an exception to the order which may then be assigned as error on appeal should final judgment in the case ultimately go against it. All defendant suffers by its inability to appeal Judge Long's order is the necessity of rehearing its motion. The avoidance of such a hearing is not a 'substantial right' entitling defendant to an immediate appeal. Neither, for that matter, is the avoidance of trial which defendant might have to undergo should its motion and plaintiff's motion for summary judgment (which is still pending) both be denied."

Finally, defendant has referred us to no case nor has our research revealed one holding that a partial summary judgment entered for plaintiff on the issue of liability only leaving for further determination at trial the issue of damages is immediately appealable by defendant. The cases uniformly hold to the contrary. *Liberty Mutual Insurance Co. v. Wetzel, supra*, 424 U.S. 737; *Leonidakis v. International Telecoin Corp.*, 208 F. 2d 934 (2d Cir. 1953); *Russell v. Barnes Foundation*, 136 F. 2d 654 (3d Cir. 1943); *Link v. State Department of Fish and Game*, 566 P. 2d 806 (Mont. 1977); 6 Moore's Federal Practice, ¶ 56.18 (2d Ed. 1976); Wright and Miller, Federal Practice and Procedure, § 2715 at 422 (1973).

Defendant's reliance on *Newton v. Insurance Co., supra*, 291 N.C. 105, 229 S.E. 2d 297; *Nasco Equipment Co. v. Mason, supra*, 291 N.C. 145, 229 S.E. 2d 278; and *Oestreicher v. Stores, supra*, 290 N.C. 118, 225 S.E. 2d 797, is misplaced. In *Oestreicher* and *Newton* plaintiffs filed, respectively, claims for both compensatory and punitive damages. In *Newton* the trial court dismissed plaintiff's claim as to punitive damages on defendant's Rule 12(b)(6) motion. In *Oestreicher* defendant's motion for summary judgment was allowed as to plaintiff's claim for punitive damages. We held in each case that the ruling was immediately appealable under G.S. 1-277 and G.S. 7A-27(d) as affecting a substantial right of each plaintiff and working injury to the plaintiff if not cor-

rected before an appeal from the final judgment. The substantial right identified was the right of the plaintiff to have the claim for punitive damages determined, if at all, before the same judge and jury which heard the claim for compensatory damages. Not to have permitted an immediate appeal might have resulted in a bifurcated trial in which one proceeding would have been directed toward compensatory and another toward punitive damages. The summary judgment held immediately appealable in *Nasco Equipment Co.* was, in effect, a final judgment ultimately disposing of all claims of any practical significance in the case.

In *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E. 2d 772 (1967), also relied on by defendant, this Court held that in a condemnation action an order of the trial court determining which tracts of land were to be condemned was immediately appealable prior to determination of compensation to be awarded for the taking. This, of course, is a classic example of an interlocutory order which affects a substantial right and will work injury to the party aggrieved if not corrected before final judgment. It would be an exercise in futility to attempt to determine damages for the taking of land under the power of eminent domain until the land which is to be taken has first been properly and finally delineated. As the Court in *Nuckles* noted, 271 N.C. at 14, 155 S.E. 2d at 784:

> "One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors. G.S. 1-277."

Defendant also relies on *Stachon and Associates v. Broadcasting Co.*, 35 N.C. App. 540, 241 S.E. 2d 884 (1978) and *Peaseley v. Virginia Iron, Coal & Coke Co.*, 12 N.C. App. 226, 182 S.E. 2d 810, *cert. denied*, 279 N.C. 512, 183 S.E. 2d 688 (1971). *Stachon* was a suit on a promissory note. Summary judgment for plaintiff was entered not only on the issue of liability but also on the issue of damages. Defendant's appeal from this judgment was not, therefore, an appeal from a partial summary judgment. It is true that in *Peaseley* the Court of Appeals considered an appeal from a par-

tial summary judgment on the question of liability only in which the trial court had reserved determination of the amount of damages. No question, however, was raised by either party concerning the appealability of the partial summary judgment and the Court of Appeals did not discuss it.[3]

We are not inadvertent to defendant's request that we bring up this judgment by writ of certiorari under Rule 21 of the Rules of Appellate Procedure, 287 N.C. 728.[4] Suffice it to say that we decline to issue our writ of certiorari under these circumstances. There seems to be a substantial legal dispute between the parties on the damages issue. If the insurance policy in question provides any coverage at all, and we express no opinion on this point, it may be that some, but not all, of the items of damage are covered. This case should be reviewed, if at all, in its entirety and not piecemeal.

For the reasons given the order of the Court of Appeals dismissing defendant's appeal is

Affirmed.

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

3. The unfortunate result of this procedure was that this litigation took a tortuous route up and down the appellate ladder. After certiorari was denied by this Court the case went back for trial. An appeal from this trial was then heard by the Court of Appeals which affirmed. 15 N.C. App. 709, 190 S.E. 2d 690 (1972). We allowed certiorari and reversed the Court of Appeals' decision on the damages issue and remanded the case for still another trial on this issue. 282 N.C. 585, 194 S.E. 2d 133 (1973). Thus there was one full blown appeal on the issue of liability and still another on the issue of damages. The case illustrates the wisdom of not permitting appeals from a partial summary judgment on the question of liability only.

4. Rule 21(a) provides:

"*General.* The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right to appeal from an interlocutory order exists; or by the Supreme Court in appropriate circumstances to permit review of the judgments and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action."

STATE OF NORTH CAROLINA v. JAMES CALVIN JONES

No. 60

(Filed 5 February 1979)

1. **Criminal Law § 102.13— capital case—jury argument—right of judicial review—new trial**

Defendant is entitled to a new trial on the guilt determination phase of a capital case because of the district attorney's improper argument to the jury that "if you do err in this case he [defendant] has the right of appeal. The State doesn't have that. State has no right of appeal from a case like this."

2. **Criminal Law § 102.13— capital case—jury argument—judicial review—failure to object**

Where there are intimations in the district attorney's argument in a death case that a jury's verdict is not a final disposition of the case, such remarks are so prejudicial that counsel's failure to make timely objection will not waive defendant's right to further review.

3. **Criminal Law § 177— bifurcated trial—new trial on guilt phase—necessity for new trial on sentencing phase**

The granting of a new trial on the guilt determination phase of a bifurcated trial requires a new trial on the sentencing phase of such trial.

4. **Criminal Law § 102.13— capital case—jury argument in sentencing phase—reading of statute providing for review of death case**

The rule precluding any argument which suggests to jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial. Therefore, it was improper for the district attorney to read to the jury G.S. 15A-2000(d), relating to the review of a sentence of death by the Supreme Court, during the sentencing phase of a bifurcated trial for the capital crime of first degree murder.

5. **Criminal Law § 102.13— capital case—jury argument in sentencing phase—possibility of parole**

In this prosecution for the capital crime of first degree murder, it was improper for the district attorney during the sentencing phase of the trial to read the parole statute to the jury and to speculate on the possibility that defendant might later be paroled if he received a life sentence.

APPEAL by defendant from *Lee, J.*, October, 1977, Session of ROBESON Superior Court.

Defendant was charged in a bill of indictment, proper in form, with the capital crime of murder in the first degree. He was declared to be an indigent on 8 July 1977, and Horace Locklear of the Robeson County Bar was appointed by the

court to represent defendant in this cause. On 27 July 1977, defendant's counsel filed a motion praying that additional counsel be appointed to assist in the defense, averring among other things that defendant's best interest would be served by the appointment of additional counsel. This motion was denied by Judge Henry A. McKinnon, Jr., on 21 September 1977. On 6 September 1977, defendant was arraigned and through his court appointed counsel entered a plea of not guilty.

The State offered evidence at the guilt determination phase of the trial which tended to show that on 3 July 1977, defendant was imprisoned in the Robeson County prison unit and on that day he was granted a six hour community release pass. He left the prison unit at about noon with his leave sponsor, Grady Locklear, who carried defendant to the home of Ernest Demery where they picked up defendant's small child. Grady Locklear left defendant and his child at the home of defendant's parents at about 1:00 p.m. Thereafter, defendant borrowed an automobile from his brother and drove to the home of Billy Ray Clark where he borrowed a rifle and eight bullets. He then proceeded to the home of "young Jimmy" Locklear, who had been going with defendant's wife during defendant's imprisonment. Defendant drove by this house several times and on two occasions stopped and sounded the horn of the automobile. No one came out of the house, and defendant then proceeded to Herbert Locklear's home where "old Jimmy" Locklear lived. Herbert had also "dated" defendant's wife while defendant was in prison.

Johnny Dial testified that on 3 July 1977 at about 4:30 p.m., he was riding by the home of Herbert Locklear when he observed an old man and a young man "toussling" in the doorway of the house. The older man's face was covered with blood, and their struggles carried the two men into the yard. The older man ran toward the road, and the younger man shot him in the back causing him to collapse onto the road. The younger man then left in a yellow Oldsmobile. The witness identified defendant James Calvin Jones as the younger man involved in the fight and the shooting.

The State also offered evidence tending to show that defendant in the late afternoon of 3 July 1977 told his brother that he had just killed Herbert Locklear's father. There was medical testimony tending to show that deceased died as a result of two

bullet wounds which entered his back. Defendant offered no evidence at the guilt determination phase of the trial, and the jury returned a verdict of guilty of murder in the first degree.

Pursuant to the provisions of G.S. 15A-2000, the trial judge then conducted a proceeding, before the same jury which returned the verdict of guilty of murder in the first degree, to determine whether defendant should be sentenced to death or life imprisonment. At the sentencing phase of the trial, defendant offered evidence which in substance showed that while defendant was in prison his wife was unfaithful to him and had had affairs with several men including young Jimmy Locklear and Herbert Locklear. His wife had neglected, abused and abandoned the young child born to their marriage.

The State's evidence during the sentence determination phase of the trial tended to show that in 1966, defendant pled guilty to armed robbery and was sentenced to imprisonment for a period of from fifteen to twenty years. He escaped from prison and was convicted of felonious escape on 24 February 1970. He was paroled on 26 May 1972, and his parole was revoked on 8 October 1976.

After answering issues as to aggravating circumstances and mitigating circumstances, the jury unanimously recommended that the punishment to be imposed upon James Calvin Jones be death.

Rufus L. Edmisten, Attorney General, by Thomas F. Moffitt, Assistant Attorney General, for the State.

Horace Locklear for defendant appellant.

BRANCH, Justice.

We first consider defendant's contention that he is entitled to a new trial because of the argument of the district attorney.

[1] Defense counsel noted an exception to that portion of the district attorney's argument made at the guilt determination phase of the trial in which the district attorney stated, "Now you know, if you do err in this case he [defendant] has the right of appeal. The State doesn't have that. State has no right of appeal from a case like this."

[2] Ordinarily it is the duty of defense counsel to immediately object to an improper argument by the district attorney so that the trial judge might attempt to correct such transgression by a curative instruction. *State v. Hawley*, 229 N.C. 167, 48 S.E. 2d 35 (1948). Here there was no objection to this portion of the district attorney's argument. However, it is now well settled that in a death case, as here, where there are intimations in the district attorney's argument that a jury's verdict is not a final disposition of the case such remarks are so prejudicial that counsel's failure to make timely objection will not waive defendant's right to further review. *State v. White*, 286 N.C. 395, 211 S.E. 2d 445 (1975); *State v. Hawley, supra*; *State v. Little*, 228 N.C. 417, 45 S.E. 2d 542 (1947).

In *State v. White, supra*, a case strikingly similar to the case *sub judice*, the defendant was convicted of murder in the first degree and appealed from judgment imposing a sentence of death. In that case, the district attorney in his argument to the jury said, ". . . you will answer the question whether this defendant is guilty of first degree murder. If found guilty, he gets an automatic appeal to the Supreme Court of North Carolina—it is necessary. If any error is made in this court, that Court will say." The trial judge sustained defendant's immediate objection to this argument and instructed the jury not to consider that portion of the district attorney's argument. Further, at the beginning of the charge, he instructed the jury as follows:

> I want to go back to the argument that was objected to in the argument of counsel that the Supreme Court has a right to send this case back on mistakes. The reason I sustained that objection, I want you all to understand is that the Supreme Court will review this case. That they would only send the case back if I made a mistake on a legal question. They will not review the decisions of the facts by the jury. The jury is the sole trier of the facts of this lawsuit.

Despite the trial judge's original admonition and later instruction, this Court found the district attorney's argument to be prejudicial. In so holding, this Court, speaking through Chief Justice Sharp, *inter alia*, stated:

> This Court has consistently held that, in a capital case, *any* argument made by the solicitor, or by private prosecu-

> tion appearing for the State, which suggests to the jury that they can depend upon either judicial or executive review to correct any errors in their verdict, and to share their responsibility for it, is an abuse of privilege and prejudicial to the defendant. [Emphasis added.]

The Court considered a similar argument by the district attorney in *State v. Little, supra.* There the district attorney in his closing argument, in substance, said that:

> . . . [I]n all first degree cases where men were convicted there would be an appeal to the Supreme Court, and that in this case, if this defendant were convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed, there would be an appeal to the Governor to commute the sentence of the prisoner; and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed.

Notwithstanding the fact that defense counsel advised the trial judge that he did not desire an instruction to disregard this argument, this Court found prejudicial error. Justice Winborne (later Chief Justice) writing for the Court stated:

> . . . [I]t is manifest that the statements of facts that if the defendant be convicted there would be an appeal to the Supreme Court, and that in the event the decision of the lower court should be affirmed there would be an appeal to the Governor to commute the sentence of the prisoner, and that not more than sixty per cent of prisoners convicted of capital offenses were ever executed, are matters not included in the evidence. Nor are they justified as being in answer to argument of counsel for defendant. They are calculated to unduly prejudice the defendant in the defense of the charge against him. . . .

Accord: *State v. Dockery*, 238 N.C. 222, 77 S.E. 2d 664 (1953); *State v. Hawley, supra.*

We note that the case of *State v. Finch*, 293 N.C. 132, 235 S.E. 2d 819 (1977), is distinguishable from the cases above reviewed and cited. In *Finch*, the trial judge stated: "If the *Court* is wrong, then the Court of Appeals will let that be known. Somebody will straighten that out, but you take your instructions from

the Court." [Emphasis added.] This statement merely let the jury know that they were to take their instructions from the court and that the court's statements as to the law were subject to review. This statement in no way affected the responsibility of the jury or intimated that the jury verdict was not binding.

In the case before us for decision, the district attorney's statement was erroneous in that the Supreme Court does not review the verdict of the finders of fact on the guilt determination phase of a bifurcated trial. However, the overriding vice in this portion of the district attorney's argument is that he effectively told the jurors that they could rely upon the Supreme Court to correct their verdict if it were wrongful or improper thereby causing the jury to believe that the Supreme Court would share with them a burden and responsibility which was in fact their sole responsibility.

[3] For error in the district attorney's argument to the jury, there must be a new trial on the guilt determination phase of the trial. We are of the opinion that the granting of a new trial on the guilt determination phase of a bifurcated trial requires a new trial on the sentencing phase of such trial.

Even so, we think it necessary to consider the district attorney's argument in the sentencing phase of this trial in order to provide guidance in future death cases.

In his argument, the district attorney stated:

> Now, listen to me a minute. Let's go to another section of the law right quick, 15A-2000, Subsection d(1) and (2). Subsection d(1) and (2), to show you what I'm talking about. This is extremely important. Please try to get a grasp of what I'm saying.
>
> "The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina, pursuant to procedures established by the Rules of Appellate Procedure." In its review, the Supreme Court is going to review your decision in this case. The Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal. Number (2). This is where it gets very important. "The sentence of death shall be overturned and a sentence of life imprisonment imposed

in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravated circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor, or upon—" listen to this, now. Here's where the domino effect comes in—"or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases."

G.S. 84-14 provides that in jury trials, the whole case as well of law as of fact may be argued to the jury. We have interpreted that statute to mean that counsel may, in his argument to the jury, in any case, read or state to the jury a statute or other rule of law *relevant to such case*, including the statutory provision fixing the punishment for the offense charged. *State v. McMorris*, 290 N.C. 286, 225 S.E. 2d 553 (1976); *State v. Britt*, 285 N.C. 256, 204 S.E. 2d 817 (1974).

[4] We are of the opinion that in the sentencing phase of a bifurcated trial, a reference to any statutory provision, which would have the effect of minimizing in the jurors' minds their role in recommending the sentence to be imposed, is precluded. The matters which a jury may consider in the sentencing phase of a bifurcated trial are clearly set forth in G.S. 15A-2000(e) and (f). Thus, we are of the opinion that it was error for the district attorney to read G.S. 15A-2000(d), relating to the review of judgment and sentence by the Supreme Court. A reference to appellate review has no relevance with regard to the jury's task of weighing any aggravating and mitigating circumstances for the purpose of recommending a sentence. More importantly however, such reference will, in all likelihood, result in the jury's reliance on the Supreme Court for the ultimate determination of sentence. This Court has held that in a capital case any argument which suggests to the jurors that they can depend upon judicial or executive review to correct any errors in their verdict and to share their responsibility for it is an abuse of privilege and prejudicial to the defendant. *State v. White, supra*; *State v. Hawley, supra*; *State v. Little, supra*. Prior to the advent of the bifurcated trial, the sole responsibility of the jury was to determine the issue of guilt. In a bifurcated trial, the jury has the additional responsibility of determining the sentence to be imposed. We hold that the

rule precluding any argument which suggests to the jurors that they can depend on judicial or executive review to correct an erroneous verdict and thereby lessen the jurors' responsibility applies with equal force to a sentence recommendation in a bifurcated trial.

[5] Defendant also excepted to this portion of the district attorney's argument:

> Let me read you something. North Carolina General Statutes 48-58, "Time of Eligibility of Prisoners to have cases considered." Talking about paroles, now.
>
> "All prisoners shall be eligible to have their cases considered for parole when they have served a fourth of their sentence. If their sentence is determinate—" that means a term of years, like twenty years or fifteen years and it's a fourth of their minimum sentence. If a sentence is indeterminate,—that being like fifteen to twenty years—provided that any prisoner serving sentence for life shall be eligible for such consideration when he has served twenty years of his sentence.
>
> Read it again, "Provided that any prisoner serving sentence for life shall be eligible for such consideration when he has served twenty years of his sentence." Then goes on to say that this section shall not be construed to make mandatory release of any prisoner on parole, but simply guarantees to every prisoner review. Can you take a chance, ladies and gentlemen of the jury? I don't know what the parole board would do in the future. I don't know of [sic] they ever would parole him or not, but can you take that sort of chance that twenty years from now he could be walking around on the streets after having done the things that he's done?

This reference to the parole statute was clearly erroneous. Neither the State nor the defendant should be allowed to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons. *State v. McMorris, supra*; *see also, State v. Conner*, 241 N.C. 468, 85 S.E. 2d 584 (1955). The jury's sentence recommendation should be based solely on their balancing of the aggravating and mitigating factors before them. The

possibility of parole is not such a factor, and it has no place in the jury's recommendation of the sentence to be imposed.

Defendant's fifth assignment of error states that it challenges the court's instruction, but the argument presented in the brief appears to be a general attack upon the death penalty and the provisions of Article 100 of Chapter 15A of the General Statutes. We do not reach the question of the constitutionality of the death penalty or the provisions contained in Article 100 of Chapter 15A of the General Statutes since we do not pass on constitutional questions when a case can be decided on other grounds. *State v. Crabtree*, 286 N.C. 541, 212 S.E. 2d 103 (1975); *State v. Jones*, 242 N.C. 563, 89 S.E. 2d 129 (1955). Neither do we deem it necessary to here consider defendant's arguments concerning jury selection and evidentiary rulings by the trial court since they present no new questions of law and in all probability will not arise in the next trial.

For reasons stated, there must be a new trial on both phases of this bifurcated trial.

New trial.

COLONIAL PIPELINE COMPANY v. JEANETTE M. NEILL

No. 128

(Filed 5 February 1979)

Eminent Domain § 4.3; Gas § 6— interstate pipeline company—right of eminent domain—origin of pipeline immaterial

G.S. 62-190 clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of N.C., regardless of whether their pipelines originate in N.C.

APPEAL by respondent from *Albright, J.*, at the 10 July 1978 Session of GUILFORD County Superior Court.

Colonial Pipeline Company, an interstate common carrier of liquid petroleum products, instituted this special proceeding on 10 March 1978 to condemn respondent's land for the purpose of constructing a portion of a petroleum pipeline originating in Houston,

Texas, and terminating in Linden, New Jersey. On 14 April 1978, respondent filed her answer and a motion to dismiss. The Clerk of Superior Court denied the motion to dismiss, ruled that Colonial was empowered to exercise the right of eminent domain pursuant to G.S. 62-190, and ordered the appointment of commissioners to determine just compensation. The commissioners' report, filed on 26 May 1978, assessed damages in the amount of $3800, and both petitioner and respondent filed exceptions. After hearing the exceptions, the Clerk of Superior Court confirmed the commissioners' report on 12 June 1978. On 30 June 1978, respondent filed a motion for a preliminary injunction to restrain Colonial from constructing the pipeline across her land. At the same time, she requested that her motions for preliminary injunction and to dismiss be consolidated for hearing. After a hearing on these motions, Judge Albright entered an order on 13 July 1978 granting respondent's motion to consolidate but denying her motions for preliminary injunction and to dismiss. Respondent gave notice of appeal to the Court of Appeals. On 3 November 1978, we allowed the petition of both parties for discretionary review prior to determination by the Court of Appeals.

Adams, Kleemeier, Hagan, Hannah & Fouts by Joseph W. Moss and Daniel W. Fouts, and Horack, Talley, Pharr & Lowndes by Benj. S. Horack and Robert C. Stephens, attorneys for petitioner appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard by James T. Williams, Jr., and Reid L. Phillips, attorneys for respondent appellant.

BRANCH, Justice.

The single question presented by this appeal is whether G.S. 62-190 confers the right of eminent domain on interstate pipeline companies such as Colonial.

It is well settled that the power of eminent domain is inherent in sovereignty. *Morganton v. Hutton & Bourbonnais Co.*, 251 N.C. 531, 112 S.E. 2d 111 (1960). The Legislature has the right to determine what portion of this sovereign power it will delegate to public or private corporations to be used for public benefit. *State v. Club Properties*, 275 N.C. 328, 167 S.E. 2d 385 (1969); *Morganton v. Hutton & Bourbonnais Co., supra.* The right of emi-

nent domain must be conferred by statute, expressly or by necessary implication, and such statute must be strictly construed. *State v. Club Properties, supra.* Our inquiry then is to determine whether the Legislature has evidenced an intent to confer the right of eminent domain upon interstate pipeline companies whose pipelines orginate outside North Carolina.

Prior to 1937, our Legislature had not granted to pipeline companies the right of eminent domain. This power was conferred upon pipeline companies, however, by Chapter 280 of the Session Laws of 1937, codified as C.S. 3542(d) [now G.S. 62-190]. The act was entitled "AN ACT TO AMEND CHAPTER SIXTY-SEVEN [Railroads and Other Carriers] OF THE CONSOLIDATED STATUTES OF NORTH CAROLINA OF ONE THOUSAND NINE HUNDRED AND NINETEEN, AS AMENDED, AND *TO CONFER UPON PIPE LINE COMPANIES THE RIGHT OF EMINENT DOMAIN* AND OTHER POWERS AND RIGHTS." [Emphasis added] and provided:

> Any pipe line company transporting or conveying natural gas, gasoline, crude oil, or other fluid substances by pipe line for the public for compensation, and incorporated under the laws of the State of North Carolina, may exercise the right of eminent domain under the provisions of Chapter thirty-three of the Consolidated Statutes of North Carolina and acts amendatory thereof, and for the purpose of constructing and maintaining its pipe lines and other works shall have all the rights and powers given railroads and other corporations by Chapters thirty-two and sixty-seven of the Consolidated Statutes of North Carolina of one thousand nine hundred and nineteen and acts amendatory thereof, provided the pipe lines of such companies transporting or conveying natural gas, gasoline, crude oil, or other fluid substances shall originate within this State. Nothing herein shall prohibit any such pipe line company granted the right of eminent domain under the laws of this State from extending its pipe lines from within this State into another state for the purpose of transporting natural gas into this State, nor to prohibit any such pipe line company from conveying or transporting natural gas, gasoline, crude oil, or other fluid substances from within this State into another state. All such pipe lines companies shall be deemed public service com-

panies and shall be subject to the laws of this State regulating such corporations.

Chapter 108 of the 1937 Session Laws amended C.S. 1706 [now G.S. 40-2] of the chapter Eminent Domain by adding the underscored words in the following portion of the statute:

> § 1706. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipe lines originating in North Carolina for the transportation of petroleum products, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:
>
> 1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipe lines originating in North Carolina for the transportation of petroleum products, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

These statutes overlap to a certain degree. The right of eminent domain was conferred upon pipeline companies by C.S. 3542(d), and the existence of that right was recognized in C.S. 1706. In both statutes, the right was limited to pipelines originating in North Carolina. There are, however, distinctions between the two. The right of eminent domain conferred by C.S. 3542(d) is limited to pipeline companies "incorporated under the laws of the State of North Carolina," whereas no such limitation appears in C.S. 1706. On the other hand, C.S. 3542(d) contains a broader grant of rights and powers than does C.S. 1706. Both statutes allow pipeline companies to exercise the right of eminent domain under the provisions of the chapter, Eminent Domain. In addition, C.S. 3542(d) provides that a pipeline company "for the purpose of constructing and maintaining its pipelines and other works shall have all the rights and powers given railroads and other corporations by chapters thirty-two [Electric, Telegraph and Power Companies] and sixty-seven [Railroads and Other Carriers] of the Consolidated Statutes of North Carolina . . . ."

In 1943, C.S. 3542(d) was renumbered G.S. 60-146 and C.S. 1706, G.S. 40-2. With respect to petroleum pipelines, the provisions of G.S. 40-2 have remained unchanged.

Such has not been the case, however, with regard to G.S. 60-146. That statute was amended in 1951 to extend the right of eminent domain to "foreign corporations domesticated under the laws of North Carolina . . . ." Although the right was extended to domesticated foreign corporations, it remained limited to pipelines originating in North Carolina. The most significant amendment, for purposes of this appeal, was enacted in 1963. Chapters 56 (Electric, Telegraph and Power Companies), 60 (Railroads and Other Carriers) and 62 (Utilities Commission) were amended, revised, recodified and rewritten as Chapter 62 (Public Utilities). G.S. 60-146 was renumbered G.S. 62-190 and amended, by omitting the language requiring the pipelines to originate in this State, to read in its present form:

> § 62-190. Right of eminent domain conferred upon pipeline companies; other rights.—Any pipeline company transporting or conveying natural gas, gasoline, crude oil, coal in suspension, or other fluid substances by pipeline for the public for compensation, and incorporated under the laws of the State, or foreign corporations domesticated under the laws of North Carolina, may exercise the right of eminent domain under the provisions of the Chapter, Eminent Domain, and for the purpose of constructing and maintaining its pipelines and other works shall have all the rights and powers given railroads and other corporations by this Chapter and acts amendatory thereof. Nothing herein shall prohibit any such pipeline company granted the right of eminent domain under the laws of this State from extending its pipelines from within this State into another state for the purpose of transporting natural gas or coal in suspension into this State, nor to prohibit any such pipeline company from conveying or transporting natural gas, gasoline, crude oil, coal in suspension, or other fluid substances from within this State into another state. All such pipeline companies shall be deemed public utilities and shall be subject to regulation under the provisions of this Chapter.

The language of the statute appears to confer the right of eminent domain upon *any* pipeline company incorporated or do-

mesticated under the laws of North Carolina. The statute does not by its terms limit the right to companies whose pipelines originate in North Carolina.

Appellant contends, however, that the right of eminent domain conferred upon pipeline companies by G.S. 62-190 is limited by the substantive provisions contained in Chapter 40, Eminent Domain, due to the reference in G.S. 62-190 to that chapter. Appellant, therefore, argues that by virtue of G.S. 40-2, only those companies whose pipelines originate in North Carolina have the right of eminent domain. Application of the pertinent rules of statutory construction leads us to a different conclusion.

It is well settled that the intent of the Legislature controls the interpretation of a statute. *Underwood v. Howland*, 274 N.C. 473, 164 S.E. 2d 2 (1968). A logical starting point in attempting to ascertain the legislative intent is with the title of the statute. Justice Clark (later Chief Justice), speaking for the Court, in *State v. Woolard*, 119 N.C. 779, 25 S.E. 719 (1896), stated:

> . . . [T]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently a legislative declaration of the tenor and object of the act. . . . Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered.

Accord: *Sykes v. Clayton*, 274 N.C. 398, 163 S.E. 2d 775 (1968), and cases cited therein.

G.S. 62-190 is entitled "Right of eminent domain conferred upon pipeline companies; other rights." It logically follows that the Legislature did not intend for pipeline companies to be dependent upon G.S. 40-2 for a right which is clearly conferred by G.S. 62-190.

Neither does it appear that the Legislature intended pipeline companies to be limited by G.S. 40-2. Legislative intent may be found from the language of the act, its legislative history, and circumstances surrounding its adoption. *Milk Commission v. National Food Stores, Inc.*, 270 N.C. 323, 154 S.E. 2d 548 (1967). The history of G.S. 62-190 indicates a legislative intent to broaden the scope of the act and to encompass interstate as well as local pipe-

line companies. In its original form, G.S. 62-190 conferred the right of eminent domain only upon pipeline companies incorporated under the laws of North Carolina, provided their pipelines originated in this State. In 1951, the right was extended to foreign corporations domesticated under the laws of North Carolina. The limitation of the right to those companies whose pipelines originate in North Carolina was dropped in 1963. In construing a statute with reference to an amendment, it is presumed that the Legislature intended either (1) to change the substance of the original act or (2) to clarify the meaning of it. *Childers v. Parker's, Inc.*, 274 N.C. 256, 162 S.E. 2d 481 (1968). Prior to the 1963 amendment, no clarification was necessary because G.S. 40-2 and G.S. 62-190 both limited the right of eminent domain to pipelines originating in North Carolina. It is presumed then, that in amending G.S. 62-190 in 1963, the intent of the Legislature was to change the substance of the act by removing the limitation contained therein.

Since G.S. 62-190 contains no procedural provisions, it is reasonable to assume that the reference to Chapter 40, Eminent Domain, is to the procedural provisions of that chapter. Even if that reference is to both the procedural and substantive provisions of Chapter 40, however, we do not believe that the language "pipelines originating in North Carolina" in G.S. 40-2 imposes a limitation on G.S. 62-190. Where one statute deals with a subject in general terms and another statute deals with a part of the same subject in detail, the specific statute will be construed as controlling, unless it appears that the Legislature intended to make the general act controlling. This is especially so when the specific act is later in point of time. *National Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 151 S.E. 2d 582 (1966). G.S. 40-2 merely states for what purposes and by whom the right of eminent domain may be exercised under the provisions of Chapter 40. In 1937, "pipelines originating in North Carolina" was added to the list, and the pertinent provisions relative thereto have remained unchanged since that time. G.S. 62-190 was enacted in the same year. It conferred upon pipeline companies incorporated under the laws of North Carolina with pipelines originating in the State the right of eminent domain. It provided that such companies could exercise the right under the provisions of the chapter, Eminent Domain. It also conferred upon the com-

panies for the purpose of constructing and maintaining pipelines, all the rights and powers given to railroads, and electric, telegraph and power companies. From these and other provisions of G.S. 62-190, it is readily apparent that, in the context of eminent domain, this statute deals with pipelines in a detailed and specific manner while G.S. 40-2 deals with the subject in only a general way. G.S. 62-190 should thus be construed to be the controlling statute, especially since it became effective in its present form at a later point in time than G.S. 40-2.

For the reasons stated, we hold that G.S. 62-190 clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of North Carolina, regardless of whether their pipelines originate in North Carolina. Therefore, the trial court correctly denied appellant's motions for preliminary injunction and to dismiss. The order entered by Judge Albright on 13 July 1978 is

Affirmed.

UNITED BUYING GROUP, INC. v. LAWRENCE H. COLEMAN AND MORTON COLEMAN

No. 98

(Filed 5 February 1979)

1. **Process § 9— nonresident defendants—notes guaranteeing account indebtedness—personal jurisdiction—statutory authority**

G.S. 1-75.4(5)a provided statutory authority for the exercise of personal jurisdiction by the courts of this State over nonresident defendants in an action to recover on promissory notes executed by defendants securing the account indebtedness of a Virginia shoe company to plaintiff buying group, a North Carolina corporation, since the promissory notes were in effect promises to pay for services to be performed in this State by plaintiff, namely the acquisition from manufacturers of shoes for the Virginia company's retail stores.

2. **Constitutional Law § 24.7; Process § 9.1— personal jurisdiction over nonresident—minimum contacts—invoking benefit of laws of forum state**

In the absence of some act by which a nonresident defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws, there can be no contact with the forum state sufficient to justify personal jurisdiction over the defendant.

3. Constitutional Law § 24.7; Process § 9.1— nonresident individual—minimum contacts—consideration of corporate acts

Where a nonresident defendant is a principal shareholder of a corporation and conducts business in North Carolina as principal agent for the corporation, his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him.

4. Constitutional Law § 24.7; Process § 9.1— note guaranteeing account—Virginia resident—personal jurisdiction—sufficient minimum contacts

In an action to recover on promissory notes executed by nonresident defendants guaranteeing the account indebtedness of a Virginia shoe company for merchandise received from plaintiff buying group, a North Carolina corporation, the defendant who was a resident of Virginia had sufficient contacts with North Carolina so that the courts of this State could assert personal jurisdiction over him where he was the president and primary shareholder of the Virginia shoe company and was also a shareholder of plaintiff buying group; the Virginia company ordered substantial quantities of footwear from plaintiff; defendant had attended trade shows in North Carolina for the purpose of selecting shoes to be purchased by the Virginia company; defendant's numerous contacts with plaintiff were aimed at securing plaintiff as a regular supplier of merchandise for his shoe stores; and defendant had access to the courts of this State to enforce the rights growing out of the numerous transactions between himself and plaintiff, including his rights accruing from plaintiff's obligation to supply shoes ordered by defendant, from ownership of stock in plaintiff, and from a security deposit left with plaintiff.

5. Constitutional Law § 24.7; Process § 9.1— note guaranteeing account—New York resident—personal jurisdiction—insufficient minimum contacts

In an action to recover on promissory notes executed by nonresident defendants guaranteeing the account indebtedness of a Virginia shoe company for merchandise received from plaintiff buying group, a North Carolina corporation, the defendant who was a resident of New York did not have sufficient contacts with North Carolina to permit the courts of this State to assert personal jurisdiction over him where such defendant was a medical doctor; his only contact with North Carolina was the promissory note he signed in New York which was payable to plaintiff in North Carolina; he owned no shares or interest in the Virginia shoe company or in plaintiff; and the only conceivable benefit to him in signing the note was the personal satisfaction of helping his brother, who was the primary shareholder of the Virginia shoe company.

6. Constitutional Law § 24.7; Process § 9.1— minimum contacts—no per se rule

The presence of minimum contacts is not to be determined by automatic application of per se rules; rather, the existence of minimum contacts depends upon the particular facts of each case.

7. Constitutional Law § 24.7; Process § 9.1— nonresident's guaranty of debt owed N.C. corporation—minimum contacts

A nonresident's mere act of signing a guaranty or endorsement of a debt owed to a North Carolina creditor does not per se constitute a sufficient contact upon which to base *in personam* jurisdiction over the nonresident. Rather,

the circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of the nonresident's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation.

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

ON petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 26, 245 S.E. 2d 402 (1978), affirming in part, reversing in part judgment of *Griffin, J.*, entered 24 May 1977 in MECKLENBURG Superior Court.

Plaintiff United Buying Group, Inc. (hereafter Buying Group) is a North Carolina corporation. Defendant Lawrence H. Coleman is a resident of Virginia. Defendant Morton Coleman, Lawrence Coleman's brother, is a medical doctor and resident of New York. Lawrence Coleman was the primary shareholder and president of Coleman Shoe Company (hereafter Coleman's), a Virginia corporation that is now insolvent. Lawrence Coleman also owned stock in plaintiff Buying Group.

In 1975 and 1976 Coleman's placed orders for shoes with Buying Group. To secure Coleman's account indebtedness with Buying Group, Lawrence and Morton Coleman individually signed separate "conditional promissory notes" which guaranteed payment to Buying Group for merchandise ordered on behalf of Coleman's. Lawrence Coleman guaranteed payment up to $36,718.75. Morton Coleman guaranteed payment up to $25,000.00.

This is an action by Buying Group to collect $14,609.24 plus interest, costs and attorney fees due under the terms of the conditional promissory note signed by each defendant. Defendants appeared by counsel and pursuant to Rule 12 of the North Carolina Rules of Civil Procedure filed a motion to dismiss for lack of jurisdiction over the person of defendants and for insufficiency of service of process. In this appeal we are concerned only with the contention that the trial court lacked personal jurisdiction over defendants.

After considering affidavits and exhibits the trial court made findings of fact and concluded that the State of North Carolina could exercise personal jurisdiction over Lawrence Coleman but not Morton Coleman. Accordingly, trial court denied Lawrence

Coleman's motion for dismissal and dismissed the case as to Morton Coleman.

On plaintiff's appeal the Court of Appeals held that personal jurisdiction could be exercised over both defendants. Both defendants appealed on constitutional grounds and, in the alternative, petitioned for discretionary review of the decision of the Court of Appeals. The petition was allowed by this Court.

Richard N. Weintraub, attorney for plaintiff appellee.

Fleming, Robinson, Bradshaw & Hinson, P.A., by Michael A. Almond, for defendant appellants.

HUSKINS, Justice.

[1] The sole question posed for decision is whether the trial court acquired in personam jurisdiction over defendants Lawrence H. Coleman and Morton Coleman pursuant to G.S. 1-75.4(5). To resolve this question we employ the two-step analysis suggested in *Dillon v. Funding Corp.*, 291 N.C. 674, 231 S.E. 2d 629 (1977). First, we determine whether G.S. 1-75.4(5) of our "long arm" statute confers jurisdiction upon the superior court, which concededly has subject matter jurisdiction, to entertain this action against defendants. If our "long arm" statute confers in personam jurisdiction over defendants we must next determine whether the exercise of such power by the courts of North Carolina over these defendants violates due process of law.

G.S. 1-75.4(5)a confers in personam jurisdiction upon the courts of this State over a person served, pursuant to Rule 4(j) of the Rules of Civil Procedure, with adequate process in any action which "[a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the Plaintiff."

The "conditional promissory notes" out of which this action arises are promises by Lawrence H. Coleman and Morton Coleman to pay for services to be performed in this State by Buying Group, plaintiff in this action. Buying Group is a North Carolina corporation which purchases footwear from manufacturers and sells said footwear to a group of member retail stores. Buying Group processes all orders from customers and performs most of its services in North Carolina. The notes signed by Lawrence and

Morton Coleman promise to pay, up to designated amounts, for any orders of merchandise placed by Coleman's, a member of Buying Group, for which Coleman's has failed to make payment. In effect, the Coleman brothers promised to pay for services, namely the acquisition of shoes from manufacturers, which Buying Group performed for one of its member retail stores, Coleman's. These facts bring this case squarely within the scope of the quoted statute and thus confer upon the superior court in personam jurisdiction over Lawrence and Morton Coleman.

Defendants Lawrence and Morton Coleman, however, are not residents of this State. Lawrence Coleman resides in Virginia and Morton Coleman resides in New York. Accordingly, we proceed to determine whether the assertion of in personam jurisdiction in this action offends due process of law in violation of the Fourteenth Amendment.

The limitations imposed by the Due Process Clause upon the assertion of in personam jurisdiction by state courts were recently discussed by the United States Supreme Court in *Kulko v. California Superior Court*, 436 U.S. 84, 56 L.Ed. 2d 132, 98 S.Ct. 1690 (1978):

> "The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants. It has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant. The existence of personal jurisdiction, in turn, depends upon the presence of reasonable notice to the defendant that an action has been brought, and a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum." (Citations omitted.)

Defendants do not dispute the adequacy of the notice they received; rather, they contend that their connection with the State of North Carolina "is too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon [them] the burden and inconvenience of defense in [North Carolina]." *Kulko v. California Superior Court, supra.*

[2] The constitutional standard to be applied in determining whether a State may assert personal jurisdiction over a nonresident defendant is found in the landmark case of *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 (1945): "[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment in personam, . . . he have certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" We noted in *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E. 2d 676 (1974), that the "minimum contacts" standard delineated in *International Shoe* did not mean that all due process restrictions on the personal jurisdiction of state courts had been removed. In *Chadbourn*, quoting from *Hanson v. Denckla*, 357 U.S. 235, 2 L.Ed. 2d 1283, 78 S.Ct. 1228 (1958), we stressed that while application of the minimum contacts standard "will vary 'with the quality and nature of defendant's activity, . . . it is essential in each case that there be some act by which defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws.'" Absent such purposeful activity by defendant in the forum State, there can be no contact with the forum State sufficient to justify personal jurisdiction over defendant. *Accord, Hanson v. Denckla, supra*; *Chadbourn, Inc. v. Katz, supra.*

We now turn to application of the minimum contacts standard to the facts of this case.

[3] At the outset we must determine whether Lawrence Coleman's corporate acts as president of Coleman's can be imputed to him for the *sole* purpose of determining whether he had sufficient contacts with North Carolina. We hold that where, as in this case, defendant is a principal shareholder of the corporation and conducts business in North Carolina as principal agent for the corporation, then his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. *See generally, Costin v. Olen*, 449 F. 2d 129 (5th Cir. 1971); *Odell v. Signer*, 169 So. 2d 851 (Fla. App. 1964).

[4] Does Lawrence H. Coleman have sufficient contact with North Carolina such that it is reasonable and fair to require him

to defend in this State against the action brought on the personal guaranty he gave to Buying Group? An examination of the record leads us to conclude that he does.

The conditional promissory note signed by Lawrence Coleman guarantees the account indebtedness of Coleman's for merchandise ordered or received from Buying Group up to $36,718.75. Lawrence Coleman was the president and primary shareholder of Coleman's. Lawrence Coleman was a shareholder in Buying Group. Coleman's made a $2000 security deposit with Buying Group to secure its account indebtedness. During 1975 and 1976 Coleman's ordered substantial quantities of footwear from Buying Group. Lawrence Coleman has attended trade shows in North Carolina for the purpose of selecting shoes to be purchased by Coleman's.

It is evident from these facts that the contacts between nonresident Lawrence Coleman and resident Buying Group were not casual or fortuitous. Lawrence Coleman's numerous contacts with Buying Group, as primary owner and president of Coleman's and as individual guarantor, were aimed at securing Buying Group as a regular supplier of merchandise for his shoe stores. In the process of establishing this continuing relationship with Buying Group, Lawrence Coleman purposefully invoked the benefits and protection of the laws of North Carolina. Lawrence Coleman had access to the courts of this State to enforce the rights growing out of the numerous transactions between himself and Buying Group. For example, the rights accruing to Lawrence Coleman from Buying Group's obligation to supply shoes ordered by Coleman, from ownership of stock in Buying Group, from the security deposit left with Buying Group were all enforceable in this State.

Viewed in this context it is apparent that the "conditional promissory note" signed by Lawrence Coleman was but one of numerous contacts in the ongoing relationship between Lawrence Coleman and Buying Group. Under these circumstances the assumption of in personam jurisdiction over Lawrence Coleman by the courts of this State does not offend traditional notions of fair play and substantial justice within the contemplation of the Due Process Clause of the Fourteenth Amendment.

[5] Does Morton Coleman have sufficient contacts with North Carolina such that it is reasonable and fair to require him to de-

fend in this State against the action brought on the conditional promissory note he gave to Buying Group? An examination of the record leads us to conclude that he does not.

Morton Coleman's only contact with this State was the conditional promissory note he signed in New York which was payable to plaintiff in North Carolina. Morton Coleman is a medical doctor residing in New York. At the time he signed the note Morton Coleman owned no shares of stock or any interest whatsoever in Coleman's or Buying Group. Under these circumstances we fail to see how Dr. Coleman purposefully availed himself of the benefits and protection of North Carolina's laws.

By agreeing to guarantee Coleman's account indebtedness with Buying Group, Dr. Coleman incurred a potential liability to a North Carolina corporation with no attending commercial benefits to himself enforceable in the courts of North Carolina. The only conceivable benefit accruing to Dr. Coleman as a result of signing the note was the personal satisfaction of helping his brother Lawrence. Needless to say, such a benefit, while substantial, does not give rise to legal rights enforceable in the courts of North Carolina. The attainment of such personal gratification can hardly be said to constitute a purposeful invocation of the benefits and protection of North Carolina's laws under the minimum contacts standard articulated in *International Shoe* and its progeny.

Viewed in this context it is apparent that the "conditional promissory note" signed by Dr. Coleman constitutes an isolated, fortuitous contact with Buying Group, a North Carolina corporation that his brother Lawrence happened to be doing business with. Accordingly, we conclude that assumption of in personam jurisdiction over Morton Coleman by the courts of North Carolina would violate due process of law.

[6] The Court of Appeals relied exclusively on the following language from *Trust Co. v. McDaniel*, 18 N.C. App. 644, 197 S.E. 2d 556 (1973), in concluding that in personam jurisdiction could be asserted over both Morton and Lawrence Coleman consistent with due process of law:

> "Where the nonresident defendant promises to pay the debt of another, which debt is owed to North Carolina creditors, such promise is a contract to be performed in

> North Carolina and is sufficient minimal contact upon which this State may assert personal jurisdiction over defendant."

We hold that reliance on the quoted language is misplaced. The presence of minimum contacts is not to be determined by automatic application of per se rules such as the one adopted in *McDaniel*; rather, the existence of minimum contacts depends upon the particular facts of each case. *Chadbourn, Inc. v. Katz, supra. Accord, Farmer v. Ferris*, 260 N.C. 619, 133 S.E. 2d 492 (1963). The impropriety of utilizing per se rules to determine whether minimum contacts are present in a given situation was recently discussed by the United States Supreme Court in *Kulko v. California Superior Court, supra*:

> "Like any standard that requires a determination of 'reasonableness' the 'minimum contacts' test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite 'affiliating circumstances' are present. . . . [T]his determination is one in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' " (Citations omitted.)

Accord, Shaffer v. Heitner, 433 U.S. 186, 53 L.Ed. 2d 683, 97 S.Ct. 2569 (1977); *International Shoe Co. v. Washington, supra.*

[7] The rule adopted in *McDaniel v. Trust Co., supra*, that a guaranty or endorsement by a nonresident of a debt owed to a North Carolina creditor per se constitutes a sufficient minimal contact upon which this State may assert personal jurisdiction over defendant is rejected as contrary to the minimum contacts rule developed by *International Shoe* and its progeny. The mere *act* of signing such a guaranty or endorsement does not in and of itself constitute a sufficient contact upon which to base in personam jurisdiction over a nonresident. Rather, the circumstances surrounding the signing of such obligation must be closely examined in each case to determine whether the quality and nature of defendant's contacts with North Carolina justify the assertion of personal jurisdiction over him in an action on the obligation.

For the reasons stated the judgment of the trial court must be reinstated. To that end the result reached by the Court of Appeals is

Affirmed as to Lawrence Coleman;

Reversed as to Morton Coleman.

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

STATE OF NORTH CAROLINA v. BOBBY DEAN SCOTT

No. 37

(Filed 5 February 1979)

Homicide § 21.5; Criminal Law § 60.5 — first degree murder — fingerprint — time of impression — insufficiency of evidence

In a prosecution for attempted robbery and first degree murder, evidence was insufficient to be submitted to the jury where the only evidence tending to show that defendant was ever in the home of deceased, the scene of the murder, was a thumbprint found on a metal box in the den on the day of the murder; but testimony by deceased's niece who lived in the same house that she had never seen defendant in the house and that only family members handled the metal box did not constitute substantial evidence that defendant's thumbprint could only have been imprinted on the box during the course of the attempted robbery which culminated in deceased's death, since the niece testified that she worked in a nearby city five days of the week and did not have an opportunity to observe during the week who came to the house on business or to visit with her uncle.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant under G.S. 7A-27(a) from *Lupton, J.*, at the January 1978 Session of the Superior Court of CABARRUS.

Upon indictments, proper in form, defendant was convicted of the attempted armed robbery and first degree murder of Clyde Goodnight on 7 May 1970. He appeals from a sentence of life imprisonment imposed upon his conviction of first degree murder.

Defendant offered no evidence. Evidence for the State tended to show the following facts:

About 6:00 p.m. on 7 May 1970, Isabelle Goodnight found the body of her uncle, Clyde Goodnight, a 72-year-old farmer, in the

living room of his two-story home in the Odell community of Cabarrus County. Prior to his death Clyde Goodnight lived there with his brother, W. O. Goodnight, and his brother's daughter, Isabelle. Both W. O. Goodnight and his daughter worked in Charlotte during the day. W. O. Goodnight (who died prior to the trial of this case) had been employed there for a number of years. Isabelle had been working in Charlotte five days a week for about a year at the time of her uncle's death. In consequence she did not ordinarily see him between 7:00 in the morning and 6:00 at night. The deceased, Clyde Goodnight, raised livestock and worked only on the farm.

Isabelle Goodnight testified that on 7 May 1970, when she left for work at 7:00 a.m., her uncle was alive and in good health. When she returned home about 6:00 p.m. she entered the house at the rear through an enclosed porch, used as a den, the door and windows of which were usually left unlocked. Her father, who had preceded her, was sitting in a reclining chair in the den. After speaking to him, Isabelle left the den and walked through the back of the hall into her downstairs bedroom. There she saw that drawers had been pulled out and their contents dumped on the floor. She then opened the door which connected her bedroom with the living room on the front of the house.

Upon entering the living room Isabelle saw her uncle lying, face down, with his head in a pool of congealed blood. His hands and feet had been tied with adhesive tape. Hearing her father coming through the house behind her, she turned to prevent him from seeing the body. She "told him that Clyde was on the living room floor" and they "needed help." They returned to the den and telephoned the Sheriff's Department. Law enforcement officers arrived at the house around 6:15 p.m.

In the opinion of the medical examiners Clyde Goodnight had been dead at least two or three hours. His death was caused by a bullet which had entered his head behind his left ear and cut a ragged path through his brain. Powder burns indicated that the lethal weapon had been fired only six to eight inches from the deceased's head.

Although most of the house had been ransacked—drawers pulled out and items strewn on the floor—the only property missing was the deceased's pocket watch and the money from his wal-

let. The only evidence in the record which connects defendant with the murder is a partial right thumbprint, State's Exhibit 16 (S-16), which was found on a small metal box on top of the desk in the den. This box, which contained insurance papers, old deeds, and odds and ends, was kept in a closed, but unlocked, filing cabinet in the den. Only "immediate family members" used the box and they went into it about once every three months. The thumbprint from this box was lifted on 8 May 1970 by Jack B. Richardson, Special Agent with the State Bureau of Investigation.

Special Agent Steven R. Jones, who qualified as an expert in fingerprint identification and comparisons, testified that, in his opinion, the thumbprint found on the metal box matched the thumbprint of the defendant; that he had compared the thumbprint (S-16) with a set of rolled ink impressions (S-15) obtained from the defendant at the time of his arrest; and that he had "an opinion fully and entirely satisfactory to himself" that the same thumb which made the print on the rolled ink impressions made the latent print on the metal box (S-16). Special Agent Jones also testified that the length of time a latent print would stay on a metal object like the box found on the desk in the den would vary depending upon conditions, but that a print "could stay there for a period of weeks."

Except for the four-year period, 1944-1948, Isabelle Goodnight had lived in the house where her uncle was killed all of her life. She testified that defendant was "a total stranger" to her; that in May of 1970 she did not know the defendant, had never seen him; and that to her knowledge he had never visited the house. When she left for work on May 7th, she had noticed that the filing cabinet doors were closed. When she returned home she observed that the doors were open and the box was on the desk. From the beginning she was careful "not to disturb anything in the house" and not to "change the condition of anything" until the officers had completed their investigation.

At the conclusion of the State's evidence defendant also rested and moved that the charges against him be dismissed by a judgment as of nonsuit. The court denied this motion. In due course, thereafter, the case was submitted to the jury, which found defendant guilty of attempted armed robbery and first degree murder. Because the attempted armed robbery had been

used to prove an essential element of the charge of the first degree murder of which defendant was convicted, G.S. 14-17 (1969), the court arrested judgment upon the robbery charge. *State v. McZorn*, 288 N.C. 417, 436, 219 S.E. 2d 201, 213 (1975). Upon his conviction of first degree murder the trial court imposed upon defendant the mandatory sentence of life imprisonment, *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d (1973), and defendant appealed to the Supreme Court as a matter of right.

Attorney General Rufus L. Edmisten and Assistant Attorney General Isham B. Hudson, Jr., for the State.

Clarence E. Horton, Jr., for defendant.

SHARP, Chief Justice.

The decisive question on this appeal is whether the trial court erred in overruling defendant's motion for judgment as of nonsuit. Such a motion requires the Court to consider all the evidence in the light most favorable to the State and to give the State the benefit of every reasonable inference to be drawn from it. In this case the State relied solely upon circumstantial evidence. However, if there is substantial evidence to support a finding that the offense charged has been committed and that defendant committed it, the motion to nonsuit should be denied whether the evidence be direct, circumstantial or both. *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

The only evidence tending to show that defendant was ever in the home of Clyde Goodnight is a thumbprint found on a metal box in the den on the day of the murder. The determinative question, therefore, is whether the State offered substantial evidence that the thumbprint could only have been placed on the box at the time of the homicide.

This Court has considered the sufficiency of fingerprint evidence to withstand a motion to nonsuit in a number of cases. *See, e.g., State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977); *State v. Miller*, 289 N.C. 1, 220 S.E. 2d 572 (1975); *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. Reid*, 230 N.C. 561, 53 S.E. 2d 849, *cert. denied*, 338 U.S. 876

(1949); *State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948). As Justice Huskins succinctly stated in *State v. Miller*, 289 N.C. at 4, 220 S.E. 2d at 574:

"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)."

Circumstantial evidence that the fingerprint could only have been impressed at the time the crime was committed comes in several different forms. *See* Annot., 28 A.L.R. 2d 1115, 1154-57 (1953). The form of the evidence is immaterial so long as it substantially demonstrates that the fingerprint could have been placed at the scene only at the time the crime was committed. In a number of cases the evidence has consisted in part of denials by the defendant that he was ever on the premises where the crime occurred. *E.g.*, *State v. Miller*, supra; *State v. Foster*, supra. In others the occupant of the premises, who might reasonably be expected to have seen the defendant had he ever been there lawfully, has been able to testify that he had never given the defendant permission to come on the premises or seen him there before the commission of the crime. This kind of evidence is particularly convincing when the scene of the crime is a private residence not accessible to the general public. *E.g.*, *State v. Jackson*, supra; *State v. Foster*, supra; *State v. Tew*, supra; *State v. Reid*, supra. In other cases the circumstantial evidence has consisted of an identification of the defendant, *State v. Jackson*, supra; the discovery of the fruits of the crime in his possession, *State v. Irick*, supra; and the establishment of a link between the defendant and the tools used in the commission of the crime, *State v. Reid*, supra; *State v. Huffman*, 209 N.C. 10, 182 S.E. 705 (1935).

When a defendant takes the stand and denies that he was ever at the scene of the crime, his inability to offer a plausible explanation of the presence of his fingerprints is some evidence of guilt. Coupled with the appearance of his fingerprints at the scene, it may be enough to send the case to the jury. *See, e.g., State v. Miller*, supra. In the present case defendant did not testify and offered no evidence. The Court is not permitted to infer from defendant's silence that his fingerprint could only have been impressed upon the box during the commission of the crime. "Neither the court nor the jury may draw any inference from the election by the defendant not to offer evidence in his own behalf." *State v. Cutler*, 271 N.C. 379, 384, 156 S.E. 2d 679, 682 (1967).

The only evidence in this case to prove when the fingerprint could have been impressed was the testimony of Isabelle Goodnight, the niece of the deceased. She testified that she had lived at her uncle's house continuously since 1948, that to her knowledge the defendant had never visited the house, and that during a twenty-year period she had never seen anyone but family members handle the metal box on which the defendant's fingerprint was discovered. However, Miss Goodnight also testified that in the year preceding her uncle's death she worked in Charlotte on weekdays, and on these days—as on the day of the murder—she normally did not see her uncle from very early in the morning until five or six o'clock at night. Thus, during the week, she had no opportunity to observe who came to the house on business or to visit with her uncle.

The case, therefore, comes to this: Does Miss Goodnight's testimony constitute "substantial evidence" that defendant's thumbprint could only have been imprinted on the box during the course of an attempted robbery which culminated in Clyde Goodnight's death?

Statements by the occupant of the locus in quo tending to show that the defendant had never been seen on the premises where the crime occurred have played an important role in a number of cases. For example, in *State v. Jackson*, supra, the defendant was convicted of rape and nonfelonious breaking and entering. The State's evidence tended to show that the prosecutrix was awakened in her upstairs apartment by a man who held a pair of shears at her throat, demanded money, and then

raped her. The defendant's fingerprint was discovered on a window sash inside the house. The victim, who was unable to identify the defendant by sight, identified him positively by the sound of his voice. She also testified that she had never seen the defendant before the morning of the assault. The Court held this evidence sufficient to take the case to the jury.

In *State v. Foster*, supra, the defendant's latent prints were found on a flower pot which had been moved during the burglary of a suburban home. The owners testified that they did not know the defendant and had never given him permission to enter their house. Defendant testified that he had not been in the house on the night of the burglary or at any other time. This evidence was held sufficient to withstand a motion for nonsuit.

On its facts, *State v. Tew*, supra, is probably the closest case to this one. The defendant Tew, who did not testify, was convicted of breaking and entering and larceny after his fingerprints were found on a piece of broken glass which had been removed from the front door of a service station during a robbery. The only other evidence for the State was the proprietor's testimony that she personally attended the station and had never before seen the defendant. The court held this evidence sufficient to go to the jury.

Each of the foregoing cases can be distinguished from the case at hand. In both *Jackson* and *Foster* the prosecuting witnesses were in a position to have personal knowledge of all persons visiting the premises and in both cases there was some additional evidence of guilt. In *Jackson*, the victim was able to identify the defendant as her assailant. Identification testimony is highly persuasive and would have been enough by itself to take the case to the jury. In *Foster* the defendant denied robbing the house but testified that he had no explanation of how his fingerprints came to be on the flower pot.

In *State v. Tew*, the only evidence linking the defendant's fingerprint to the offense charged was the prosecuting witness's testimony that she had never seen the defendant on the premises before the day of the robbery. A crucial distinction exists, however, between the facts in *Tew* and those now before this Court. In *State v. Tew* the proprietor personally attended the service station and was in a position to testify of her own knowl-

edge that the defendant had never visited the station. The weight to be given this testimony was a matter for the jury. Isabelle Goodnight, on the other hand, worked during the day and was unable to testify from personal knowledge as to who visited her uncle during her absence. In the absence of additional evidence, it is not unreasonable to infer that the defendant's fingerprint might have been impressed on the box at some time prior to the homicide. In short, the evidence presented by the State does not substantially exclude the possibility that the defendant might have visited the house for some lawful or unlawful purpose in the weeks preceding the murder.

Clyde Goodnight, who had apparently retired from active farming, still raised hogs and, "once in a while," a calf. The porch where the fingerprint was found, and which served as the family's business office, was located at the rear of the house. The State's expert witness testified that the thumbprint might have been placed on the box several weeks before the homicide. It is apparent, therefore, that during that period defendant could have either entered the porch unlawfully without the occupant's knowledge or lawfully to transact business with the deceased. Isabelle Goodnight, as she freely conceded, was simply not in a position to know who came into the house "during the five week days."

In the light of all these facts, we are constrained to hold that the evidence was insufficient to withstand a motion to dismiss. The burden is not upon the defendant to explain the presence of his fingerprint but upon the State to prove his guilt. As we observed upon a similar occasion in *State v. Cutler*, 271 N.C. 379, 383, 156 S.E. 2d 679, 682 (1967): We reach the conclusion that the evidence introduced in the present case "is sufficient to raise a strong suspicion of the defendant's guilt[1] but not sufficient to remove that issue from the realm of suspicion and conjecture." *See also State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971); *State v. Smith*, 274 N.C. 159, 161 S.E. 2d 449 (1968); *State v. Minton*, 228 N.C. 518, 46 S.E. 2d 296 (1948).

1. For circumstances which enhance the suspicion that defendant in this case was involved in the murder of Clyde Goodnight, see the preliminary statement of facts in the case of *State v. Vaughn*, 296 N.C. 167, --- S.E. 2d --- (1978). In that case this Court affirmed the defendant Vaughn's conviction of the murder of Clyde Goodnight.

Defendant's motion to dismiss is allowed and the case is remanded to the Superior Court of Cabarrus County for the entry of a judgment of nonsuit.

Reversed.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

ALEX HENSLEY, FATHER; CHRISTINE A. HENSLEY, MOTHER; ALEX HENSLEY, GUARDIAN AD LITEM FOR CYNTHIA GAYLE HENSLEY, SISTER, AND CHRISTOPHER DAVID HENSLEY, BROTHER OF DALE BRISCOE HENSLEY, DECEASED v. CASWELL ACTION COMMITTEE, INC., MARYLAND CASUALTY COMPANY

No. 15

(Filed 5 February 1979)

1. **Master and Servant § 55.5— workmen's compensation—death by drowning—accident arising out of and in the course of employment**

The death of a fourteen-year-old employee of a sanitary district by drowning while he was attempting to wade across a reservoir to complete his work of cutting weeds on the other side arose out of and in the course of his employment, although he had received general instructions at an earlier time not to go into the water, where the place at which he stepped into the water was shallow and the danger was not obvious, and decedent's actions were thus not so extreme as to break the causal connection between his employment and his death.

2. **Master and Servant § 94.4— scope of hearing for further testimony**

Where the Industrial Commission remanded a workmen's compensation case for the taking of further testimony as to average weekly wage, and the notice of hearing stated that the purpose of the further hearing was to take testimony "bearing on the question of the rate at which compensation shall be paid," the hearing commissioner on remand properly excluded evidence on the issue of compensability and properly limited the testimony to matters relating to wage rates.

3. **Master and Servant § 71.1— workmen's compensation—death of minor employee—computation of average weekly wage**

Under G.S. 97-2(5), compensation for the death of a minor employee must be based on the average weekly wage of adults employed in a similar class of work by the same employee to which decedent would probably have been promoted had he not been killed if such method can be used, and it is only when

such method cannot be used that compensation may be based upon a wage sufficient to yield the maximum weekly compensation benefit.

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

APPEAL by plaintiffs pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, reported at 35 N.C. App. 544, 241 S.E. 2d 852 (1978), reversing an award by the Industrial Commission.

Blackwell & Farmer, by R. Lee Farmer, Attorneys for plaintiff appellants.

Johnson, Patterson, Dilthy & Clay, by I. Edward Johnson, Attorneys for defendant appellees.

EXUM, Justice.

The deceased, a boy of 14 years, drowned in the Yanceyville Reservoir while on the job he was hired to do by defendant Caswell Action Committee, Inc., after being generally instructed by his supervisor not to go in the water. The Court of Appeals held that his death was not compensable. We reverse. We also conclude that the Deputy Commissioner who heard the case on remand from the Industrial Commission properly limited the hearing to testimony concerning wage rates. Finally we conclude the Industrial Commission erred in its determination of the average weekly wage to be used in computing benefits under G.S. 97-2(5), and we modify its award accordingly.

Decedent, Dale Briscoe Hensley, was employed by defendant Caswell Action Committee, Inc., in June of 1975. He was assigned to work for the Caswell Sanitation District under the supervision of Mr. Aaron Wilson. Decedent was 14 years old. Working with him were two other boys, James Alexander Long, age 15, and Robert A. Scott, age 17. Their tasks included cutting weeds on the banks of the Yanceyville Reservoir. Wilson had given them general instructions that while they were cutting the weeds they should not go into the water.

On 30 June 1975 the three boys had almost worked their way around the reservoir. About noon they noticed some growth they had missed on the other side. Decedent and Long, instead of walk-

ing the long way around the dam, waded toward the spot across the reservoir, wearing their work clothes and boots and carrying their tools. Scott refused to join them in wading across. Both decedent and Long stepped into a deep hole, apparently the creek bed that led out of the reservoir. Long was able to get back to safety, but decedent drowned.

Decedent's next of kin subsequently sought to recover against defendants under the Workmen's Compensation Act. The case first came to be heard on 19 January 1976 before Deputy Commissioner Roney, who found decedent's death to be compensable and set decedent's average weekly wage for the purpose of calculating benefits at $120. At defendants' request, the Indsutrial Commission remanded the case for the taking of further testimony. A second hearing was held before Deputy Commissioner Denson who also found decedent's death to be compensable but set the average weekly wage at $100. The Industrial Commission adopted her decision in all respects except for the average weekly wage, which it set at $120. The Court of Appeals reversed the award of the Industrial Commission, finding that decedent's death was not compensable.

[1] The first, and most important, issue before us is whether decedent's death was a result of an accident arising out of and in the course of employment. This is the basic inquiry which must be satisfied before recovery can be had for any injury under the Workmen's Compensation Act. *See* G.S. 97-2(6); "Workmen's Compensation Law," Survey of Developments in North Carolina Law, 1977, 56 N.C.L. Rev. 1166-68 (1978). An "accident" is "an unlooked for and untoward event which is not expected or designed by the injured employee." *Harding v. Thomas & Howard Co.*, 256 N.C. 427, 428, 124 S.E. 2d 109, 110-11 (1962). There can be no doubt that decedent's death by drowning was an "accident" in this sense. "The words 'in the course of the employment' . . . refer to the time, place and circumstances under which an accidental injury occurs; the phrase 'arising out of the employment' refers to the origin or cause of the accidental injury." *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350, 353 (1972). We have little difficulty holding that decedent's death occurred "in the course of the employment." Decedent at the time of his death was on the job and was engaged in the process of moving from one point to another on the work site to continue his task.

The more difficult question is whether decedent's death arose out of his employment. Defendants rely on several cases in which employees were denied recovery under the Workmen's Compensation Act because they disobeyed their employers' directives in such a fashion that the causal connection between employment and injury was broken. The Court of Appeals relied on this line of cases in reversing the Industrial Commission. We think these cases are distinguishable and hold that decedent's death did arise out of his employment.

In *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (per curiam), decedent was killed when he attempted to ride a conveyor belt from one floor to another instead of taking the stairs. He had done so before, been reprimanded by his supervisors and positively forbidden to do so again. Among the findings of the Industrial Commission was the following: "The employee Teague's attempt to ride the empty crate conveyor from the basement to the first floor was an attempt either for his own personal convenience or for the thrill of performing a hazardous feat; to do an obviously dangerous thing." *Id.* at 547, 196 S.E. at 875. On these facts this Court affirmed a ruling by the Industrial Commission that there was no causal connection between the employment and the injury.

In *Morrow v. Highway Commission*, 214 N.C. 835, 199 S.E. 265 (1938) (per curiam), decedent was engaged in painting a bridge over the Catawba River and dropped his paint brush in the river. "Something was said about going into the water to recover the brush, and the foreman told the deceased not to do so. In violation of this instruction deceased pulled off his clothing, went into the river for the purpose of recovering the paint brush, and was drowned." *Id.* at 835, 199 S.E. at 266. The Industrial Commission concluded that decedent's death did not arise out of his employment, and this Court affirmed.

In *Taylor v. Dixon*, 251 N.C. 304, 111 S.E. 2d 181 (1959), plaintiff sought to recover for injuries sustained to his leg when a tractor turned over on him. Defendants argued that he should not recover because his injuries did not arise out of his employment. The evidence showed that plaintiff was hired to run a power saw. There was testimony that when he got on the tractor he was told to get off and replied that "he was going to drive the damn trac-

tor that day." *Id.* at 304, 111 S.E. 2d at 182. When told he was going to hurt himself the way he was driving the tractor, he said "Old man, I will get down and whip your * * * if you don't hush up. I know what I am doing." *Id.* The Industrial Commission failed or refused to find facts in relation to the defense raised by this evidence. This Court remanded the case for reconsideration because of this procedural failing. As we read the decision, no opinion was expressed on the merits.

[1] Of the cases relied on by defendants, then, *Taylor* actually deals with procedural rather than substantive matters; *Teague* involved dangerous thrill-seeking completely unrelated to the employment; and *Morrow* involved the performance of an obviously dangerous act in the face of an immediate and specific order not to do that very act. While decedent's actions in this case had the same unfortunate result as the actions in *Teague* and *Morrow*, they were not so extreme as to break the causal connection between his employment and his death. Decedent was a 14 year old boy working without immediate adult supervision. He had received only general instructions at some undetermined earlier time not to go in the water. He was not engaged in thrill-seeking unrelated to his employment, nor was the danger obvious. The place where he and Long stepped in was shallow and they could see the bottom. He was proceeding from his work on one side of the reservoir to complete his work on the other side.

We think this case is more akin to *Hartley v. Prison Department*, 258 N.C. 287, 128 S.E. 2d 598 (1962). Plaintiff in *Hartley* was a prison guard. In the course of his duties he was going to relieve another guard in a tower. Instead of walking some 300 feet to a gate, he took a short cut by climbing over a fence, fell and was injured. The superintendent of the prison testifed that it was against the rules to climb over the fence, although there was testimony that employees had done so before. The Industrial Commission entered an award granting compensation, and this Court, in an opinion by Justice Higgins, affirmed. Justice Higgins' conclusion in the case fits almost perfectly with our conclusion here:

> "The essence of the story in this case may be told in few words: Usually the idea of a short cut is attractive. Sometimes it is dangerous. To follow [defendant's] contention

> would require us to hold that contributory negligence in this case is a complete defense. Our cases construing the [Workmen's Compensation] Act hold to the contrary." *Id.* at 291, 128 S.E. 2d at 601.

The Industrial Commisison was correct in deciding that decedent's death was a result of an accident arising out of and in the course of his employment.

[2] The next issue is whether Deputy Commissioner Denson improperly limited testimony before her to matters relating to wage rates. At the first hearing before Deputy Commissioner Roney defendants offered no evidence as to the average weekly wage because they mistakenly thought the matter was settled by a stipulation. They asked to be allowed to put in more evidence on this question, and the Industrial Commission remanded for that purpose. The notice of hearing issued by the Commission read as follows:

> "SUBJECT OF HEARING
>
> To take such testimony as either side desires to offer *bearing on the question of the rate at which compensation shall be paid* as provided under GS 97-2(5) in the event compensability is ultimately found herein." (Emphasis supplied.)

Defendants sought to introduce additional evidence on the issue of compensability. To receive such evidence was not the purpose of this hearing, and Deputy Commissioner Denson acted correctly in excluding it.

[3] The final issue is whether the Commission erred in setting the average weekly wage for purposes of determining compensation. It was stipulated that decedent made $40.10 per week. There was uncontradicted evidence that adults employed as decedent was employed could make up to $84 per week. The Industrial Commission set decedent's average weekly wage as follows:

> "Decedent's average weekly wage shall be calculated upon a wage sufficient to yield the maximum weekly compensation benefits which was $120.00 on the date of the accident. This will produce a compensation rate of $80.00 per week."

Computation of the average weekly wage of an injured minor employee is controlled by G.S. 97-2(5), which states:

"Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, *first*, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, *second*, upon a wage sufficient to yield the maximum weekly compensation benefit." (Emphasis supplied.)

We read this statute as establishing a clear order of preference. When the first method of compensation *can* be used, it *must* be used. There was uncontradicted evidence concerning the average weekly wage of adults employed in a similar class of work by the same employer to which decedent would probably have been promoted had he not been killed. That wage was $84 per week. Under G.S. 97-38, the award to decedent's next of kin should have been for 66⅔ percent of that wage, or $56, paid for 400 weeks from the date of decedent's death.

The decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Industrial Commission with directions to modify its award in accordance with this opinion.

Reversed and remanded.

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

BETTY B. ARNOLD v. MAX W. SHARPE AND COMMUNITY BANK OF CAROLINA

No. 103

(Filed 5 February)

1. Libel and Slander § 1.1 — three classes of libel

The three classes of libel are (1) publications obviously defamatory which are called libel *per se*, (2) publications susceptible of two interpretations one of which is defamatory and the other not, and (3) publications not obviously

defamatory but when considered with innuendo, colloquim, and explanatory circumstances become libelous, which are termed libels *per quod.*

2. Libel and Slander § 2— libel per se defined

Libel *per se* is the publication, expressed in writing or printing, or by signs and pictures which when considered alone without innuendo tends to subject one to ridicule, public hatred, contempt or disgrace, or tends to impeach one in his trade or profession.

3. Libel and Slander § 5.2— excerpt from memorandum about employee—no libel per se

A memorandum prepared by a bank vice president was not libelous *per se* where the alleged libel was a short excerpt from a document of about a page and a half which a bank employee furtively observed on the vice president's desk while he was away.

4. Libel and Slander § 6— memorandum about employee—no name mentioned—reading by another employee—no publication

Where a bank employee observed an allegedly libelous memorandum on the bank vice president's desk, there was no publication of libel to the bank employee since there was no evidence that the witness knew that the handwritten memorandum which she observed was referring to plaintiff.

5. Libel and Slander § 10.1— memorandum about employee—qualified privilege

Evidence was insufficient to support a finding of a publication of libel when a bank vice president forwarded a copy of a memorandum concerning plaintiff to the president of the bank and filed the original with the bank's personnel department, since the vice president was clearly acting under a qualified privilege in these instances; moreover, there was nothing in the record to show that the memorandum was libelous since neither the document itself nor a copy thereof was included in the record and there was no testimony before the jury as to what the typed memorandum contained.

Justice BROCK took no part in the consideration or decision of this case.

APPEAL pursuant to G.S. 7A-30(2) by defendants from decision of the Court of Appeals reported in 37 N.C. App. 506, reversing *Judge Walker's* judgment granting summary judgment in favor of defendants at 26 May 1977 Session of GUILFORD Superior Court.

Plaintiff instituted this action seeking compensatory and punitive damages for libel and blacklisting. There was no evidence offered to support the action alleging blacklisting.

Plaintiff testified that she was hired by defendant Bank as a switchboard operator in October, 1974. Mr. William Black was President of the Bank, and defendant Sharpe, a Vice President of

the Bank, was in charge of the Loan Department. Both plaintiff and defendant Sharpe worked on the lower floor of the Bank. After plaintiff had been employed by the Bank for a short time, she noticed that one of the employees was punching another employee's timecard, and she reported these irregularities to Mr. Sharpe, who told her that this was none of her business. Her relations with Mr. Sharpe had been very pleasant and continued to be so until 24 February 1975. On that date, she decided to talk to Mr. Black concerning the time clock irregularities and, thereupon, went to his office on the upper level of the Bank and advised him of these irregularities. Mr. Black told her that he would talk to Mr. Sharpe immediately. She returned to her work station, and shortly thereafter, Mary Jane Moore, who worked on the upper level of the Bank, came to the switchboard and advised her that Mr. Sharpe had gone to Mr. Black's office. Upon his return to the lower floor, Mr. Sharpe asked her to accompany him to the "coke" room. He appeared to be upset and told her that she had "gone over his head." She told Mr. Sharpe that she had gone to him twice, and he had done nothing. There was an exchange of words in which defendant Sharpe called her a divorcee and told her that he was going to dismiss her. She was then summoned to Mr. Black's office, and he told her that Mr. Sharpe was her supervisor. At about 1:00 o'clock, Mr. Sharpe asked her to accompany him to a conference room located on the upper level of the Bank building where he gave her a check representing two weeks severance pay. He stated that she had done a good job and that she was being discharged because she had "gone over his head." She, thereupon, gathered her personal belongings and left. She further testified that she was out of work for about eighteen months.

Mary Jane Moore testified that she was employed by the Bank during the month of February, 1975, and on one occasion, another employee mentioned to her a paper lying on Mr. Sharpe's desk. She left her place of work on the upper level of the Bank and went to Mr. Sharpe's desk. His desk was situated in a large open area in front of a credenza located against the wall. His chair was between the credenza and his desk, and there was no aisle behind the desk. Upon going to Mr. Sharpe's desk, the witness "glanced" at a handwritten document which was lying on the desk. Mr. Sharpe was not present, and she merely glanced at

the paper because she was uneasy about being there and she did not want to be caught reading materials on his desk. Ms. Moore said that the substance of what she read was, "She gossiped, and she could not get along well with employees, and she was a troublemaker." The witness testified that she did not recall that anyone was named in the document.

Defendant Sharpe testified that he prepared a handwritten document concerning the plaintiff on or about 24 February 1975. He stated, "When I wrote it, I modified it several times. I changed it, struck out, deleted and added to it. It was a document of a page and a half or so." Upon being shown plaintiff's Exhibit 1 for identification, he further testified "as to whether that is in substance the same memorandum as it was in the handwritten form, *in its final draft*, yes." [Emphasis added.] The witness further testified that the handwritten document was destroyed after he received the final typed copy and that a copy of the typed document was given to Mr. Black. The original of the typewritten copy was personally delivered to the Personnel Department for filing by the witness. He had no idea that employees would come to his desk and read papers located on it. Neither did he have any idea as to what stage his draft of the handwritten document was in when Mary Jane Moore looked at it.

The typewritten document, identified as plaintiff's Exhibit 1, was offered into evidence by the plaintiff, and defendants' objection to its admission was sustained. Plaintiff did not except to or assign as error the ruling sustaining defendants' objection.

At the close of plaintiff's evidence, defendants moved for a directed verdict pursuant to Rule 50(a), and the motion was allowed on the ground that plaintiff's evidence was not sufficient to carry the case to the jury.

Smith, Patterson, Follin, Curtis, James & Harkavy, by Norman B. Smith, Michael K. Curtis, and Melinda Lawrence, attorneys for plaintiff appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by William L. Stocks and Robert D. Albergotti, attorneys for defendant appellants.

BRANCH, Justice.

A motion for a directed verdict pursuant to Rule 50(a) presents the same question as did a motion for nonsuit prior to the adoption of the New Rules of Civil Procedure. The question is whether the evidence presented is sufficient to carry the case to the jury. *Kelly v. Harvester Co.*, 278 N.C. 153, 179 S.E. 2d 396 (1971). In passing on this motion, the trial judge must consider the evidence in the light most favorable to the non-movant, and conflicts in the evidence together with inferences which may be drawn from it must be resolved in favor of the non-movant. The motion may be granted only if the evidence is insufficient to justify a verdict for the non-movant as a matter of law. *Kelly v. Harvester Co., supra.*

[1] There are three classes of libel. They are: (1) publications obviously defamatory which are called libel *per se;* (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquim, and explanatory circumstances become libelous, which are termed libels *per quod.* In an action upon the second class, it is for the jury to determine whether, under the circumstances, the publication was defamatory and was so understood by those who saw it. In publications which are libelous *per quod,* the innuendo and special damages must be alleged and proved. *Flake v. News Co.*, 212 N.C. 780, 195 S.E. 55 (1938). Here we are not concerned with the second class since the language allegedly published was clear and unambiguous. Neither do we further consider libel *per quod* since plaintiff failed to prove special damages. We are, however, concerned with the question of whether there was a publication of a libel *per se* and, therefore, deem it necessary to further define that term.

[2] Libel *per se* is the publication, expressed in writing or printing, or by signs and pictures which when considered alone without innuendo tends to subject one to ridicule, public hatred, contempt or disgrace, or tends to impeach one in his trade or profession. It is not essential that the words involve an imputation of crime, moral turpitude or immoral conduct. *Kindley v. Privette,* 241 N.C. 140, 84 S.E. 2d 660 (1954); *Flake v. News Co., supra; Broadway v. Cope,* 208 N.C. 85, 179 S.E. 452 (1935). When a

publication is libelous *per se*, a prima facie presumption of malice and a conclusive presumption of legal injury arise entitling the victim to recover at least nominal damages without proof of special damages. *Stewart v. Check Corp.*, 279 N.C. 278, 182 S.E. 2d 410 (1971).

[3] The only evidence of libel offered by plaintiff consisted of the words from a document which the witness Mary Jane Moore furtively observed while Mr. Sharpe was away from his desk. She testified:

> . . . I stepped to the desk and I did not touch the document. I glanced down at it. To the best of my knowledge and recollection, it said something to the effect that she gossiped and she could not get along well with employees and that she was a troublemaker. . . .

The Court of Appeals in holding that this language constituted libel *per se* relied on several North Carolina cases. The most supportive cases are *Pentuff v. Park*, 194 N.C. 146, 138 S.E. 616 (1927), and *Kindley v. Privette*, *supra*.

In *Kindley*, the pastor of Southside Baptist Church of Concord, North Carolina, said in essence that plaintiff, a minister and member of that church, had been a disorderly member thereof in the sense that he was unwilling to cooperate in maintaining peace and the right spirit in the church but caused trouble amounting to a continuous upheaval and disruption of the peace and harmony of the church. This Court held this language to be libelous *per se*.

In *Pentuff*, a newspaper editorial was held to be libelous *per se* which said of plaintiff, an ordained minister, "There has not, to our knowledge, appeared in public within the memory of the present generation of North Carolinians, a more ignorant man . . . or one less charitable towards men who might honestly disagree with him."

In instant case, the alleged libel was a short excerpt from a document of about a page and a half. The remainder of the document might well have reflected the writer's opinion that even with her failings, plaintiff was a skilled, efficient and loyal employee. Therefore, on this record, we cannot say that the evidence shows libel *per se*. However, there are more compelling reasons which lead us to reverse the decision of the Court of Appeals.

[4] There is no basis for an action for libel unless there is a publication of the defamatory matter to a person or persons other than the defamed person. *Taylor v. Jones Brothers Bakery*, 234 N.C. 660, 68 S.E. 2d 313 (1951). Under the facts of instant case, we agree with that portion of the Court of Appeals' decision which holds that there was no publication of libel to the witness Moore since there was no evidence that the witness knew that the handwritten memorandum which she observed was referring to plaintiff. In fact, the words alleged to be libelous might well have referred to other employees of the Bank.

In order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them dafamatory. *Nordlund v. Consolidated Electric Co-Op*, 289 S.W. 2d 93 (Mo. 1956); 53 C.J.S. *Libel and Slander* § 11.

[5] We next consider whether there is evidence to support a finding of a publication of libel when Mr. Sharpe forwarded a copy of the document to Mr. Black, the President of the Bank, and filed the original with the Bank's Personnel Department.

It is clear that Mr. Sharpe was acting under a qualified privilege in these instances since he was acting in a matter in which he had an interest as an employee of the Bank, and it was his duty to communicate such information to his superior and to make it a part of the Bank's personnel records. Under these circumstances, there could be no basis for an action in libel unless defendant Sharpe acted with actual malice. *Stewart v. Check Corp., supra.* However, we need not consider the question of malice or qualified privilege for the simple reason that there is nothing in this record to show that the memorandum communicated to Mr. Black and filed in the Personnel Department was libelous. The instrument allegedly containing the libel is not a part of the record. A typewritten document was shown to the witness Mary Jane Moore, but she never testified before the jury as to any similarity between the typed memorandum and the handwritten document which she viewed for a few seconds. Mr. Sharpe testified that the typewritten document was in substance the same as the *final draft* of the handwritten memorandum. However, he further testified that he modified, deleted and added

to the original handwritten memorandum before it was reduced to typewritten form. The record does not disclose whether the witness Moore saw the original handwritten memorandum or the changed and modified final form of that instrument. For these reasons, we cannot know what appeared in the typewritten document. Thus, plaintiff has failed to show a publication of libel by the delivery of the typewritten document to Mr. Black or by filing the document with the Bank's Personnel Department.

We hold that the evidence in this case was insufficient to justify a verdict for the plaintiff as a matter of law. The trial judge, therefore, correctly granted defendants' motions for a directed verdict.

The decision of the Court of Appeals is

Reversed.

LUTHER Y. MARTIN, FATHER, EDNA MARTIN, MOTHER OF VINCENT KEITH MARTIN, DECEASED, EMPLOYEE, PLAINTIFFS v. BONCLARKEN ASSEMBLY, EMPLOYER, EMPLOYERS COMMERCIAL UNION INSURANCE CO., CARRIER, DEFENDANTS

No. 26

(Filed 5 February 1979)

Master and Servant § 60.4— workmen's compensation—death by drowning in lake during lunch hour—accident not arising out of and in course of employment

The death of a fifteen-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour when the lifeguard was not on duty did not arise out of and in the course of his employment where he had been assigned on the day of his death to cut grass in an area at least one-half mile from the lake; deceased's body was found outside the chained area of the lake; deceased had not taken a swimming test; and rules posted in a place where one using the lake could not avoid seeing them permitted swimming in the lake before 4:30 p.m. only under the supervision of the lifeguard and permitted only those who had passed a swimming test given by the lifeguard to swim outside the chained area at any time, since all the evidence showed that deceased was acting in contravention of specific instructions from his employer and that he was engaged in an independent recreational activity totally unrelated to his work of cutting grass.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

ON defendants' petition for discretionary review of the decision of the Court of Appeals reported in 35 N.C. App. 489, 241 S.E. 2d 848 (1978).

This proceeding is a claim by the next of kin, parents of Vincent Keith Martin (Vincent), deceased, for death benefits under the Workmen's Compensation Act, G.S. 97-40 (1972). Bonclarken Assembly (Assembly) is a conference and mountain resort area with about 90 cottages, a hotel, and various recreational facilities, among which is a 10-acre lake. The jurisdictional facts are stipulated and the uncontradicted evidence tends to show:

In the latter part of May 1974, the Assembly employed Vincent, a 15-year-old boy, as a laborer earning $2.00 per hour. Vincent was in the eighth grade, and he could read and write. His father, Claimant Luther Y. Martin, had been regularly employed by the Assembly for three or four years. Vincent's work was "mostly grass cutting with a handpush mower" in places where the tractor mowers could not go. He would work between six and forty hours per week depending upon how long he chose to work. He, like all Assembly employees, had an hour for lunch, during which time he was on his own. Employees were not paid for the lunch hour, but had the choice of eating a free lunch in the hotel dining room or going elsewhere.

With reference to the Assembly's recreational facilities G. H. Jones, "the Supervisor in charge of maintenance," told his employees, including Vincent, that they were free to use the gym and the tennis courts during their lunch hour "when they weren't actually on the payroll." The employees often used these facilities after lunch. Supervisor Jones testified, however, that he had never given the employees any instructions about swimming in the lake because the subject, "never came up."

The swimming area of this lake, marked by a buoy-supported rope, included a pier with a diving board at the end of it, a sliding board, two rafts anchored in deep water, and a small, shallow chained-in area in which the water was from two inches to three feet deep. The lake was regularly closed for lunch, and the lifeguard would put his life-saving equipment in the storage room to indicate that the lake was closed. (The resident director of the Assembly testified that this was done to remove all evidence that the lake was open and to prevent anyone's assuming that the

lifeguard might be there.) Regulations governing the use of the lake, which had been in effect several years, were imprinted on a large sign composed of four boards in alternate colors of yellow, white, and black. This signboard confronted all persons who crossed the footbridge, which was the only access to the lake unless one waded the creek at the far end of the lake. In big letters and numerals of contrasting color, the signboard stated:

LAKE REGULATIONS

MONDAY—SATURDAY, Swimming and boating under supervision of lifeguard until 4:30 p.m.

MONDAY—SATURDAY, Swimming ONLY 5:00 p.m.—7:00 p.m. AT YOUR OWN RISK.

SUNDAY ONLY, Lake open from 2:00—5:00 p.m. under supervision of lifeguard.

SWIMMING TEST BY LIFEGUARD REQUIRED FOR SWIMMING BEYOND CHAINED AREA.

On 30 July 1974 Vincent was instructed to mow grass near the front gate of the Assembly which was about one-half mile from the lake. On that day the lunch hour for employees at the Assembly hotel, which varied from day to day, was from 11:30 to 12:30. About 11:25 Jones saw Vincent at the shop where the boys usually "cleaned up" before going to the dining room for lunch, and it was Jones's impression that Vincent was getting ready to eat lunch. About noon, however, Mary Jo Yeager, an Assembly employee who had skipped lunch to sun bathe on the lake pier saw Vincent approach the lake. The lifeguard had gone to lunch, and she and Vincent were the only persons in the area. As he passed they each said "hi" and that was all.

Miss Yeager watched Vincent wade into the shallow area of the lake and then come out and walk to the sliding board. Thereafter she saw him jump or dive from the bottom of the sliding board into the deep area and swim toward a raft. She had never before seen Vincent in the lake. When he was about two feet from the raft she heard him call for help. She thought he was "kidding" until she looked back and found he was nowhere to be seen. She swam toward the raft and started diving in eight feet of water searching for him. Being unable to find him she went to

the nearest cottage and summoned the lifeguard. He came quickly and retrieved the body. The death certificate recites that Vincent died by accidental drowning at 12:45 p.m. on 30 July 1974.

The lifeguard, David Kilmer Romine, testified in substance as follows:

He knew Vincent and had talked to him once or twice while he was on duty. Romine was having lunch at the hotel when he received the emergency call to come to the lake. When he arrived he found Vincent's body in the deep area outside the chain. The posted swimming regulations applied to everyone—employees as well as Assembly guests: Swimming before 4:30 p.m. was permitted only under the supervision of the lifeguard and only those who had passed a swimming test given by the guard were allowed to swim outside the chained area at any time. Vincent had never taken the swimming test and the guard had not given him permission to swim on 30 July 1974.

Vincent's twin brother, Kenneth, testified that prior to 30 July 1974 to his knowledge his brother had never gone swimming in the lake.

The Industrial Commission found facts consistent with the evidence detailed above and concluded as a matter of law that Vincent's death by drowning arose out of and in the course of his employment. The Commission awarded claimants compensation under G.S. 97-2(5). Defendants appealed to the Court of Appeals and in an opinion by Judge Webb the Court of Appeals affirmed the award. Upon defendants' petition we allowed discretionary review. G.S. 7A-31(a) (1969).

George W. Moore for plaintiff appellee.

Morris, Golding, Blue and Phillips for defendant appellant.

SHARP, Chief Justice.

The question this appeal presents is whether the evidence before the Industrial Commission is sufficient to support its findings and conclusion that Vincent Martin's accidental death by drowning resulted from an accident *arising out of* and *in the course of* his employment. G.S. 97-2(6) (1972); *Keller v. Waring Co.*, 259 N.C. 222, 130 S.E. 2d 342 (1963); *Henry v. Leather Co.*, 231

N.C. 477, 57 S.E. 2d 760 (1950). These two italicized phrases are not synonymous; they "involve two ideas and impose a double condition, both of which must be satisfied in order to bring a case within the Act." *Robbins v. Nicholson*, 281 N.C. 234, 238, 188 S.E. 2d 350 (1972).

An injury arises out of employment when it is the result of a condition or risk created by the job. The words "in the course of," as used in G.S. 97-2(6), refer to the time, place and circumstances under which the accident occurred. "An accident arises out of and in the course of the employment when it occurs while the employee is engaged in some activity or duty which he is authorized to undertake and which is calculated to further, directly or indirectly, the employer's business." *Perry v. Bakeries Co.*, 262 N.C. 272, 274, 136 S.E. 2d 643 (1964). *See Bell v. Dewey Brothers, Inc.*, 236 N.C. 280, 72 S.E. 2d 680 (1952); Thorpe, *Workmen's Compensation, Survey of North Carolina Case Law*; 45 N.C.L. Rev. 983, 992-995 (1967).

Claimants assert that it would be the "natural inclination of a 15-year-old boy after a morning of hard work on a hot day to desire to avail himself of the opportunity to swim in the Assembly lake during his lunch break"; that the "accidental drowning was a hazard or risk of his employment because of the nature of his work [cutting grass] and the availability of [the lake] to the deceased"; and therefore that "deceased's drowning 'arose out of' his employment because the employment was a condition contributory to his drowning."

Quoting from *Watkins v. City of Wilmington*, 290 N.C. 276, 283, 225 S.E. 2d 577, 582 (1976) (a case factually dissimilar to instant case), claimants argue that "where competent proof exists that the employee understood or had reasonable ground to believe that the act resulting in injury was incidental to his employment, or such as would prove beneficial to his employer's interests or was encouraged by the employer in the performance of the act or similar acts for the purpose of creating a feeling of good will, or authorized so to do by common practice or custom, compensation may be recovered, since then a causal connection between the employment and the accident may be established." The difficulty with this argument, however, is that the record contains no evidence which will support its application to the

present case. On the contrary, all the evidence negates such an application.

As heretofore noted, the evidence was uncontradicted and tends to show that the supervisor of maintenance, under whom the grass-cutters worked, had specifically authorized them to use only the gym and the tennis courts during nonworking hours. As to swimming in the lake, he said, "that never came up" and he had never given "the boys" instructions either way. Notwithstanding, the rules governing the use of the lake applied to all persons who used the lake, guests and employees alike, and these rules were posted at a place where no one who could read could avoid seeing them. Vincent's twin brother, who ordinarily worked with him every day, testified that he had never been specifically instructed as to these rules, but it was his understanding that the lake was closed while the lifeguard was eating lunch; and that until after 4:30 p.m. swimming was allowed only when the lifeguard was on duty. He testified further that, to his knowledge, pior to the day of Vincent's death he had never gone swimming in the lake. It is significant, we think, that no witness testified he had ever seen Vincent in the lake.

The lifeguard testified that he knew Vincent; that he had seen him at the lake, and had talked to him while he was on duty; that no one who had not taken a swimming test given by the lifeguard was permitted to swim outside the chained-in area, and this regulation was posted on the sign "located near and facing the foot bridge that everybody had to use to get into the lake." The guard also said that "the deceased never did take the swimming test."

From the foregoing recital it is implicit in this evidence—indeed, it will support no other inference—that when deceased jumped into the deep water of the lake during his lunch hour on 30 July 1974, at a time when the lifeguard was at his lunch, deceased was acting outside the scope of his employment, in contravention of specific instructions from his employer, and that he had no reasonable grounds to believe otherwise. He was engaged in an independent recreational activity, totally unrelated to his work of cutting grass. On the day of his death he was assigned to cut grass in an area at least one-half a mile from the lake. The risk of his drowning during the lunch hour in a lake he

was forbidden to enter at that time was a risk foreign to his employment. In short, deceased's accidental drowning was neither a natural and probable consequence nor an incident of his employment; there was no causal relation between his death and the performance of any service calculated to further the business of the Assembly either directly or indirectly. *Perry v. Bakeries Co.*, 262 N.C. 272, 136 S.E. 2d 643 (1964).

As noted in 1A Larson's Workmen's Compensation Law § 21.21(d) (1978) ". . . there is no magic in being on the [employer's] premises, if the employee is injured by getting into places where he has no right to go." Neither a minor nor an adult claimant can recover under the Workmen's Compensation Act when he "does acts different in kind from what he is expected or required to do, which are forbidden and outside the range of his service." *Radtke Bros. v. Industrial Commission*, 174 Wis. 212, 217, 183 N.W. 168, 170 (1921). The circumstances of this case preclude the application of the "personal comfort doctrine." *See Larson, supra*, § 21.

Upon the undisputed facts of this case we hold as a matter of law that the death of Vincent Keith Martin did not arise out of and in the course of his employment. *Perry v. Bakeries Co., supra*; *Matthews v. Carolina Standard Corp.*, 232 N.C. 229, 60 S.E. 2d 93 (1950).

The decision of the Court of Appeals affirming the award of the Industrial Commission is reversed, and this proceeding is returned to that Court for remand to the Commission for the entry of an order in accordance with this opinion denying compensation.

Reversed.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. BOBBY LEE HENLEY

No. 132

(Filed 5 February 1979)

1. **Criminal Law § 87.1— sexual matters—leading questions proper**

The trial court in a first degree rape prosecution did not err in allowing the district attorney to ask the prosecuting witness leading questions to establish the essential elements of rape, since the court had discretionary authority to permit leading questions concerning a subject of a delicate nature, such as sexual matters, and defendant failed to show that he was prejudiced by the leading questions in light of the prosecuting witness's prior testimony.

2. **Criminal Law § 169.3— objection to corroborative evidence—no objection to other similar evidence—objection waived**

Defendant's objection to the admissibility of corroborative evidence by one witness was waived where seven other witnesses gave substantially similar corroborative evidence and defendant made no objection.

APPEAL by defendant under G.S. 7A-27 from *Lupton, J.*, 17 July 1978 Criminal Session of Superior Court, FORSYTH County.

Defendant was charged in a bill of indictment with the first degree rape of Thresa Bernice Phelps. Defendant entered a plea of not guilty, and the jury returned a verdict of guilty of first degree rape. Judgment was entered imposing a sentence of life imprisonment.

The State's evidence tended to show the following: On 20 April 1978, at approximately 6:30 p.m., Thresa Phelps, a 23 year old nursing school student at Winston-Salem State University, was alone in her car driving to her home after having dinner with her husband's parents. As she stopped for a stop sign at an intersection, defendant opened the door on the passenger's side, brandished a pistol, told Thresa "not to try anything foolish", and seated himself in the front seat on the passenger's side. Pointing the pistol at Thresa's waist, defendant instructed her where to drive until they reached a secluded spot out in the county. There the defendant directed Thresa to remove her clothes from her waist down, which she did, and defendant did likewise. At all times, defendant held the pistol in his right hand. Defendant then had sexual intercourse with Thresa. Thresa submitted to defendant because of her fear that he would shoot her if she did not. Defendant then told Thresa to get her clothes on, and he directed

her where to drive. Thresa testified: "He [the defendant] said, 'well, thank you for letting me invade your privacy.' He also said that if by chance we were to meet again, we would do it again. He said, 'Are you going to tell?' I said, 'No.' He said, 'Well, it wouldn't do you any good, anyway.' " Defendant finally left the car while in a parking lot to which he had directed Thresa, and walked away.

Thresa returned to her home at approximately 8:30 p.m. and immediately called one of her instructors who in turn called "Rape Line" for her. Thresa then called her pastor's wife and another of her instructors both of whom immediately went to Thresa's home. At approximately 9:00 p.m. Thresa's husband returned home from his night classes at A&T University, and the police were notified. Thresa related the events to the police and the others, and she was then taken to the hospital for examination.

On the day in question the sun was still shining at the time defendant entered Thresa's car, and was shining during part of the time they were riding to the secluded spot. Thresa observed defendant face to face and gave the police a description of his face, his height, and the clothes he was wearing. Thresa recognized defendant about one week later when she saw him walking along the street in front of her apartment while she was driving out of her parking lot. She testified: "He looked at me and I looked at him. He stood there and I just wheeled on out." Thresa reported this sighting to a police officer but no arrest was made. About two weeks later Thresa again saw the defendant walking along a street. She called the police and gave a description of the place she saw defendant and of the clothing he was wearing. In about 15 minutes an officer brought defendant in a squad car to Thresa's location. She immediately identified defendant as the man who had raped her. Defendant was then placed under arrest. He declined to be interrogated.

Defendant's evidence tended to show the following: During all of the afternoon in question he was in his parent's home. At 6:15 p.m. the defendant along with his mother and father had just finished eating his evening meal and defendant was washing the dishes. Defendant's brother-in-law arrived at approximately 6:15 p.m. to bring his children to stay while he and his wife attended a

meeting. The brother-in-law visited about 15 minutes before returning home. Defendant finished washing the dishes and went upstairs to his room where he remained the rest of the evening.

Attorney General Edmisten, by Assistant Attorney General Thomas J. Moffitt, for the State.

White & Crumpler, by Fred G. Crumpler, Jr., G. Edgar Parker, and David R. Tanis, for the defendant.

BROCK, Justice.

Defendant's assignments of error Nos. 2, 5, 6, 8 and 9 are deemed abandoned. "The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief are deemed abandoned." Rule 28, North Carolina Rules of Appellate Procedure. This opinion is limited to a discussion of assignments of error Nos. 1, 3, 4 and 7.

[1] By his first assignment of error defendant contends that the trial judge abused his discretionary authority by permitting the district attorney to propound leading questions to the prosecuting witness to establish the essential elements of rape.

It is well established in this jurisdiction that the trial court has discretionary authority to permit leading questions in proper instances such as when the inquiry is into a subject of delicate nature such as sexual matters, and that an appellant must show prejudice before the action of the trial court will be disturbed. *State v. Manuel*, 291 N.C. 705, 231 S.E. 2d 588 (1977). In *State v. Brunson*, 287 N.C. 436, 215 S.E. 2d 94 (1975) the rule was thus stated: "[T]his Court has wisely and almost invariably held that the presiding judge has wide discretion in permitting or restricting leading questions. When the testimony so elicited is competent and there is no abuse of discretion, defendant's exception thereto will not be sustained." *Id.* at 444, 215 S.E. 2d at 99.

Defendant's exceptions Nos. 1 and 2 form the basis for this first assignment of error. Exception No. 1 discloses the following:

"Q. Well, once he entered you, what, if anything, did he do?

A. He just, well, moved around, if that's what you are saying.

Q. All right. And did he reach a climax?

A. It appeared that he did."

OBJECTION: OVERRULED.

DEFENDANT'S EXCEPTION NO. 1

Conceding arguendo that the question was leading it was nevertheless a permissible question. *State v. Greene*, 285 N.C. 482, 492, 206 S.E. 2d 229, 235 (1974).

The question that is the subject of defendant's exception No. 2 is as follows:

"Q. You did not consent to him having intercourse with you except at the point of a gun?

A. Right."

OBJECTION: OVERRULED

DEFENDANT'S EXCEPTION NO. 2

Although we agree with defendant that this latter question was leading, we view it as non-prejudicial because of the witness' prior testimony. The witness has already testified that defendant pointed the pistol at her when he opened her car door, that he kept it pointed at her as she drove under his directions, and that he held the pistol in his right hand at all times. She further testified:

"Q. During the time that the man was on top of you, what was your state of mind?

A. Well, at that time, I was just trying to—I was trying to forget. I was praying at the same time that I didn't get killed, and I was just sitting, well, there gritting my teeth, hating every minute of it."

Defendant's first assignment of error is overruled.

Defendant's assignment of error No. 3 alleges prejudice to him, by reason of a question propounded to a State's witness by

the district attorney even though the trial judge sustained defendant's objection to the question. This argument is without merit. The district attorney asked a police identification technician if, in his opinion, State's exhibit No. 1 (a photograph of a composite drawing made from the description Thresa Phelps had given the police of her assailant which had been identified, admitted into evidence, and presumably exhibited to the jury) was a likeness of the defendant. Defendant's objection was promptly sustained by the trial judge and the witness did not answer. This assignment of error is overruled.

[2] Defendant's assignment of error No. 4 challenges the rulings of the trial judge in admitting, over objection, prior statements of Thresa to others for the purpose of corroboration. "The application of the rules regulating the reception and exclusion of corroborative testimony of this kind, so as to keep its scope and volume within reasonable bounds, is necessarily a matter which rests in large measure in the discretion of the trial court." *Gibson v. Whitton*, 239 N.C. 11, 17, 79 S.E. 2d 196, 201 (1953). A total of eight witnesses testified as to prior statements of Thresa describing the events and her attacker. Yet defendant brings forward exceptions to the testimony of only one of these eight corroborative witnesses. In view of this situation, a well established rule comes into play. When incompetent evidence is admitted over objection, but the same evidence has theretofore or thereafter been admitted without objection, the benefit of the objection is lost. *See Harvels, Inc. v. Eggleston*, 268 N.C. 388, 150 S.E. 2d 786 (1966); 1 Strong's North Carolina Index 3d, Appeal and Error, § 30.1. Nevertheless, defendant launches an attack on the liberality of the North Carolina rule upon the admissibility of such corroborative evidence. We are not convinced that change is either needed or desirable. An excellent observation on the question was made by Dean Henry Brandis, Jr. as follows: "Particularly this latter aspect of the North Carolina rule has been subjected to severe criticism; but the present author believes that sound practical reasons justify it. The cases reflect few, if any instances in which the reception of such evidence has unduly prolonged trials or unfortunately confused the issues. Identifying the substantive evidence which is credible is the main task of the jury in many, if not most trials; and, in the view of this author, trial judges should have wide discretion in admitting evidence which they believe

may aid the jury in appraising credibility. The North Carolina rule allows this and thus, at the appellate level, avoids much technical, and largely profitless, disputation as to the precise occasions on which corroborative evidence should be received." 1 Stansbury's North Carolina Evidence, § 52, pp. 149-150 (Brandis Rev. 1973).

The defendant further argues that even if we do not see fit to reject the present North Carolina rule, and we do not, the trial court erred in giving its limiting instruction on the manner in which the jury should consider evidence of prior consistent statements. Upon objection being overruled as to the admissibility of evidence of a prior consistent statement, if counsel desires a limiting instruction he should request it. At no point in the present case did counsel make such a request. Even so, on numerous occasions the trial court upon its own initiative gave a limiting instruction. Each was substantially the same. Defendant's argument is addressed only to the limiting instruction given as the seventh corroborating witness testified. We have examined this instruction and find that it substantially complies with the law. Defendant has shown no prejudice. Defendant's assignment of error No. 4 is overruled.

Defendant's assignment of error No. 7 contends that the trial judge expressed an opinion upon the evidence as he was summarizing the defendant's evidence. Defendant cites us to a point in the instructions where the trial judge summarized a portion of defendant's evidence by stating that there was evidence which tended to show that defendant was not the man that got in the prosecuting witness' car. The judge then said, "don't consider that", and proceeded to say that there was evidence that tended to show that the defendant was not the man that the prosecuting witness said got in her car.

We find no intimation from the trial judge of an opinion as to whether any fact had or had not been proved. Defendant's assignment of error No. 7 is overruled.

From the whole record we conclude that defendant had a fair trial, free from prejudicial error.

No error.

STATE OF NORTH CAROLINA v. FRANKLIN MONROE SUITS

No. 39

(Filed 5 February 1979)

1. **Criminal Law § 83 — wife's actions — testimony against husband — evidence improperly admitted**

In a first degree rape case where the victim's assailant allegedly used a knife, the trial court committed prejudicial error in allowing a police officer to testify that he went to defendant's residence and asked defendant's wife if defendant had a knife, and that the wife left the room and came back with a small pocket knife which she gave the officer, since the wife was not competent or compellable to give evidence against defendant, and evidence of her actions should have been excluded as a declaration within the meaning of that rule. G.S. 8-57.

2. **Criminal Law § 86.5 — prior convictions without counsel — questions about prior acts of misconduct proper**

The trial court did not err in denying defendant's motion to limit cross-examination of him concerning his criminal record, and the court properly ruled that "it would not allow questions concerning previous convictions wherein the defendant did not have counsel or did not waive counsel but would allow the district attorney to make inquiry even in those cases wherein the defendant did not have counsel and had not waived counsel, on the basis of prior acts of misconduct," since a defendant in a criminal action who testifies on his own behalf may be impeached by being asked about prior acts of misconduct.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

Chief Justice SHARP concurs in the result.

APPEAL by defendant from *Wood, J.* at the 2 January 1978 Criminal Session of GUILFORD County Superior Court.

The defendant was charged in four separate indictments, proper in form, with the following: two kidnapping offenses, one offense of first degree rape and one offense of crime against nature. The defendant entered pleas of not guilty to all the charges, and the cases were consolidated for trial.

The evidence for the State tended to show the following:

At approximately 1:30 a.m. on 16 August 1977, Marcia Hasty and Cheryl Elaine Small, sisters, were seated in their car that was parked under a street light near the bus station in Greensboro, North Carolina. They were there to pick up some of

Mrs. Small's luggage that was arriving by bus from Goldsboro. Mrs. Small was in the driver's seat and Marcia Hasty was asleep in the passenger side of the front seat.

A man came from behind the car, opened the door on the driver's side, and told Mrs. Small to "move over." He put a sharp object, later observed to be a knife, at her side. Both Ms. Hasty and Mrs. Small identified that man as the defendant.

The defendant started driving the car away from the bus station and instructed the two women to take off their clothes. He stated that he was "only going to rape them." When the car was stopped at a stop sign, Marcia Hasty jumped out. She ran across the street to an apartment house, and the police were called.

As the defendant was driving the car, he ordered Mrs. Small to perform acts of oral sex on him. He drove to a deserted shack, and the defendant made Mrs. Small get out of the car and remove her clothes. She testified she complied because he had the knife. The defendant performed oral sex on Mrs. Small and then raped her.

Afterwards, the defendant used his handkerchief to wipe off the car. He drove Mrs. Small back to the bus station and required her to lie down on the seat. When he got out, the defendant took the car keys and dropped them on the ground. Shortly thereafter, Mrs. Small got out of the car and started looking for the keys. She observed an old black truck, with "Dodge" written across the back of it, slow down as it drove past the street on which the bus station was located. Although she could not tell whether the driver was a male or a female, she noticed the driver was tall and had shoulder-length hair.

In the early morning hours of 17 August 1977, two Greensboro police officers observed an old black Dodge truck fitting Mrs. Small's description travelling south on Summit Avenue in Greensboro. They stopped the vehicle and determined that Franklin Monroe Suits, the defendant, was the owner and driver of the truck. After the police officers told the defendant they were investigating a rape that had occurred the night before, the defendant stated that he had an alibi. He claimed that he had been at Louie's Body Shop at the time of the crime.

At his request, the police officers followed the defendant to Louie's Body Shop. The defendant went into the building first. The officers followed, and they talked with Mr. Louie Flores, the manager. Then they went outside to look for some papers in their car. When they returned to the building, the defendant had disappeared. The next day the defendant was arrested at the home of his step-daughter.

A policeman testified that he saw a black pickup truck, similar to the one belonging to the defendant, in a parking lot next to the Greensboro bus station at about 1:30 a.m. on 16 August 1977. He observed a man get out of the truck and walk toward the bus station. When the officer went back to the station at 3:30 a.m. to investigate the crime in question, the truck was gone.

The evidence for the defendant tended to show the following:

The defendant testified that on 15 August 1977 he worked at the Cone Mobile Service Center from 3:00 p.m. until 11:00 p.m. He closed the station and left at about midnight. The defendant bought two bottles of wine at a convenience store and then changed clothes at home. Thereafter he went to Louie's Body Shop where he and Mr. Flores talked and drank some wine. The phone rang, the defendant answered it and then handed it to Mr. Flores. The defendant left sometime after 1:00 a.m. on 16 August 1977. Mr. Flores took the stand and corroborated this story. The defendant testified that he went directly home and to bed. The telephone rang and the defendant answered it. No one spoke, so he hung up. Cathy Haley, the defendant's step-daughter, stated that she called the defendant at his home between 1:30 and 1:45 a.m. on 16 August 1977. Her mother had asked her to call to see whether the defendant was home, and when the defendant answered, she hung up.

When the defendant and the police officers were at Louie's Body Shop on the afternoon of 17 August 1977, the defendant left because he felt that he was going to be put in jail for something he did not do, and he wanted to talk with his wife first. The defendant claimed he had not been to the Greensboro bus station for over two years. He denied ever having seen either Marcia Hasty or Cheryl Elaine Small before they testified against him in this matter.

After denying defendant's motions as of nonsuit, the trial judge submitted the four cases to the jury. The jury found the defendant guilty of the two charges of kidnapping, guilty of first-degree rape and not guilty of attempted crime against nature (the trial judge reduced the original offense to attempted crime against nature). The judge imposed a life sentence for the rape conviction and thirty-five years imprisonment for each of the kidnapping convictions, to run concurrently with the life sentence. The defendant appealed to this Court on the first-degree rape case, and we allowed his motion for review prior to a determination by the Court of Appeals of the two kidnapping convictions.

Other facts relevant to the decision will be related in the opinion below.

Assistant Public Defender Anne B. Lupton for the defendant.

Attorney General Rufus L. Edmisten by Associate Attorney Leigh Emerson Koman for the State.

COPELAND, Justice.

[1] In his first assignment of error, the defendant claims the State violated G.S. 8-57. We agree; therefore, the defendant must be granted a new trial.

Over defendant's repeated objections, the State introduced State's Exhibit Number 3, a knife taken from the defendant's residence, into evidence at trial. The admission of the knife was based on the following testimony by an officer of the Greensboro Police Department:

> "Q. Detective Travis, subsequent to the arrest of the defendant in this case, Franklin Monroe Suits, did you have occasion to go to his residence?
>
> A. Yes, sir, I did.
>
> Q. When did you go?
>
> A. I went to 2804 Emerson Road, which is the residence of Mr. Suits, on the eighth month, 19th day, 1977, sometime in the afternoon.
>
> Q. And when you went to the residence, who, if anyone, did you see?

A. Mrs. Suits, Frankie Suits' wife, came to the door and—

Q. Tell the Judge and the members of the jury what happened?

A. Mrs. Suits and myself had some conversation. I asked her if Frankie had a knife.

Q. What did Mrs. Suits do?

A. We were in the front room. She went out of the front room to another part of the house, was gone just a short time and came back and a small pocket knife was given to me.

Q. Detective Travis, I hand you what has been previously marked State's Exhibit No. 3. Can you identify that, sir?

A. This is the pocket knife that was given to me at 2804 Emerson Road on the 19th by Mrs. Suits."

At common law, a husband or a wife was incompetent to testify either for or against his or her defendant-spouse in a criminal action. North Carolina Gen. Stat. 8-57 changed this rule to the effect that a husband or a wife can testify *for* a defendant-spouse. *State v. Alford*, 274 N.C. 125, 161 S.E. 2d 575 (1968). The common law rule remains in effect, however, regarding testimony *against* a spouse in a criminal action. Subject to certain exceptions not relevant to this case, "[n]othing herein shall render any spouse competent or compellable to give evidence against the other spouse in any criminal action or proceeding." G.S. 8-57.

In discussing the rule, this Court has said that "[t]he 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." *State v. Dillahunt*, 244 N.C. 524, 525, 94 S.E. 2d 479, 480 (1956) (per curiam). It is unquestioned that this defendant was not present and he did not consent to his wife giving the policeman the knife.

The State and the trial judge in this case made an effort to exclude any *oral* statement made by defendant's wife; however, that is not the only type of evidence that must be excluded as a "declaration" of a spouse. "[A]n act, such as a gesture, can be a declaration within the meaning of this rule." *State v. Fulcher*, 294 N.C. 503, 517, 243 S.E. 2d 338, 348 (1978).

In response to the officer's inquiry as to whether the defendant had a knife, the jury was informed that the defendant's wife left the room and returned with a pocket knife, identified as State's Exhibit Number 3. This conduct was equivalent to the wife stating, "Yes, the defendant has a knife, and here it is." "[I]t must be observed that the line of cleavage between conduct and statements is one that must be drawn in the light of substance, rather than form." MCCORMICK ON EVIDENCE § 250 (2d ed. 1972). Thus, the court committed prejudicial error in allowing the police officer to testify to the wife's actions in this case. The defendant must be granted a new trial.

[2] At the close of the State's evidence, the defendant made a written motion *in limine*, requesting the court to restrict the State's cross-examination of the defendant in this manner:

> "1. Not to mention, refer to, interrogate concerning or attempt to convey to the jury in any way, directly or indirectly, the fact that the defendant was sentenced in cases in which he was not represented by counsel nor waived counsel, or in cases in which he plead (sic) nolo contendere.
>
> 2. Not to question the defendant regarding his criminal record or specific acts of alleged misconduct, further than to ask him what he has been tried and convicted of, without first obtaining specific permission from the court to ask further questions outside the presence and hearing of the jury."

After a hearing on the motion, the trial court denied defendant's motion, indicating that "it would not allow questions concerning previous convictions wherein the defendant did not have counsel or did not waive counsel but would allow the district attorney to make inquiry even in those cases wherein the defendant did not have counsel and had not waived counsel, on the basis of prior acts of misconduct." We feel the judge ruled correctly in this matter.

The undisputed rule in North Carolina is that when a defendant in a criminal action testifies on his own behalf, he may be impeached by being asked about prior acts of misconduct. *See, e.g., State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973). After carefully reviewing the record on this point, we note that in no instance did the State couch its questions regarding prior bad acts in

terms of arrests, indictments, convictions or sentences. *See State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971). This argument is without merit.

The defendant brings forth numerous assignments of error to this Court relating to the kidnapping convictions. These contentions have been answered in *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978), a recent opinion by this Court. We assume defendant's new trial will be conducted in accordance with that decision. We do not address the defendant's other assignments of error because they are not likely to recur in the new trial.

For the reasons stated above, the defendant is granted a

New trial.

Justice BRITT and Justice BROCK took no part in the consideration or decision of this case.

Chief Justice SHARP concurs in the result.

STATE OF NORTH CAROLINA v. LUICO CARL FLEMING, JR.

No. 62

(Filed 5 February 1979)

1. 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. G.S. 14-17.

2. Homicide § 5— second degree murder defined

Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation.

3. Homicide § 6— voluntary manslaughter defined

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

4. Homicide § 6.1— involuntary manslaughter defined

Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict bodily injury.

5. Homicide § 4— malice defined

Malice is that condition of the mind which prompts one person to take the life of another intentionally without just cause, excuse or justification.

6. Homicide § 15.2— evidence of malice

Circumstances immediately connected with the killing by defendant, the viciousness and depravity of his acts and conduct attending the killing are evidence of malice.

7. Homicide § 30.2— murder case—submission of involuntary manslaughter—failure to submit voluntary manslaughter—no error

It was not error for the trial court in a murder prosecution to submit involuntary manslaughter with appropriate instructions and to exclude voluntary manslaughter from the list of permissible verdicts where the State's evidence tended to show that defendant chased the nude victim down the street and, when she fell, defendant straddled her and cut and slashed her numerous times, and defendant testified that the only reason he ran after the victim was because she was naked, that the victim dropped the knife and he picked it up on impulse, that when the victim stumbled and fell, defendant tried to pick her up but she kicked him, gained possession of the knife and tried to cut him, and that he put his legs across her solely to hold her in place and, while attempting to ward off her blows, he "pushed the knife too hard and it hit her," since defendant's testimony, if believed, would support a finding of either (1) an accidental killing or (2) perhaps an unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty.

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

DEFENDANT appeals from judgment of *Rousseau, J.*, 3 April 1978 Session, FORSYTH Superior Court.

Defendant was tried upon a bill of indictment, proper in form, charging him with the first degree murder of Debra Jean Carpenter on 21 December 1977.

The State offered evidence tending to show that on 21 December 1977 at about 10:30 a.m. Debra Jean Carpenter was seen running nude down East 31st Street in Winston-Salem. She was bleeding about her head and a man, later identified as defendant, was chasing her. She was "hitting backwards" at the man chasing her and begging residents along the street for help. The woman fell and defendant straddled her. One State's witness described what followed in these words: ". . . While straddling her he was moving his arm up and down and around just cutting . . . as if he had . . . killed a chicken." Defendant remained astride the

victim for about five minutes while cutting and slashing her as described above. A pathologist testified that examination of Debra Jean Carpenter's body revealed multiple wounds in the head, neck, chest, back, shoulders and hands. There were thirty-three stab wounds and two incision wounds on the body. Death was produced by the multiple stab wounds.

Defendant testified that he and Debra Jean Carpenter were not married but had been living together and had a small daughter named Tish. On the morning of 21 December 1977 he went to the home of the victim's sister, where Debra Jean lived, and asked her where she had been the previous night. After first saying she had spent the night at her sister-in-law's house, Debra Jean admitted that she had been out with her ex-boyfriend. They talked and thereafter had sexual relations. Defendant asked permission to keep his little girl, Tish, during the day and was refused. Debra Jean then went to the kitchen and returned with a knife which she swung at defendant, cutting his hand when he threw it up to block the blow. Defendant struck her above the eye and struck her again when she continued to swing the knife. She fell into the bathroom striking her face on the sink and bled profusely. She then returned to the bedroom and told defendant she was going to stop being unfaithful to him. Debra Jean went back to the bathroom and stopped her bleeding. Shortly thereafter she and defendant reconciled and had sexual relations again. When her face began bleeding again he sent her to the bathroom to clean up so he could take her to the hospital. He heard the shower running and then heard the window being opened. On investigation he discovered that she had gone out the window and was running down the street naked. He ran after her to bring her back inside. While fleeing, Debra Jean dropped the knife she was carrying. On impulse, defendant picked it up but had no intention of hurting her. When she stumbled and fell defendant tried to pick her up but she kicked him and he "put his leg across her to hold her in place." She somehow got the knife and swung it at him again and "he pushed the knife too hard and it hit her." Thereafter she stopped struggling and stopped moving. He panicked, ran back to the house, got some clothes and left in her car.

The trial court submitted, as permissible verdicts, guilty of murder in the first degree, guilty of murder in the second degree,

guilty of involuntary manslaughter or not guilty. The jury convicted defendant of second degree murder and he was sentenced to life imprisonment. He appealed to the Supreme Court assigning as error the failure of the court to submit voluntary manslaughter as a permissible verdict and charge the jury with respect thereto.

Rufus L. Edmisten, Attorney General, by Isaac T. Avery III, Assistant Attorney General, for the State.

Edward B. Higgins, Jr., attorney for defendant appellant.

HUSKINS, Justice.

[1] Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. G.S. 14-17; *State v. Lamm*, 232 N.C. 402, 61 S.E. 2d 188 (1950).

[2] Murder in the second degree is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963).

[3] Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation. *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967).

[4] Involuntary manslaughter is the unlawful killing of a human being without malice, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971). *Compare State v. Rummage*, 280 N.C. 51, 185 S.E. 2d 221 (1971).

The jury should be instructed on a lesser included offense when, and only when, there is evidence from which the jury could find that such included crime of lesser degree was committed. *State v. Ward*, 286 N.C. 304, 210 S.E. 2d 407 (1974); *State v. Duboise*, 279 N.C. 73, 181 S.E. 2d 393 (1971). "The *presence of such evidence* is the determinative factor." *State v. Hicks*, 241 N.C. 156, 84 S.E. 2d 545 (1954).

[5, 6] Here, all of the State's evidence tends to show a killing with malice. Malice is that condition of the mind which prompts one person to take the life of another intentionally without just cause, excuse or justification. "Malice is not only hatred, ill-will, or spite, as it is ordinarily understood—to be sure that is malice—but it also means that condition of mind which prompts a per-

son to take the life of another intentionally without just cause, excuse, or justification." *State v. Moore*, 275 N.C. 198, 166 S.E. 2d 652 (1969). Malice is said to exist as a matter of law "whenever there has been an unlawful and intentional homicide without excuse or mitigating circumstance." *State v. Baldwin*, 152 N.C. 822, 68 S.E. 148 (1910). Circumstances immediately connected with the killing by defendant, the viciousness and depravity of his acts and conduct attending the killing, are evidence of malice and properly considered. *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769, *cert. denied*, 368 U.S. 851 (1961). A malicious killing cannot be voluntary manslaughter.

[7] The testimony of State's witness Sharon Albright places defendant and his victim about a block away when she first saw them. She saw the man when he "went around the girl's neck"; and while the girl was fighting to get away and fell, the man straddled her and his arm was moving up and down and around "just cutting . . . as if he had . . . killed a chicken." While this was transpiring, the victim held up her hands and said, "Lady, oh Lord, please help me."

State's witness Jo Anne Carpenter testified that when Debra Jean fell defendant straddled her and stayed on top cutting her "a good five minutes." She said defendant had a knife that looked like a butcher knife.

On the other hand, defendant testified that the only reason he ran down the street after the victim was because she was naked; that he picked up the knife on impulse and had no intention of hurting her; that she stumbled and fell and when he tried to pick her up she kicked him and, having again obtained possession of the knife, tried to cut him; that he put his legs across her solely for the purpose of holding her in place and, while attempting to ward off her blows, he "pushed the knife too hard and it hit her."

Clearly, defendant's evidence, taken as true, neither justifies nor requires a charge on voluntary manslaughter. It does not indicate that the killing resulted from the use of excessive force in the exercise of the right of self-defense, nor that it was the result of anger suddenly aroused by provocation which the law deems adequate to dethrone reason temporarily and to displace malice. *See State v. Ward, supra.* Defendant in his testimony makes no contention that he cut the deceased in the heat of passion or in

self-defense. He says the cutting was not intentional. If believed, his testimony would support a finding of either (1) an accidental killing or (2) perhaps an unintentional homicide resulting from the reckless use of a deadly weapon under circumstances not evidencing a heart devoid of a sense of social duty. In the setting created by such testimony, *and with credibility a matter for the jury*, it was not error for the court to submit involuntary manslaughter with appropriate instructions and exclude voluntary manslaughter from the list of permissible verdicts. Defendant's first and only assignment of error is therefore overruled.

For the reasons stated the verdict and judgment must be upheld.

No error.

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

STATE OF NORTH CAROLINA v. RONALD McGILL

No. 123

(Filed 5 February 1979)

Narcotics § 1.3— possession with intent to sell and deliver marijuana—possession of more than one ounce of marijuana—no lesser included offense

The offense of possession of more than one ounce of marijuana is not a lesser included offense of possession with intent to sell or deliver marijuana, so the State was not required to make an election between the two offenses; however, defendant could not be punished for both offenses because of possession of the same contraband, and the trial court properly instructed the jury to consider first the offense of possession with intent to sell or deliver marijuana, and if and only if they found him not guilty of that offense were they to consider the charge of possession of more than one ounce of marijuana.

Justice BROCK took no part in the consideration or decision of this case.

ON petition for discretionary review of the decision of the Court of Appeals, 38 N.C. App. 29, 247 S.E. 2d 33 (1978) (*Hedrick, J.*, concurred in by *Brock, C.J.*, and *Webb, J.*), which found no error in the judgment of *Walker, S.J.*, entered in the 3 November 1977 Criminal Session of MECKLENBURG County Superior Court.

The defendant was charged in an indictment, proper in form, with possession of more than one ounce of marijuana. In a separate bill of indictment, proper in form, he was charged with possession with intent to sell or deliver marijuana. The defendant made pretrial motions to require the State to elect between the two charges and to dismiss the charge of possession with intent to sell or deliver. Rulings on both motions were reserved by the trial judge until a later time.

At trial the evidence for the State tended to show the following:

On 26 November 1976 the residence located at 929 Beal Street, Apartment 8 in Charlotte, North Carolina, was searched for marijuana pursuant to a search warrant issued earlier that day. The defendant, his son, the younger brother of a woman who lived there, and an adult male identified as Lind Criddell were in the apartment at that time. The defendant told the police officers that he lived there.

The officers found four white plastic bags containing marijuana on the floor of the closet in one of the bedrooms. They also discovered two small plastic bags of marijuana in a shoe box on top of the dresser. An official laboratory analysis of the substance contained in the larger bags indicated that it totaled over 3,400 grams. A .38 caliber revolver was located in a dresser drawer, and $300 was found in a man's tweed coat hanging in the closet. A letter addressed to the defendant at 929 Beal Street, Apartment 8 was on the dresser.

The policemen seized all these items, arrested the defendant and advised him of his rights. The officers then began questioning Lind Criddell after reading him his rights. At that time the defendant informed the officers that "Mr. Criddell did not live there, and that he knew nothing about anything in the apartment, that everything in the apartment was his."

The evidence for the defendant tended to show the following:

The residence located at 929 Beal Street, Apartment 8 is occupied by Amelia McDaniel and her son. The defendant was the father of the child but was not married to Ms. McDaniel. No one

else lived there. This fact was testified to by Barry McDaniel, who is Amelia McDaniel's brother, the defendant and Lind Criddell.

On 26 November 1976 the defendant was living with his mother, his brother and his sister at 336 Yorkshire Drive in Charlotte. At that time he earned his living by managing and singing in a band.

On 26 November 1976 the defendant and Lind Criddell had just gotten back from New York City. They went to Amelia McDaniel's apartment so that the defendant could visit his son, which he did periodically. As defendant did not have a key to that apartment, Ms. McDaniel's brother let them in.

The defendant did not know that a letter addressed to him at 929 Beal Street, Apartment 8 was in the apartment; he had never seen it. The defendant intentionally received some of his business mail at that address to "keep the agencies working with our group separated," and Amelia McDaniel had permission to open any of defendant's mail that came there.

The defendant did not know there was any marijuana in the apartment, and he was surprised when the police officers found it. He denied ever having stated that everything in the apartment belonged to him.

The judge instructed the jury to consider the two charges against the defendant in the alternative. The jury found the defendant not guilty of possessing marijuana with intent to sell or deliver it and guilty of possessing more than one ounce of marijuana. The defendant appealed. The Court of Appeals found that the defendant had a trial free from prejudicial error, and this Court granted defendant's petition for discretionary review.

Laura A. Kratt for the defendant.

Attorney General Rufus L. Edmisten by Associate Attorney Christopher P. Brewer for the State.

COPELAND, Justice.

For the reasons stated below, we find no error in defendant's trial; therefore, the decision of the Court of Appeals is affirmed.

In his first assignment of error, the defendant argues the trial court erred in not requiring the State to elect before trial between the two charges against the defendant. We do not agree.

The defendant contends that because the crime of possession of more than one ounce of marijuana is a lesser included offense of possession with intent to sell or deliver marijuana,[1] the State was required to choose under which theory they were proceeding. Otherwise, he claims, the accused is prejudiced because the jury hears multiple charges against him and infers greater criminal activity than actually exists. The defendant states in his brief that his argument "is addressed to the limited situation dealing with multiple charges of a particular kind, that is, a principal charge and, in a separate indictment, its lesser included offense, and does not consider any other possible composition of multiple or duplicate charges."

The fault in defendant's position lies in his underlying premise that one charge in question is a lesser included offense of the other. While this Court has stated that simple possession of contraband is a lesser included offense of possession with intent

1. Both offenses are included in G.S. 90-95, which reads in relevant part:

"(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Any person who violates G.S. 90-95(a)(1) with respect to:

* * *

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five thousand dollars ($5,000), or both in the discretion of the court, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1);

* * *

(d) Any person who violates G.S. 90-95(a)(3) with respect to:

* * *

(4) A controlled substance classified in Schedule VI shall be guilty of a misdemeanor and shall be fined not more than one hundred dollars ($100.00); but *if the quantity of the controlled substance* exceeds one ounce (avoirdupois) of marijuana . . . . the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both in the discretion of the court."

Under G.S. 90-94, marijuana is a Schedule VI controlled substance.

to sell or deliver the same matter, *State v. Aiken*, 286 N.C. 202, 209 S.E. 2d 763 (1974), that reasoning does not control this case. One crime is not a lesser included offense of another "[i]f each of two criminal offenses, as a matter of law, requires proof of some fact, proof of which fact is not required for conviction of the other offense." *State v. Overman*, 269 N.C. 453, 465, 153 S.E. 2d 44, 54 (1967). *See also State v. Stepney*, 280 N.C. 306, 185 S.E. 2d 844 (1972).

To prove the offense of possession of over one ounce of marijuana, the State must show possession and that the amount possessed was greater than one ounce. To prove the offense of possession with intent to sell or deliver marijuana, the State must show possession of any amount of marijuana and that the person possessing the substance intended to sell or deliver it. Thus, the two crimes each contain one element that is not necessary for proof of the other crime. One is not a lesser included offense of the other.

This does not mean, however, that a defendant can be punished for both offenses because of possession of the *same* contraband. Multiple punishment is one facet of the prohibition against double jeopardy. *See State v. Irick*, 291 N.C. 480, 231 S.E. 2d 833 (1977). That rule applies "[w]here two or more offenses of the same nature are by statute carved out of the same transaction and are properly the subject of a single investigation." *State v. Midgett*, 214 N.C. 107, 110, 198 S.E. 613, 614 (1938) (quoting *Dowdy v. State*, 158 Tenn. 364, 366, 13 S.W. 2d 794, 794 (1929)). *See also In re Powell*, 241 N.C. 288, 84 S.E. 2d 906 (1954).

It is clear that the State charged the defendant with both these offenses so that the evidence would conform to the pleadings under either means of proving felonious possession. An election is not required in this situation.

> "The rule here is, that where the indictment contains charges that are actually distinct, and grow out of different transactions, in such cases the Court will compel the State to elect, or will quash. But where it appears by the indictment . . . that the charges in the several counts relate to the same transaction, varied and modified merely to meet the probable proofs, the Court cannot either quash or compel an election." *State v. Eason*, 70 N.C. 88, 91-92 (1874).

Although the charges here were contained in two separate indictments, they may be treated as separate counts of the same indictment. *See, e.g., State v. Stephens*, 170 N.C. 745, 87 S.E. 131 (1915).

In this case the judge instructed the members of the jury to first consider the offense of possession with intent to sell or deliver marijuana. If and only if they found him not guilty of that offense were they to consider the charge of possession of more than one ounce of marijuana. The able trial judge followed the correct procedure in this situation. *See State v. Meshaw*, 246 N.C. 205, 98 S.E. 2d 13 (1957).

This Court has applied the same rule in felony-murder situations. In *State v. Boyd*, 287 N.C. 131, 214 S.E. 2d 14 (1975), the defendant was charged in two separate indictments with first degree murder and first degree burglary. The charges were consolidated for trial. The defendant made a pretrial motion to require the State to elect whether it was going to proceed on the theory of felony-murder or on both indictments separately, in which case premeditation and deliberation would be the basis for the crime of first degree murder. We held that the trial court's denial of the defendant's motion was correct. *See also State v. Swift*, 290 N.C. 383, 226 S.E. 2d 652 (1976). This assignment of error is overruled.

The defendant also asks us to review the two other questions that were presented to the Court of Appeals. We have examined them and find them without merit for the reasons stated by that court.

It appears in the record that the trial court made a technical error and dismissed the wrong case after the jury returned its verdict. The judge inadvertently entered judgment on case number 76CRS69883, which was possession with intent to sell or deliver marijuana and of which the jury found defendant not guilty. He then dismissed case number 76CRS69882, possession of more than one ounce of marijuana, the crime of which the jury found defendant guilty. Therefore, we direct the Court of Appeals to return the case to Mecklenburg County Superior Court with directions to reinstate case number 76CRS69882 and to dismiss case number 76CRS69883.

For the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

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

LLOYD P. SLOAN, JR., D/B/A SLOAN INSURANCE AGENCY v. JOSEPH EARL WELLS

No. 102

(Filed 5 February 1979)

1. **Insurance § 4— form of binder**

No specific form or provision is necessary to render a memorandum or an oral communication intended as an insurance binder a valid contract of insurance, and it is not necessary that the writing or oral communication set forth all the terms of the contemplated contract of insurance in order to constitute a valid binder.

2. **Insurance § 2.3— failure to procure insurance—nature and duration of risk—sufficiency of evidence**

The evidence was sufficient for the jury on defendant's counterclaim against plaintiff insurance agent for breach of an oral agreement to procure insurance on a Franklin logger which was subsequently destroyed by fire, notwithstanding there was no evidence of the exact nature of the risk to be insured against or the duration of the risk, where defendant testified as to the subject matter, amount of coverage, and the premium to be paid, and where plaintiff's testimony that he had started insuring defendant's logging equipment the year before the agreement in question would permit the jury to find that upon defendant's request plaintiff would obtain coverage consistent with the parties' previous dealings.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

APPEAL by defendant from the decision of the Court of Appeals, reported in 37 N.C. App. 177, 245 S.E. 2d 529 (1978), finding no error in the trial before *Ward, J.*, at the 16 May 1977 Civil Session of Beaufort County District Court.

Plaintiff instituted this action on an account to recover insurance premiums on motor vehicles owned by defendant. Defend-

ant counterclaimed, alleging that plaintiff had failed to procure insurance, pursuant to an oral agreement, on a Franklin logger which was subsequently destroyed by fire.

In support of his counterclaim, defendant offered evidence tending to show that on or about 10 September 1973 he went to plaintiff's office to inquire about obtaining insurance coverage for his Franklin logger. Plaintiff quoted tentative premium rates for coverage of $16,000 and $12,500. Defendant decided on coverage of $12,500, and plaintiff told him that the premium was $412 and "it would be covered." Thereafter, defendant did not attempt to obtain any other insurance on the Franklin logger.

Plaintiff testified that while he did not remember talking to defendant concerning insurance on the logger, "I could have talked to him on that day concerning the Franklin logger. It's very possible. I talk to a lot of people every day about some stuff . . . insuring something." He denied, however, *any* agreement with defendant relative to insurance coverage on this particular piece of logging equipment.

At the close of all the evidence, plaintiff moved for a directed verdict on defendant's counterclaim, which motion was granted.

William P. Mayo and Rodman, Rodman, Holscher & Francisco, by Edward N. Rodman, attorneys for plaintiff appellee.

McCotter & Mayo by Hiram J. Mayo, Jr., attorneys for defendant appellant.

BRANCH, Justice.

The sole question presented is whether the trial court erred in granting plaintiff's motion for a directed verdict on defendant's counterclaim.

In finding no error in the trial below, the Court of Appeals apparently relied on an Oregon case, *Rodgers Insurance Agency v. Andersen Machinery*, 211 Or. 459, 316 P. 2d 497 (1957), and quoted the following language therefrom:

> . . . [W]e believe that a contract to procure insurance should be proved with the same certainty as an oral contract of insurance or agreement to insure. The essential elements of such an agreement were first stated by this court in *Cleve-*

land Oil Co. v. Ins. Society, 34 Or. 228, 233, 55 P. 435, in the following language:

> "In order to make a valid contract of insurance," says Mr. Wood, in his work on Fire Insurance (2 ed.) § 5, "several things must concur: First, the subject-matter to which the policy is to attach, must exist; second, the risk insured against; third, the amount of the indemnity must be definitely fixed; fourth, the duration of the risk; and, fifth, the premium or consideration to be paid therefor must be agreed upon, and paid, or exist as a valid legal charge against the party insured where payment in advance is not a part of the condition upon which the policy is to attach. The absence of either or any of these requisites is fatal in cases where a parol contract of insurance is relied upon."

After quoting the foregoing language from *Rodgers*, Judge Erwin, speaking for the Court of Appeals, stated:

> We conclude that defendant presented sufficient evidence to submit the following issues to the jury on the question of whether or not a proposed insurance contract was entered: (1) the subject matter to which the policy was to attach was a Franklin Logger, (2) the amount of indemnity or the proposed insurance contract was $12,500.00. However, defendant's evidence was fatal on the following issues: (1) the risk insured against (whether fire, liability, or comprehensive), (2) the duration of the risk (whether six months or one year), (3) the premium consideration to be paid for the proposed insurance contract. The evidence did not show that the premiums were paid or that the plaintiff charged the defendant for such insurance. In view of the record before us and the lack of evidence on the part of defendant, we are compelled to hold that the trial court properly granted plaintiff's motion for directed verdict of defendant's counterclaim under Rule 50(a) of the Rules of Civil Procedure.

We note that a subsequent Oregon case clarifies *Rodgers*. In *Hamacher v. Tumy*, 222 Or. 341, 352 P. 2d 493 (1960), the court stated:

> . . . The Rodgers case does not hold that the manner of proof is the same for both contracts to procure insurance and contracts of insurance. . . .

> . . . Obviously, liability for failure to procure insurance could not arise unless the agent had sufficiently definite directions from his principal to enable him to consummate the final insurance contract. Perhaps ordinarily the broker and his client expressly agree upon all of the essential elements which are to be included in the final insurance contract. But such an *express* agreement is not necessary; the scope of the risk, the subject matter to be covered, the duration of the insurance, and other elements can be found by implication. . . .

In light of the distinction between contracts of insurance and contracts to procure insurance noted by the Oregon Supreme Court in *Hamacher*, we are of the opinion that the Court of Appeals' reliance on *Rodgers Insurance Agency v. Andersen Machinery, supra*, was misplaced.

More importantly, however, our own cases dictate a different result than that reached by the Court of Appeals. North Carolina does not adhere to such rigid requirements for valid insurance binders as those imposed by the Court of Appeals.

[1] A binder is an insurer's bare acknowledgment of its contract to protect the insured against casualty of a specified kind until a formal policy can be issued. The binder may be oral or written. *Wiles v. Mullinax*, 270 N.C. 661, 155 S.E. 2d 246 (1967); *Moore v. Electric Co.*, 264 N.C. 667, 142 S.E. 2d 659 (1965). No specific form, or provision, is necessary to constitute a memorandum, or an oral communication, intended as a binder, a valid contract of insurance. *Mayo v. Casualty Co.*, 282 N.C. 346, 192 S.E. 2d 828 (1972); *Wiles v. Mullinax, supra*. Moreover, it is not required that the writing, or oral communication, set forth all the terms of the contemplated contract of insurance. *Mayo v. Casualty Co., supra*.

[2] In instant case, defendant testified as to the subject matter, the amount of coverage, and the premium to be paid. Although the record does not indicate the exact nature of the risk to be insured against or the duration of the risk, plaintiff testified that he "had insurance or started insuring his [defendant's] logging equipment in July, 1972." This evidence would support an inference which would permit, but not require, the jury to find that upon defendant's request plaintiff would obtain coverage consistent with the parties' previous dealings.

We hold that the evidence presented was sufficient to carry defendant's counterclaim to the jury, and the trial court erred in granting plaintiff's motion for a directed verdict thereon.

The decision of the Court of Appeals is

Reversed.

Justices BRITT and BROCK did not participate in consideration or decision of this case.

DOROTHY B. HAMILTON v. BUFORD L. HAMILTON, JR.

No. 99

(Filed 5 February 1979)

1. **Divorce and Alimony § 17.2; Estoppel § 5— estoppel to assert divorce as bar to alimony**

Defendant was estopped from asserting an absolute divorce as a bar to plaintiff's alimony rights where the trial judge was informed by both parties before defendant obtained the divorce that their dispute as to child custody, child support and alimony had been settled although the consent order had not yet been drawn up, the same judge then granted defendant a divorce on the assumption that a formal agreement would be reached, and the parties subsequently failed to sign a consent order.

2. **Appeal and Error § 2— scope of review—questions presented to Court of Appeals**

In a review by the Supreme Court of a decision of the Court of Appeals, a party can raise only those questions which were properly presented to the Court of Appeals. App. R. 16(a).

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

ON petition for discretionary review of the decision of the Court of Appeals, 36 N.C. App. 755, 245 S.E. 2d 399 (1978) (*Mitchell, J.*, concurred in by *Brock, C.J.* and *Hedrick, J.*), which affirmed the judgment of *Cornelius, D.J.*, entered in the 22 March 1977 Session of IREDELL County District Court.

On 10 June 1976 the plaintiff-wife instituted an action for alimony without divorce and for custody and support of the

children born to the parties' marriage. The defendant-husband counterclaimed for an absolute divorce based on separation for over one year. He also asked for custody of the children.

The trial was originally scheduled for 29 September 1976. On that date the attorneys for both plaintiff and defendant met with the judge in chambers and stated that the parties had agreed to a settlement of their differences. The resolution was held open pending the execution of a consent order, and on 26 October 1976 the defendant was granted an absolute divorce on his counterclaim.

Subsequently, the parties failed to sign the consent order drawn up by plaintiff's attorney. On 25 January 1977 trial was held concerning custody, support and alimony. At the close of all the evidence, defendant made a motion to amend his answer, pleading the absolute divorce previously granted him as a bar to plaintiff's right to alimony.

On 22 March 1977 the trial judge issued his order. After making findings of fact and conclusions of law, he awarded the plaintiff custody of the children, child support in the amount of $45.00 per week for each child, alimony in the amount of $50.00 per week and reasonable attorney's fees. The defendant appealed. The Court of Appeals affirmed the order, and this Court granted defendant's petition for discretionary review.

Pope and McMillan by Constantine H. Kutteh II for the plaintiff.

Sowers, Avery & Crosswhite by William E. Crosswhite and McElwee, Hall & McElwee by John E. Hall for the defendant.

COPELAND, Justice.

[1] The only assignment of error properly before this Court is whether the absolute divorce granted to defendant bars plaintiff's right to alimony in this case. Because we find that it does not, the decision of the Court of Appeals is affirmed.

The defendant correctly points out that a dependent spouse's right to alimony is controlled by G.S. 50-16.2. He argues that this plaintiff is denied that right because at the time of the award, she was not a "dependent spouse" as defined in G.S. 50-16.1(3) because

she was not a spouse. Furthermore, the defendant claims alimony in this situation is forbidden by G.S. 50-11(a), which states that, subject to certain exceptions, "[a]fter a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine." *See Mitchell v. Mitchell*, 270 N.C. 253, 154 S.E. 2d 71 (1967).

The Legislature has recognized and dealt with this situation should it arise in the future through its recent addition to G.S. 50-6. That provision stipulates that "no final judgment of divorce shall be rendered under this section [on the basis of separation of one year] until the court determines that there are no claims for support or alimony between the parties or that all such claims have been fully and finally adjudicated." Notwithstanding the fact that the new proviso does not apply to this case, we hold that the defendant is estopped from asserting the divorce as a bar to plaintiff's alimony rights under these circumstances.

Before defendant obtained the divorce, the trial judge was informed by both parties that their dispute over custody, support and alimony had been settled although the consent order had not yet been drawn up. The same judge then granted the divorce, unquestionably on the assumption that a formal agreement would be reached. "It is an equitable principle, very generally recognized, that in a given transaction a man may not assume and maintain inconsistent positions to the prejudice of another's rights. And the principle so stated is usually allowed to prevail either in court proceedings or in transactions between individuals." *Bizzell v. Auto Tire and Equipment Co.*, 182 N.C. 98, 103, 108 S.E. 439, 441 (1921).

We do not mean to imply that the defendant intentionally or fraudulently misled the plaintiff or the trial court by his assertion that the parties had settled the matters in question. However, neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 181 S.E. 2d 588 (1971).

> "[A] party may be estopped to deny representations made when he had no knowledge of their falsity, or which he made without any intent to deceive the party now setting up the estoppel. . . . [T]he fraud consists in the inconsistent position subsequently taken, rather than in the original conduct. It is

the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party." H. MCCLINTOCK, EQUITY § 31 (2d ed. 1948).

In a somewhat analagous situation, we have invoked this doctrine to estop a defendant from pleading the statute of limitations as a bar to the plaintiffs' action. In *Nowell v. Great Atlantic & Pacific Tea Co.*, 250 N.C. 575, 108 S.E. 2d 889 (1959), the parties had been negotiating over a period of time concerning the defendant's liability for the defective construction of a building. The defendant had previously admitted fault and had assured the plaintiffs that the necessary repairs would be made. Based on this conduct, the plaintiffs delayed bringing suit for more than three years after the cause of action had accrued. In upholding judgment for the plaintiffs, this Court stated:

> "The lapse of time, when properly pleaded, is a technical legal defense. Nevertheless, equity will deny the right to assert that defense when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith. 'The doctrine of equitable estoppel is based on an application of the golden rule to the everyday affairs of men. It requires that one should do unto others as, in equity and good conscience, he would have them do unto him, if their positions were reversed. . . . Its compulsion is one of fair play.'" *Id.* at 579, 108 S.E. 2d at 891 (quoting *McNeely v. Walters*, 211 N.C. 112, 113, 189 S.E. 114, 115 (1937)). *See also Watkins v. Central Motor Lines, Inc.*, *supra.*

In neither the *Nowell* case nor this one were the defendants under a legal duty to actually enter into a binding settlement. Yet justice dictates that they not be allowed to preclude a judgment on the merits because of a technical defense obtained through their innocent yet misleading representations and conduct. This assignment of error is overruled, and the proposed amendment to defendant's answer is stricken.

[2] The above issue is the only one raised before the Court of Appeals. The defendant now attempts to make another argument, regarding an entirely different matter, to this Court. This he cannot do. Rule 16(a) of the North Carolina Rules of Appellate Procedure stipulates that in a review by this Court of a decision of

the Court of Appeals, a party can raise only those questions that were properly presented to the appellate court below.

For the foregoing reasons, the decision of the Court of Appeals is

Affirmed.

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

STATE OF NORTH CAROLINA v. THURMAN GUNTHER

No. 131

(Filed 5 February 1979)

Kidnapping § 1; Criminal Law § 26.5 — kidnapping and assault — assault not element of kidnapping — separate punishments proper

Defendant could properly be sentenced for both a kidnapping conviction and a felonious assault conviction inasmuch as the assault was not an element of the so-called "aggravated kidnapping" offense of which defendant was also convicted.

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

APPEAL by both the State and defendant pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, 38 N.C. App. 279, 248 S.E. 2d 97, opinion by *Judge Harry C. Martin*, concurred in by *Chief Judge Brock*, *Judge Clark* dissenting. Defendant appeals from the decision insofar as it found no error in defendant's trial before *Judge Bruce* at the 30 January 1978 Criminal Session of PITT Superior Court. The State appeals from the decision insofar as it ordered that judgment be arrested on defendant's conviction of assault with intent to commit rape.

Rufus L. Edmisten, Attorney General, by David S. Crump, Special Deputy Attorney General, for the State.

Robert B. Rouse III, Attorney for defendant.

PER CURIAM.

Defendant was tried on bills of indictment charging him with kidnapping one Evonne Sumrell in violation of G.S. 14-39 and as-

saulting her with intent to commit rape in violation of G.S. 14-22. The charges were consolidated for trial and the jury convicted defendant of both offenses. He was sentenced to 25 years imprisonment on the kidnapping conviction and 5 years imprisonment on the felonious assault conviction to commence at the expiration of the kidnapping sentence. The Court of Appeals unanimously found no error in defendant's trial leading to the convictions. A majority of that court, however, decided that defendant could not be sentenced for the felonious assault conviction inasmuch as this assault was an element of the so-called "aggravated kidnapping" offense of which defendant was also convicted.

The only question presented, therefore, on the State's appeal is whether this defendant can be sentenced for both the kidnapping conviction and the felonious assault conviction. This question was thoroughly analyzed in our recent decision of *State v. Williams*, 295 N.C. 655, 249 S.E. 2d 709 (1978). We there answered it affirmatively. The Court of Appeals' decision in this case was noted in *Williams*, 295 N.C. at 663, 249 S.E. 2d at 715, and therein implicitly overruled on this point. On the authority, therefore, of *Williams* we reverse the Court of Appeals' decision insofar as it ordered that judgment in the felonious assault case, No. 77CRS18040 in the trial court, be arrested. The judgment of the trial court in this case is, therefore, reinstated.

The Court of Appeals being unanimously of the opinion that no error was committed in the trial of these cases, it might well be argued that defendant has no right to appeal from this aspect of the decision. Defendant did not petition this Court for further discretionary review. Nonetheless we have carefully reviewed defendant's assignments of error and conclude that the Court of Appeals' refusal to sustain any of them was correct for the reasons given in the majority opinion. Insofar as the Court of Appeals found no error in defendant's trial its decision is affirmed.

Reversed in part.

Affirmed in part.

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

SHIRLEY S. BEASLEY v. DWIGHT R. BEASLEY

No. 66

(Filed 5 February 1979)

Divorce and Alimony § 24.9— contempt for willful failure to comply with child support order

Decision of the Court of Appeals affirming an order of the district court holding defendant in contempt for willful failure to comply with a child support order is affirmed by the Supreme Court.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

APPEAL pursuant to G.S. 7A-30(2) by defendant from a decision of the Court of Appeals, 37 N.C. App. 255, 245 S.E. 2d 820, opinion by *Judge Morris*, now Chief Judge, in which *Judge Vaughn* concurred. *Judge Robert M. Martin* dissented. The decision affirmed a judgment of the district court entered by *Judge Beaman* on 22 July 1977, in which defendant was found in contempt of court for wilfully failing to comply with an order of the district court requiring him to provide support payments for his two minor children in the sum of $50.00 per week.

Aldridge and Seawell, by Christopher L. Seawell and Daniel D. Khoury, Attorneys for plaintiff appellee.

Leroy, Wells, Shaw, Hornthal, Riley & Shearin, P.A., by John G. Gaw, Jr., Attorneys for defendant appellant.

PER CURIAM.

We have carefully studied the records in this case, the opinions filed in the Court of Appeals and the briefs of the parties. In defense of an order to show cause why he should not be held in contempt defendant husband testified that because of his personal expenses he could not afford to pay child support as ordered; therefore he had not wilfully violated the order. He also testified that from 20 October 1972 until the time of the hearing in district court on 17 June 1977 he had been able to pay $35.00 per week for the support of his two minor children under an earlier court order. Most of this time he earned only $90.00 per week take home pay. On 8 February 1977 the district court increased these support payments to $50.00 per week. At that time, the record

indicates, defendant was, and has been since, earning $760.00 per month take home pay.

There is no difference between the parties or between the majority and dissenting opinions in the Court of Appeals as to the legal principles which govern this case. The differences lie in the application of the principles to the facts here presented. We believe the opinion of Judge, now Chief Judge, Morris correctly applies proper principles of law to these facts. The decision of the Court of Appeals is, therefore,

Affirmed.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

HOUSING, INC.; MERHA, LTD.; CARL W. JOHNSON; AND JACKIE JOHNSON, PLAINTIFFS v. H. MICHAEL WEAVER; W. H. WEAVER CONSTRUCTION COMPANY; ALVIN R. BUTLER, TRUSTEE. DEFENDANTS AND LANDIN, LTD., ADDITIONAL DEFENDANT

No. 105

(Filed 5 February 1979)

APPEAL by defendants under G.S. 7A-30(2) from the decision of the Court of Appeals, 37 N.C. App. 284, 246 S.E. 2d 219 (1978), reversing the judgment of *Collier, J.*, at the 25 April 1977 Session of GUILFORD Superior Court granting summary judgment in favor of defendants, *Judge Robert M. Martin* noting a dissent.

Smith, Moore, Smith, Schell & Hunter, by Jack W. Floyd and Frank J. Sizemore III, for plaintiff-appellees.

Brooks, Pierce, McLendon, Humphrey & Leonard, by James T. Williams, Jr., and Edward Winslow III, for defendant-appellants.

PER CURIAM.

We have carefully reviewed the Court of Appeals opinion by Morris, Judge (now Chief Judge), and the briefs and authorities

on the points in question. Judge Martin's notation of dissent, which authorized defendant to appeal to the Supreme Court as a matter of right, states no reason for his disagreement with the decision or opinion of the Court of Appeals. We conclude that the result reached by the Court of Appeals, its reasoning, and the legal principles enunciated by it are correct. Its decision is, therefore,

Affirmed.

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

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BACHE HALSEY STUART, INC. v. HUNSUCKER

No. 159 P.C.

Case below: 38 N.C. App. 414.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

BOARD OF TRANSPORTATION v. RECREATION COMM.

No. 167 P.C.

Case below: 38 N.C. App. 708.

Petition by defendants (Diocese, Trustees and Bishop) for discretionary review under G.S. 7A-31 denied 5 February 1979. Motion of defendant-appellee (Recreation Comm.) to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

BUCHANAN v. MITCHELL COUNTY

No. 162 P.C.

Case below: 38 N.C. App. 596.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

CAVENDISH v. CAVENDISH

No. 166 P.C.

Case below: 38 N.C. App. 577.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

DEPT. OF SOCIAL SERVICES v. MALONE

No. 173 P. C.

Case below: 38 N.C. App. 242.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

ELLIOTT v. POTTS

No. 174 P.C.

Case below: 38 N.C. App. 743.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

FOX v. MILLER

No. 138 P.C.

Case below: 38 N.C. App. 391.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 February 1979.

HARMON v. PUGH

No. 165 P.C.

Case below: 38 N.C. App. 438.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 February 1979.

IN RE DALE

No. 4 P.C.

Case below: 39 N.C. App. 390.

Petition by respondent for discretionary review under G.S. 7A-31 denied 5 February 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

IN RE KIRKMAN

No. 161 P.C.

Case below: 38 N.C. App. 515.

Petition by Kirkman for discretionary review under G.S. 7A-31 denied 5 February 1979. Motion of appellee to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

IN RE McCOY

No. 199 P.C.

Case below: 39 N.C. App. 52.

Petition by respondents for discretionary review under G.S. 7A-31 denied 5 February 1979.

LEDWELL v. BERRY

No. 191 P.C.

Case below: 39 N.C. App. 224.

Petition by plaintiffs for discretionary review under G.S. 7A-31 denied 5 February 1979.

McLEAN v. SALE

No. 163 P.C.

Case below: 38 N.C. App. 520.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

MORTGAGE CO. v. REAL ESTATE, INC.

No. 193 P.C.

Case below: 39 N.C. App. 1.

Petition by defendant construction company for discretionary review under G.S. 7A-31 allowed 5 February 1979.

REDEVELOPMENT COMM. v. COX

No. 188 P.C.

Case below: 39 N.C. App. 259.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

RUTHERFORD v. AIR CONDITIONING CO.

No. 172 P.C.

Case below: 38 N.C. App. 630.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 February 1979.

SHEET METAL, INC. v. DISTRIBUTORS

No. 136 P.C.

Case below: 38 N.C. App. 391.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

SHEPPARD v. SHEPPARD

No. 184 P.C.

Case below: 38 N.C. App. 712.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 February 1979.

SMITH v. SANITARY CORP.

No. 158 P.C.

Case below: 38 N.C. App. 457.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 February 1979.

STATE v. ALSTON

No. 182 P.C.

Case below: 38 N.C. App. 219.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. ASHFORD

No. 176 P.C.

Case below: 38 N.C. App. 118.

Application by defendant for further review denied 5 February 1979.

STATE v. BOONE

No. 190 P.C.

Case below: 39 N.C. App. 218.

Petition by Attorney General for discretionary review under G.S. 7A-31 allowed 18 January 1979.

STATE v. GOSNELL

No. 185 P.C.

Case below: 38 N.C. App. 679.

Petition by defendant for discretionary review under G.S. 7A-31 denied 8 February 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

STATE v. MacEACHERN

No. 21 P.C.

Case below: 39 N.C. App. 260.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 12 February 1979.

STATE v. MACKEY

No. 170 P.C.

Case below: 38 N.C. App. 628.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. MILLS

No. 187 P.C.

Case below: 39 N.C. App. 47.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

STATE v. RAYNOR

No. 196 P.C.

Case below: 39 N.C. App. 259.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

STATE v. REID

No. 168 P.C.

Case below: 38 N.C. App. 547.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 5 February 1979.

STATE v. TRIPP

No. 155 P.C.

Case below: 38 N.C. App. 628.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979.

STATE v. WAY

No. 160 P.C.

Case below: 38 N.C. App. 628.

Petition by defendant for discretionary review under G.S. 78A-31 allowed 5 February 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

TOWN OF KILL DEVIL HILLS v. CULBRETH

No. 186 P.C.

Case below: 38 N.C. App. 743.

Petition by defendant for discretionary review under G.S. 7A-31 denied 5 February 1979. Motion of plaintiffs to dismiss appeal for lack of substantial constitutional question allowed 5 February 1979.

TUTTLE v. TUTTLE

No. 156 P.C.

Case below: 38 N.C. App. 651.

Petition by defendants for discretionary review under G.S. 7A-31 denied 5 February 1979.

WOODELL v. PETERS

No. 169 P.C.

Case below: 38 N.C. App. 629.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 5 February 1979.

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM 1979

MARIE CANNON PHILLIPS v. HOWARD LEE PHILLIPS, JR., INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF HOWARD LEE PHILLIPS; HOWARD LEE PHILLIPS III; JOHN BRADFORD PHILLIPS; AND EDGAR W. TANNER, CLERK OF THE SUPERIOR COURT OF RURTHERFORD COUNTY

No. 75

(Filed 16 March 1979)

1. **Wills § 61 — right of successive spouse to dissent — intestate share — no consideration of reduced distributive share**

The right of a "second or successive spouse" to dissent from her deceased spouse's will was determined by the amount of her "intestate share" pursuant to G.S. 30-1(a) without reference to her ultimate distributive share under G.S. 30-3(b).

2. **Wills § 61 — right to dissent — meaning of "intestate share"**

The "intestate share" of a surviving spouse is the quantum of real and personal property he or she would receive under the provisions of the Intestate Succession Act, G.S. Ch. 29.

3. **Wills § 61 — right to dissent — determination of net estate**

Since the intestate share of a surviving spouse is ordinarily a percentage of the decedent's net estate, in establishing whether the surviving spouse may dissent from decedent's will, the amount of the net estate must be determined within limits which will permit the court to ascertain with substantial accuracy whether the value of the intestate share of the surviving spouse is less or greater than the value of the property passing to her inside and outside the will.

4. **Wills § 61 — right to dissent — determination of net estate — deduction of widow's year's allowance**

The amount allotted to plaintiff as her widow's year's allowance should have been subtracted from decedent's gross estate to ascertain net estate for the purpose of determining whether plaintiff could dissent from decedent's will.

5. **Wills § 61— right to dissent—determination of net estate—deduction of estimated federal estate tax**

For the purpose of determining whether a surviving spouse may dissent, an estimation of the federal estate tax must be deducted in approximating the "net estate." This estimate is not an estimate of the actual tax which will be paid on the estate but rather an estimate of the tax which would be paid if the surviving spouse received the share of the "net estate" specified by G.S. 30-1(a)(1), including any marital deduction the estate would receive as a result of her taking that share.

6. **Wills § 61— right to dissent—determination of net estate—interest and penalties on federal estate tax**

Interest and penalties on the federal estate tax may not be considered when computing the "net estate" for the purpose of determining whether a surviving spouse can dissent.

7. **Wills § 61— right to dissent—determination of net estate—deduction of estimated costs of administration**

In determining the right of a surviving spouse to dissent from the deceased spouse's will, an estimation of the costs of administration of the estate, including the executor's commissions and reasonable attorneys' fees incurred in the administration of the estate, must be deducted in approximating the value of the "net estate." However, for the limited purpose of determining the surviving spouse's right to dissent, the deduction for attorneys' fees should not include any fees generated during litigation over the determination of that right.

8. **Wills § 61— right to dissent—when determined**

The determination of a surviving spouse's right to dissent should not be postponed until the actual value of the net estate can be ascertained, i.e., at the time of distribution. Rather, the clerk (or judge) should determine the right to dissent whenever, in his judgment, the value of the "net estate" can be estimated with reasonable accuracy.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

ON defendants' petition for discretionary review of the decision of the Court of Appeals, reported in 34 N.C. App. 428, 238 S.E. 2d 790 (1977), affirming the judgment for plaintiff entered by *Griffin, J.*, at the 29 October 1976 Session of RUTHERFORD Superior Court, docketed and argued as case No. 48 at the Spring Term 1978.

Action for a declaratory judgment under G.S. 1-253 (1966) upon stipulated facts.

Plaintiff, "a second or successive spouse," is the widow of Howard Lee Phillips (testator), who died testate on 8 April 1975.

No children were born to their marriage. Testator, however, was survived by one son, defendant Howard Lee Phillips, Jr., the child of a prior marriage. To him and his two children, defendants Howard Lee Phillips III and John Bradford Phillips, testator bequeathed and devised his entire estate, share and share alike. The will, which was executed on 6 June 1974, prior to testator's marriage to plaintiff on 22 December 1974, made no provision for her. As the beneficiary in a policy of life insurance, plaintiff received $70,000; and this was all the property she received "in any manner outside the will" in consequence of testator's death.

The will was duly probated, and letters testamentary were issued to Howard Lee Phillips, Jr., on 16 April 1975. In the "90-Day Inventory," filed on 8 July 1975, the executor valued testator's total estate at $326,936: personalty, $64,519; realty, $262,417. For the valuation of the realty the executor relied upon an itemized appraisal made for him on 30 May 1975 by a building contractor and realtor of Rutherford County.

On 2 September 1975, pursuant to N. C. Gen. Stats., Ch. 30, Art. 4 (G.S. 30-15 through 30-33) (1966), plaintiff filed an application for a year's allowance. She claimed $6,834.42 and the executor paid her this amount.

On 11 September 1975, acting under N. C. Gen. Stats., Ch. 30, Art. 1 (G.S. 30-1 through 30-3) (1966), plaintiff filed a dissent to testator's will, in which she alleged the total value of his estate to be at least $652,594. Relying upon an appraisal made for her on 30 July 1975 by a realtor-appraiser and licensed broker of Gastonia, North Carolina, plaintiff averred the value of testator's realty to be $588,075. She and the executor being in disagreement, pursuant to G.S. 30-1(c), plaintiff prayed the court to appoint one or more disinterested persons to determine and establish the value of testator's estate at the time of his death. In consequence, on 20 October 1975, the clerk appointed Charles D. Owens, whom he found to be "a licensed and competent real estate broker, familiar with the value of land in Rutherford County," to appraise the property of the estate. On 20 October 1975 Owens filed with the court an itemized appraisal, in which he determined the fair market value of testator's realty on 8 April 1975 to have been $238,452.

Thereafter, on "the _____ day of November 1975," plaintiff tendered to the Clerk an order which contained findings and conclusions summarized as follows: On the day of testator's death the total value of his estate was $302,971.50: realty, $238,452.50; personalty, $64,519. Under G.S. 30-3(b), plaintiff's "intestate share" of the estate is $75,742.87 (one fourth). Plaintiff, having received nothing in the will and only $70,000 outside the will, is entitled to dissent from it and to receive one fourth of the net estate, "including one-fourth of the personal property and one-fourth undivided interest in the real property." The clerk never signed this order. After 30 October 1975 he made no orders.

In order to determine her right to dissent, on 11 March 1976, plaintiff brought this action for a declaratory judgment. She prayed the court to declare her right (1) to dissent from her husband's will under G.S. 30-1, and (2) to receive, as a surviving successive spouse, one fourth of his net estate, "including one-fourth (1/4) undivided interest in the real property and rental from her interest in said real property from April 8, 1975."

When this case, having been regularly scheduled for trial, was called on 14 September 1976 all parties were present in court with their respective counsel of record. At that time counsel for the plaintiff and defendants "stipulated and agreed as to the findings of fact and all parties acknowledged that this was a matter of law for the court, and that both parties waived any right they might have to a jury trial in this cause." The "findings of fact" in addition to those heretofore stated are set out in the judgment of the trial judge and summarized as follows (enumeration ours):

1. At the time of testator's death his realty was encumbered by deeds of trust totaling $82,594.35. Since his death the estate has accumulated rents, money from the sale of cattle, profits from the operation of a supermarket, and the payments upon deeds of trust.

2. Defendant executor, "being of the opinion that the question of the right of the widow to dissent . . . had first to be determined," has neither filed nor paid any federal or state inheritance taxes. He has now estimated the federal estate tax to be $39,394.69 plus accumulated interest and penalties in the amount of $12,316.76. The State inheritance tax has been estimated at

$7,384.18, with accumulated interest and penalties totaling $582.72.

3. For the purpose of determining plaintiff's right to dissent under the provisions of G.S. 30-1, the parties concede that the value of testator's personalty was $64,519 as shown in the 90-Day Inventory, and that the clerk had accepted Mr. Owens' valuation of the realty at $238,452.50, making the total value of the estate $302,971.50 at the time of testator's death.

4. "The aggregate value in property passing in any manner under or outside the will to the plaintiff as the surviving spouse is Seventy Thousand ($70,000.00) Dollars, received from an insurance policy and widow's year's allowance in the sum of $6,834.42."

Upon the facts stipulated Judge Griffin concluded as a matter of law:

1. Plaintiff having "received less than her intestate share from all sources under or outside of her deceased spouse's will" is entitled to dissent under G.S. 30-1(a)(1).

2. Since plaintiff is a surviving successive spouse and testator is survived by one child of a former marriage and no lineal descendants from his marriage to plaintiff, she is entitled to one fourth of testator's estate as defined by G.S. 29-2(5).

3. The widow's year's allowance is not to be charged against her share in this estate.

From this judgment defendant appealed to the Court of Appeals, which affirmed the judgment. Upon defendants' petition we allowed discretionary review.

Roberts and Planer by Joseph B. Roberts III for plaintiff appellee.

Robert W. Wolf and George R. Morrow for defendant appellants.

SHARP, Chief Justice.

The question in this case is whether the facts found by the trial judge and stipulated by the parties are sufficient to establish

the right of plaintiff, a childless surviving successive spouse, to dissent from the will of her deceased husband, who is survived by one son of a prior marriage.

The right of a surviving spouse to dissent from his or her deceased spouse's will is conferred by statute "and may be exercised at the time and in the manner fixed by statute." *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969). The "time and manner" is fixed by G.S. 30-2, which permits any spouse entitled to dissent to do so within six months of the date letters testamentary were issued to the decedent's personal representative. The clerk may extend the time if litigation affecting the share of the surviving spouse is pending at the expiration of the time allowed. In this case the right to dissent is conferred by N. C. Gen. Stats. § 30-1(a) (1976), the law in effect on 8 April 1975, the date of testator's death. This secton provided:

> "§ 30-1. Right of dissent.—(a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for the benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator:
>
> (1) Is less than the intestate share of such spouse, or
>
> (2) Is less than one half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent."

Effective 1 October 1975, G.S. 30-1(a) was amended by adding a new subdivision as follows: "(3) Is less than the one half of the amount provided by the Intestate Succession Act in those cases where the surviving spouse is a second or successive spouse and the testator has surviving him lineal descendants by a former marriage and there are no lineal descendants surviving him by the second or successive marriage."

This subsection squarely addresses the factual situation of the instant case. However, since the General Assembly expressly

limited its application "to the estates of decedents dying after 1 October 1975," it has no application here.

At this point it is necessary to take note of Section (b) of G.S. 30-3, which will determine the distributive share of plaintiff in the net estate of her deceased husband if her right to dissent is upheld. This section provides: "Whenever the surviving spouse [who dissents to the will of the deceased spouse] is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage."

Thus, if it be determined that plaintiff is entitled to dissent, the parties concede the correctness of the trial court's conclusion that she will be entitled to one fourth of the decedent's net estate (one-half of her intestate share). *See Vinson v. Chappell*, 275 N.C. 234, 238, 166 S.E. 2d 686, 689 (1969).

[1] We find no merit in defendants' contention that because G.S. 30-1(a) and G.S. 30-3(b) are in *pari materia*, plaintiff should have a right to dissent only if the property she receives within and without the will is less than the share she would take under G.S. 30-3(b). As a "successive spouse," plaintiff will receive only one half of an intestate share under G.S. 30-3(b) if her right to dissent is established. Defendants argue therefore that she should be allowed to dissent only if the $70,000 she received outside the will is less than one half of her intestate share. Clearly, under the facts of this case, if that is to be the test, plaintiff will have no right to dissent.

It is true that statutes dealing with the same subject matter must be construed together. "When, however, the section dealing with a specific matter is clear and understandable on its face, it requires no construction." *Utilities Comm. v. Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E. 2d 663, 670 (1969). *See* 12 Strong's N. C. Index 3d *Statutes* § 5.5 (1978). The term "intestate share," as used in G.S. 30-1(a)(1) is clear and unambiguous. That the legislature provides one criterion for determining whether the right to dissent exists and another for determining the consequences of the dissent creates no ambiguity.

The absence of any ambiguity in G.S. 30-1(a)(1) likewise refutes defendants' argument that the 1975 amendment which added subsection (3) to G.S. 30-1(a) manifests the General Assembly's intent that the term "intestate share" in subsection (1) be defined with reference to the consequences of the dissent. While the purpose of an amendment to an ambiguous statute may be presumed to be "to clarify that which was previously doubtful," it is logical to infer that an amendment to an unambiguous provision, such as G.S. 30-1(a), evinces an intent *to change* the law. *Taylor v. Crisp,* 286 N.C. 488, 497, 212 S.E. 2d 381, 387 (1975); *Childers v. Parker's, Inc.,* 274 N.C. 256, 162 S.E. 2d 481 (1968).

Nor does attributing to G.S. 30-1(a)(1) its plain and definite meaning lead to an absurd result, as defendants contend. Common sense does not compel the assumption the legislature intended that the comparative figure used to determine a spouse's right to dissent (intestate share) should necessarily equal the distributive share of a dissenting spouse. The language of G.S. 30-1(c), which establishes a valuation procedure "[f]or the purpose of establishing the right of dissent" and mandates that the value so determined "be used exclusively for [that] purpose," indicates that the General Assembly anticipated a variance between this valuation and the ultimate distributive share. Further, under our present law, several situations exist where the right to dissent is determined by use of a figure which is more or less than the amount which would actually be received as a consequence of the spouse's dissent. *See* Note, *Does North Carolina Law Adequately Protect Surviving Spouses?,* 48 N.C.L. Rev. 361 (1970).

We hold therefore that the plaintiff's right to dissent is determined by subsection (1) of G.S. 30-1(a) without reference to G.S. 30-3(b).

To determine whether a surviving spouse has the right to dissent from the deceased spouse's will it is necessary to ascertain and compare two figures. The first is the aggregate value of the property passing to the surviving spouse under the will and outside the will.

G.S. 30-1(b) provides, among other things, that the value of proceeds of insurance policies on the life of the decedent received

by the spouse shall be included in the value of property passing to the surviving spouse as a result of the testator's death. Subsection (c) requires that the estate of the deceased spouse, and any property passing outside the will to the surviving spouse as a result of the testator's death, be determined and valued as of the date of death. When the personal representative and the surviving spouse fail to agree, G.S. 30-1(c) directs the clerk to appoint one or more disinterested persons to determine and establish the value of the property. It further provides that such determination and valuation "shall be final for determining the right of dissent and shall be used exclusively for this purpose."

Here, nothing passed to plaintiff under the will. Only the proceeds of a life insurance policy on testator's life, $70,000, came to her outside the will. Thus, in this case, the first figure is $70,000.

The second figure to be ascertained is the value of plaintiff's intestate share in testator's estate. If this figure is more than $70,000, plaintiff has the right to dissent; otherwise not. Obviously, therefore, the right to dissent cannot be determined without first ascertaining the value of the surviving spouse's intestate share in the deceased spouse's estate.

[2] The "intestate share" of a surviving spouse is the quantum of real and personal property he or she would receive under the provisions of N. C. Gen. Stat., ch. 29 (1976), known as the Intestate Succession Act. The section of the Act which applies to plaintiff's situation, G.S. 29-14(1), provides: "If the intestate is survived by only one child or by any lineal descendant of only one child, [the surviving spouse shall receive] one half of the net estate, including one half of the personal property and a one half undivided interest in the real property."

"Net estate" as used in the Intestate Succession Act "means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate." G.S. 29-2(5).

[3] Since the intestate share of any surviving spouse, or other heir, is ordinarily a percentage of the decedent's net estate, the amount of the net estate must be determined within limits which will permit the court to ascertain with substantial accuracy whether the value of the intestate share of the surviving spouse

is less or greater than the value of the property passing to her in and outside the will. This determination, however, may not be an easy task. Indeed, in some cases, it may not be possible.

Prior to the time the personal representative files his final account, it will seldom, if ever, be possible to determine with complete accuracy the value of the testator's net estate and the intestate share of the surviving spouse. In some instances, the net value of the estate can be ascertained with sufficient accuracy during the six months within which the surviving spouse is permitted to dissent to enable him or her to determine the right. We note, however, that creditors also have six months after the first publication of the executor's notice to creditors in which to file claims against the estate. G.S. 28A-19-3. Even ascertaining the amount of the debts may prove difficult when the claims are contingent or are being disputed by the executor. *See* G.S. 28A-19-5, -15, -16 (1976).

The most troublesome problem of valuation concerns the federal estate tax. Until this figure is ascertained with a reasonable degree of certainty, the clerk will be unable to determine the value of the decedent's "net estate." Under § 6075 of the Internal Revenue Code the estate tax return need not be filed until 9 months after the decedent's death. I.R.C. § 6075(a). If the Internal Revenue Service grants an extension, the return may be filed as late as 15 months after the date of decedent's death. I.R.C. § 6081(a). Further, if the Government chooses to contest the executor's valuation of the estate, always a realistic possibility when an estate of any size is concerned, a final valuation for tax purposes may be postponed as much as two years after the testator's death.

Without revealing his modus operandi, upon the facts stipulated by the parties, the trial judge concluded "as a matter of law" that plaintiff "received less than her intestate share from all sources under or outside of her deceased spouse's will." Thus the Court of Appeals was confronted with the question which now confronts us: Do the stipulated facts establish that the $70,000 plaintiff received outside the will is less than what she would have received had her husband died intestate?

The Court of Appeals, upon the following calculations, reached the same conclusion as did the trial judge: From $302,971.50,

the stipulated value of testator's gross estate, it subtracted $134,305.80. This figure is the sum of the following items: $82,594.35, the mortgage indebtedness on testator's realty; $39,394.69, the executor's estimate of the federal estate tax; $1,877.16, interest on the unpaid tax; $10,439.60, penalty for failure to pay the estate tax. "From the deduction of these amounts," the Court of Appeals said, "net estate can be reasonably ascertained—in the amount of $168,655.70—for the purpose of computing the plaintiff's intestate share and establishing her right to dissent. . . . Since the aggregate value of property passing to plaintiff under and outside her deceased spouse's will—$70,000—is *less than* her intestate share, plaintiff is entitled to dissent from the will." *Phillips v. Phillips*, 34 N.C. App. 428, 434, 238 S.E. 2d 790, 794 (1977). This arithmetic may be correct, but the formula is not.

[4] To ascertain "net estate" under G.S. 29-2(5) it is necessary to subtract from the value of the gross estate, "family allowances, costs of administration, and all lawful claims against the estate." In its computations the Court of Appeals erroneously failed to deduct the $6,834.42 allotted to plaintiff as her year's allowance; it did not consider the costs of administration; and it erroneously deducted the interest and penalties attributable to the executor's failure to pay the federal estate tax.

[5] Certainly the federal estate tax is one of the "lawful claims" against testator's estate, and the widow's intestate share of the estate is to be computed after its deduction. *Tolson v. Young*, 260 N.C. 506, 133 S.E. 2d 135 (1963). It is equally certain that the "net estate" cannot be either determined or fairly estimated without taking into consideration the federal estate tax. Yet the amount of the estate tax which will ultimately be due may vary substantially according to whether a surviving spouse can or cannot dissent. *See, e.g., In re Estate of Connor*, 5 N.C. App. 228, 168 S.E. 2d 245 (1969). Obviously, therefore, for purposes of determining whether a surviving spouse may dissent, it is an estimation of the federal estate tax which must be deducted in approximating the "net estate"; so the question becomes how to arrive at an estimate.

In the case before us the parties stipulated that the estimated amount of the federal estate tax for the purposes of

determining the "net estate" was $39,394.69. This figure was apparently based on the assumption that the property would pass according to the terms of testator's will. Having stipulated to that figure, the parties are in no position to question its accuracy on this appeal. We note, however, that the estimate required by G.S. 30-1(a) is not an estimate of the actual tax which will be paid on the estate but rather an estimate of the tax which would be paid if plaintiff received the share of the "net estate" specified by G.S. 30-1(a)(1), including any marital deduction the estate would receive as a result of her taking that share.

[6] The parties also agreed that at the time of the trial interest on the federal estate tax ($1,877.16) and penalty charges ($10,439.60) due to the delay in filing and payment had accumulated. Because of the stipulation plaintiff cannot object to the value assigned to these charges, but she can and does contend that these charges should not be deducted in the estimation of "net estate" for purposes of determining whether a surviving spouse can dissent.

Insofar as these interest and penalty charges are "lawful claims against the estate," they must be deducted before a distributive share can be determined. This does not mean, however, that the executor in a proper case may not be held personally liable for the interest and penalties or that such charges should be considered when determining whether a surviving spouse is entitled to dissent. It commonly occurs, as here, that the interests of the executor, the party responsible for filing the return and paying the tax debt, are antagonistic to those of the surviving spouse who is attempting to dissent. The legislature could not have intended to confer upon executors the power to extinguish any potential right to dissent merely by delaying the filing of an estate tax return, or payment of the principal of the debt, until interest and penalty charges sufficiently erode the "net estate." The date for filing a return, absent an extension, and the date upon which payment of the tax is due are the same (nine months from the date of death), and no interest or penalties accrue prior to that time. *See* I.R.C. § 6651; Treas. Reg. §§ 20.6075-1, 20.6081-1, 20.6151. While in *actuality* some delays in administration may be unavoidable, it appears reasonable to assume for the purpose of estimating the value of the net estate that an executor will comply with the time limits embodied in the

federal estate tax provisions. Accordingly, we hold that interest and penalties on the federal estate tax should not be considered when computing the "net estate" for the purpose of determining whether a surviving spouse can dissent.

On the basis of the stipulated facts, we now attempt to estimate testator's net estate. From $302,971.50, the value of testator's gross estate, we deduct $128,823.36, the sum of the following items: The widow's year's allowance, $6,834.42; lawful claims against the estate, $82,594.35 (mortgage debt); estimated federal estate tax exclusive of interest and penalties, $39,394.59. The difference is $174,148.14. The difference between one half of this figure and $70,000 is $17,074.07.

[7] Despite the fact that the parties agreed that this case was to be determined as a matter of law upon the stipulated facts, they failed to include an estimate of the costs of administration, an item which G.S. 29-2(5) specifically provides shall be taken into account in determining "net estate." Costs of administration include the executor's commissions and "reasonable sums for necessary charges and disbursements incurred in the management of the estate." G.S. 28A-23-3. Reasonable attorneys' fees come within the latter item. *See* M. Edwards, *North Carolina Probate Handbook* §§ 33.1-.5 (2d ed. 1975), 2 N. Wiggins, *Wills and Administration of Estates in North Carolina* §§ 249-50 (1964) and cases cited therein.

For this Court to determine plaintiff's right to dissent on the facts stipulated, we would have to conclude as a matter of law that reasonable commissions and attorneys' fees could not exceed $17,074.07. This we cannot do.

The amount of the executor's commissions, though limited to 5% of the receipts and disbursements and subject to review by the superior court judge on appeal, is addressed to the discretion of the clerk in the first instance. Attorneys' fees are also subject to the court's approval. Neither attorneys' fees nor commissions can be finally determined until the settlement of the estate. G.S. 28A-23-3(c), (d).

As a judge of probate, the clerk has supervised the administration of the estate from the beginning and presumably will have some idea of the value of the service which the executor and his attorney have rendered the estate. Upon a record silent on

these matters, the appellate court cannot assume the time expended, responsibility and trouble involved, and the skill required to settle the estate.

Since the cost of administration must be estimated before the net value of the estate can be approximated, this case must be remanded to the Superior Court for a determination of that figure. The cost of administration should include reasonable attorneys' fees incurred in the course of administering the estate. However, for the limited purpose of determining plaintiff's right to dissent, that figure should not include any fees generated during litigation over the determination of that right. Because it is apparent that the federal estate tax in this case was estimated on the basis of a mistaken assumption of law, that figure should also be recomputed in accordance with the rule enunciated in this opinion.

Because the clerk was apparently unable to cope with either the legal or factual complexities raised by plaintiff's dissent, the question of her right came before the superior court judge in an action for declaratory judgment. Therefore, on remand, the determination of the value of the "net estate," and consequently of plaintiff's right to dissent, must be made by the superior court judge on the basis of facts found by him or stipulated by the parties.

[8] Because the parties erroneously assumed that all facts necessary to determine testator's net estate were stipulated in the trial court's judgment, this appeal does not present directly the question of when the right to dissent should be determined. Nevertheless, the Court of Appeals chose to address that issue. *Phillips v. Phillips*, 34 N.C. App. 428, 238 S.E. 2d 790 (1977). That Court concluded that a surviving spouse's right to dissent should not be "finally established until 'net estate' is ascertained." 34 N.C. App. at 433, 238 S.E. 2d at 793. Although this statement is not free from ambiguity, it seems to imply that the right to dissent is not to be finally established until the actual value of the net estate can be ascertained, *i.e.*, at the time of distribution.

This proposed solution to the problems of valuation posed by the statute must be rejected. First, the legislature obviously intended for the right to be determined as quickly as possible after the dissent is filed. To this end G.S. 30-1(c) establishes a simple

and conclusive procedure for valuing the property passing to the dissenting spouse within and without the will. Second, and most decisive, the Court of Appeals' approach fails to take into account the effect of a spouse's right to dissent on the amount of federal estate taxes. A spouse's elective share will normally qualify for the marital deduction under § 2056 of the Internal Revenue Code. *See* Treas. Reg. § 20-2056(e)-2(c) (1958); 4 J. Mertens, The Law of Federal Gift and Estate Taxation § 29.14 (1959 and Supp. 1972); 1 J. Rasch, Harris-Handling Federal Estate & Gift Taxes § 251 (3d Ed. 1978). Because of the size of the elective share provided by G.S. 30-3, it will typically constitute the single largest deduction from the testator's gross estate. Under the rule proposed by the Court of Appeals, the executor would usually be forced to file the federal estate tax return before he knew whether the estate qualified for the marital deduction. His only alternative would be to delay the filing of the return and risk the accumulation of interest and penalties, or to go through the cumbersome process of seeking a refund.

In our view, the only practical solution to the problems involved is for the clerk (in this case the judge) to determine the widow's right to dissent whenever, in his judgment, the value of the "net estate" can be estimated with reasonable accuracy. This approach is apparently consistent with the present practice of the probate bar. *See* M. Edwards, North Carolina Probate Handbook § 28-10 (2d Ed. 1975). Of course, where the testator's personal representative and the dissenting spouse, dealing at arm's length, are able to agree upon the value of the "net estate," the clerk or the court will ordinarily abide by this agreement in determining the right to dissent. This approach parallels the procedure set out in G.S. 30-1(c) for establishing the value of property passing to the widow within and without the will.

We recognize that no judicially imposed solution can adequately redress the problems of valuation raised by our dissent statutes. While the use of an estimated "net estate" may work well where the right to dissent is clear-cut, it will inevitably cause problems in cases such as this one where that right is closely contested. Furthermore, it is apparent that the statutory scheme, which was intended to provide a relatively simple procedure for determining the right to dissent, will in many cases prove to be complex, time-consuming, and expensive. An unin-

tended effect of these drawbacks may be to discourage a deserving spouse from exercising the right to dissent.

Most of the problems of valuation and interpretation concern G.S. 30-1, the statute outlining the surviving spouse's right to dissent. Once the right is established it is relatively easy to compute the amount of the surviving spouse's distributive share. With the exception of the community property states, the vast majority of American jurisdictions give a surviving spouse an unqualified right to dissent from a deceased spouse's will. *See* Prentice-Hall, 2 Wills, Estates and Trusts ¶ 2735 (1975) for a list of states with elective shares. North Carolina is one of the few jurisdictions which grant only a qualified right. Bolich, *Election, Dissent, and Renunciation,* 39 N.C.L. Rev. 17, 30 (1960).

Under G.S. 30-1(a)(1) a surviving spouse has a right to dissent only when the total value of property received under and outside the will is less than what he or she would have received had the deceased spouse died intestate. As to property passing under the will, there is no need to qualify the right to dissent since a widow must renounce all rights under the will of the deceased in order to take an elective share. When the will adequately provides for a surviving spouse, economic self-interest will prevent a dissent.

The apparent purpose of G.S. 30-1 is to deny a surviving spouse a share of the testator's "net estate" when he or she has been adequately provided for by property passing outside the probate estate. Unlike property passing under the will, non-probate assets need not be renounced in order to take a dissenting share. As at least one commentator has pointed out, however, the statute may fall far short of accomplishing that goal.[1] For example, when a spouse receives a nontestamentary gift which is only slightly less than her intestate share, he or she will be entitled to keep both the non-probate assets and the elective share provided by G.S. 30-3. This may result in a "windfall" to the surviving spouse at the expense of beneficiaries under the will. *See* 48 N.C.L. Rev. at 365. The statute also fails to foreclose the possibility of intentional disinheritance. A surviving spouse's elective share under G.S. 30-3 is based on a percentage of the decedent's "net estate." Because the net estate includes only probate assets, there is nothing in the statute to prevent a testator from

1. *See* Note, *Does North Carolina Law Adequately Protect Surviving Spouses?* 48 N.C.L. Rev. 361 (1970).

disinheriting his spouse by leaving his property to others through the use of will substitutes.[2] *See, e.g.*, Landon, *Elective Share Rights — What's Left for the Spouse Who Wants to Avoid Them?* 113 Tr. & Est. 82 (1974).

Additional equitable considerations may arise when the dissent is filed by a successive spouse. Because plaintiff here is a "second or successive spouse," she will receive only one half of an intestate share (one fourth of the net estate) under G.S. 30-3(b) if it is determined on remand that she has a right to dissent. Apparently this statute was passed to protect a testator's children by a former marriage against a "fortune-hunting" second or successive spouse. However, as former Chief Justice Bobbitt observed in *Vinson v. Chappell*, 275 N.C. 234, 166 S.E. 2d 686 (1969), G.S. 30-3(b) contains "seeds of inequity." In particular he pointed to the following problems:

"1. If the 'second or successive spouse' is the decedent, and is not survived by a child or lineal descendant of a former marriage, if any, the surviving husband (wife), if he (she) elects to dissent will receive the *full* intestate share of a surviving spouse. . . . It would seem that, in a factual situation in which one spouse would be reduced to one-half of the share to which he or she would be entitled if the other died intestate, the rule as to *one-half* should be applied equally to both parties to the marriage.

"2. The inferior rights of the surviving 'second or successive spouse' do not depend upon whether a child was born of her (his)

2. The Uniform Probate Code proposes one possible solution to both of these problems. *See, generally*, 8 Uniform Laws Annotated—Estate Probate and Related Laws (Master Ed. 1972); Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 Conn. L. Rev. 513 (1970); Kurtz, *The Augmented Estate Concept under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 Iowa L. Rev. 981 (1977); Robertson, *How the Family Fares: A Comparison of the Uniform Probate Code and the Ohio Probate Reform Act*, 37 Ohio St. L.J. 321 (1976).

Recognizing that the probate process is no longer the exclusive or even the major means of transmitting wealth, Section 2-202 of the Code defines the "augmented estate" against which the right of election is measured to include not only probate assets but also certain testamentary substitutes, which if excluded could be used to defeat the spouse's legitimate claims. Under Section 2-201 a surviving spouse may elect to take a ⅓ share in the decedent's "augmented estate," which is defined to include probate property, gratuitous lifetime transfers to persons other than the surviving spouse, and the property of the spouse derived from the decedent. The Code also addresses the problem of "double compensation," which may occur under G.S. 30-1, by crediting against the spouse's elective share any property he or she may receive within or without the will. Uniform Probate Code, Section 2-207. Thus, if the spouse has already received property in excess of one third of the augmented estate, she receives no additional share by exercising her right to dissent. A number of states have adopted elective share statutes based on the UPC. *See, e.g.*, N.D. Cent. Code Ann. § 30.1-05 (1976); Utah Code Ann. §§ 75-2-201 to -207 (1978).

In the vast majority of states the disinherited spouse is simply given an unqualified right to a specified share of the decedent's probate assets. From as early as 1784 to 1 July 1960, North Carolina gave such a right to the widow. Laws of 1784, ch. 22, § 8; 1959 N. C. Sess. Laws, ch. 880. Although this approach fails to take non-probate assets into account, it offers, *inter alia*, the compensations of certainty, ease of administration, the avoidance of expensive and time-consuming litigation such as this, and—in all probability—results in no more inequities than does the present statutory scheme.

marriage with the decedent; rather, they depend upon whether such child (or lineal descendant) *survives* the decedent.

"3. G.S. 30-3(b) is applicable when the decedent is *survived* by a child or lineal descendant of a former marriage *even if* the decedent's will leaves nothing to such child or lineal descendant.

"Whether G.S. 30-3(b) applies does not depend at all upon such considerations as: (1) The comparative durations of the first and second marriage; (2) whether the former marriage was terminated by death or by divorce; (3) the age(s) of the child or children of the former marriage at the time of the second or successive marriage; and (4) the age(s) of the child or children of the former marriage and their financial status at the time of the death of the decedent." 275 N.C. at 238-39, 166 S.E. 2d at 690.

Solutions to the problems created by our present dissent statutes must, of course, await legislative action. In the meantime, bench and bar, executors and surviving spouses must cope with the existing statutes as best they can.

The decision of the Court of Appeals is reversed. The case is remanded to that court with directions that it be returned to the Superior Court of Rutherford County for further proceedings in accordance with this opinion.

Reversed.

Justices BRITT and BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. LONZO M. CREWS, JR. AND PHILLIP EUGENE TURPIN

No. 55

(Filed 16 March 1979)

1. Criminal Law § 92.5— defendants charged with same crimes—severance properly denied

The trial court did not err in denying defendants' motion for severance where they were tried for the murders of the same two people; neither defendant made an extrajudicial statement or confession that was introduced at trial; and neither showed any prejudice stemming from the joint trial.

2. Constitutional Law § 30— defendant's half-brothers and half-sister—welfare files—disclosure properly denied

In a prosecution for first degree murder where the evidence tended to show that one defendant's half-brothers and half-sister were present at the scene of the crimes, the trial court did not err in ordering that welfare department files concerning the half-brothers and half-sister not be released to defendants or the State, since the files in question were not in the prosecutor's possession, custody or control and therefore were not subject to discovery as a matter of right; almost all the material asked for was privileged under G.S. 8-53.3, as it consisted primarily of reports and test results on the children by practicing psychologists; and the trial court determined that disclosure of the files was not necessary to a proper administration of justice.

3. Searches and Seizures § 15— stolen vehicle—standing to challenge lawfulness of search

Defendants had no standing to object to the search of a truck since the truck belonged to neither defendant but had been stolen by them, and in fact neither defendant was present at the time of the search.

4. Criminal Law § 29.1— request for psychiatric examination—denial proper

The trial court did not abuse its discretion in denying one defendant's motion for a psychiatric examination where defendant had been in custody for over four months at the time he first requested the examination; no showing of any merit was made until the day of trial; defendant was present at his arraignment, entered a general plea of not guilty, and raised no question about his capacity to proceed at that time; and an affidavit filed by defendant's attorney in support of his motion was more of an indication that defendant did not have cancer or a brain tumor which would affect his capacity to proceed than an indication that he did have such a malady.

5. Constitutional Law § 30— defendant's statement to third person—discovery not required

The State was not required pursuant to G.S. 15A-903(a)(2) to disclose to defendant the substance of a statement allegedly made by him to a third person.

6. Criminal Law § 57— ballistics expert—granting of motion to suppress testimony—further evidence not prejudicial

Defendant failed to show error in the trial court's allowing the State to examine a ballistics expert further on the comparison between two exhibits after the court had granted defendant's motion to suppress ballistics testimony, since defendant did not include the voir dire in the record and it was therefore impossible to determine what material the trial judge was excluding by his order to suppress; the testimony further elicited from the witness merely clarified his former statement; and the later testimony was in fact beneficial to defendant.

7. Criminal Law § 86.4— earlier warrant against defendant—inquiry for impeachment improper—error inconsequential

Though the trial court erred in overruling defendant's objection to the State's question as to whether there was a warrant out against him for car

larceny at an earlier time, such error was inconsequential in light of the overwhelming evidence of defendant's guilt.

Justice BROCK took no part in the consideration or decision of this case.

APPEAL by defendants from the judgment of *Thornburg, J.*, entered in the 24 October 1977 Criminal Session of MADISON County Superior Court. This case was docketed and argued during Fall Term 1978 as Number 3.

In indictments, proper in form, the defendants were each charged with the first degree murder of Bennie Hudgins and the first degree murder of Tommy Norton. They entered pleas of not guilty as to all the charges, which were consolidated for trial.

At trial the evidence for the State tended to show the following:

On 12 June 1977 Mrs. Evelyn Alemany, Lloyd Romero, age thirteen, Raymond Romero, age fifteen, Debbie Romero, age sixteen, and the two defendants were camping in some woods near Big Laurel River in Madison County. Mrs. Alemany is the mother of the three Romeros and defendant Turpin; the Romero children are the half-brothers and half-sister of defendant Turpin. Defendant Crews is unrelated to all the others.

These people came to Madison County in Mrs. Alemany's Buick with a U-Haul trailer attached to it. The car developed two flat tires, and on 12 June 1977 the defendants decided they had to leave the area. The defendants told Debbie Romero to go out to the highway and stop someone "and make sure there are no women in the car and . . . make sure there are only two people in the car." They told Debbie that if she did not, they would hurt Raymond or Lloyd. At that time both defendants had guns with them. Debbie stopped a pickup truck containing an elderly man and a young boy, but she became frightened and told them to keep going.

At defendants' suggestion, Lloyd Romero then went to the road, and a pickup truck containing Bennie Hudgins and Tommy Norton stopped. The boy told them his mother had two flat tires and asked if they could help. Lloyd got in the truck with the two men, and the three of them drove toward the camp site. Lloyd jumped out of the truck and hid next to the creek. He was scared

the men were going to be shot because of statements previously made by defendant Crews.

The defendants came out of the bushes and approached the truck. Defendant Crews yelled for the two men to get out and put their wallets on top of the truck. Tommy Norton complied. Bennie Hudgins refused, so defendant Crews shot him in the back, took Mr. Hudgins' wallet from his pocket and threw the body next to the creek. Mr. Hudgins died as a result of that wound.

Defendant Crews then told defendant Turpin to shoot Tommy Norton "and let's get out of here." Defendant Crews then returned to camp with the pickup truck. He told Mrs. Alemany, Debbie and Raymond to take the things out of the truck and throw them in the creek, which they did.

In the meantime, defendant Turpin and Tommy Norton were still up by the road. Tommy Norton was crying and begged defendant Turpin three times not to shoot him because he had children at home. Mr. Norton started running up a hill, and defendant Turpin shot him in the arm with a scope rifle. He fell, and defendant Turpin ran up to him and shot him in the head. Mr. Norton died from this head wound.

Defendant Turpin and Lloyd Romero returned to camp. Defendant Turpin stated that he did not shoot the second man because "he [defendant Turpin] didn't want us [Lloyd and Raymond Romero] to know that he was a killer." Lloyd Romero testified, however, that he actually saw defendant Turpin shoot Tommy Norton in the head.

Some gasoline was siphoned from the pickup truck and was sprinkled on Mrs. Alemany's car. The car was then set on fire. Defendant Crews had stated that he wanted this done "because he didn't want his fingerprints or anything there to show that he had been there."

Mrs. Alemany, the three Romero children and the two defendants all got in the pickup truck and drove to Dresden, Tennessee so that defendant Crews could visit with his family. Once there, defendant Crews decided to remain with his family, and Debbie Romero stayed with him. She claimed that she did not want to stay, but her family just left her there. Mrs. Alemany

testified that defendant Crews made Debbie Romero stay with him "to guarantee that I [Mrs. Alemany] kept my mouth shut."

After leaving defendant Crews and Debbie in Dresden, Tennessee, Mrs. Alemany, Lloyd and Raymond Romero and defendant Turpin began driving to California in Tommy Norton's pickup truck. On 14 June 1977 they were seen siphoning gas out of a church bus by Reverend Grant Atkinson in Cripple Creek, Colorado. The police were notified, and a chase ensued between the truck and the officers. Eventually the pickup truck was forced to stop near an open field, but no one was in it by the time the police arrived.

About an hour later the officers apprehended Mrs. Alemany, Raymond and Lloyd in a field near the truck. They informed the police there was a fourth occupant, defendant Turpin, who may be armed. Defendant Turpin was arrested one hour later after he was discovered riding in a red pickup truck that was stopped at a roadblock.

Mrs. Alemany and the two Romero boys told the officers in Colorado that the pickup truck they were riding in had been stolen. They also mentioned the murders that had occurred in North Carolina, although there was some question as to whether Tommy Norton had been killed or had gotten away. This information was relayed to Sheriff Ponder of Madison County, and the bodies of Bennie Hudgins and Tommy Norton were found that day.

The evidence for defendant Crews tended to show the following:

Seven members of defendant Crews' family testified to his good reputation in the Dresden, Tennessee community. His wife also testified to defendant Crews' good reputation at Fort Jackson, South Carolina and Fort Campbell, Kentucky, places he had been stationed in the Army.

Charlotte Crews, defendant Crews' wife, testified that she and defendant Crews got married in January, 1975, and he joined the Army in December of that year. They have a daughter who is fifteen months old. In the Spring of 1977 they were living at Fort Campbell. Mrs. Crews discovered that defendant Crews was hav-

ing an affair with Debbie Romero, so she left him and went to California.

Mrs. Kathleen Crews, defendant Crews' mother, testified that Mrs. Alemany and Debbie Romero had been to her home in Tennessee with defendant Crews two times before June of 1977. On one occasion Mrs. Crews told Mrs. Alemany that she "didn't approve" of her and asked her to leave.

On 13 June 1977 her son, defendant Turpin, Mrs. Alemany, Debbie Romero and the two Romero boys came to her house about 10:30 a.m. They stayed about one hour, and then all of them except Debbie and defendant Crews left. Mrs. Crews stated that she had told Mrs. Alemany Debbie could not stay there, and Mrs. Alemany replied that "she was going to leave her there anyway."

Defendant Crews' sister, Mrs. Elizabeth Poag, testified that she had discussed the events of 12 June 1977 with Debbie Romero. Debbie had told her that Debbie's brother had killed one of the men and her mother had killed the other.

Defendant Crews took the stand on his own behalf. He testified that on 12 May 1977 he went AWOL from the Army because "I [defendant Crews] was depressed with the way the Army was treating me." He and Debbie Romero went to Dresden, Tennessee to get his car fixed. They returned to Fort Campbell, Kentucky, and the next day he, defendant Turpin, Mrs. Alemany, Debbie Romero and the two Romero boys left Kentucky. The two defendants were in defendant Crews' car, and the others were in Mrs. Alemany's Buick. They all went to Chicago to visit some of defendant Crews' relatives, and defendant Crews left his car with some cousins.

On 10 June 1977 Mrs. Alemany decided that the group would camp along Big Laurel River in Madison County. On Sunday, 12 June 1977 defendant Turpin and Mrs. Alemany got into an argument during breakfast. Mrs. Alemany broke a plate over her son's hand and threw a butcher knife at him.

That morning, about 11:00 a.m., defendant Crews left the camp site and sat down in the woods. He was thinking about his wife and child and about getting back to Fort Campbell. He heard some shots and thought someone was target shooting. As he

returned to the camp, he saw a roadblock and "thought I [defendant Crews] saw a body." At the camp he noticed the others taking things from the U-Haul trailer and putting them into the back of a pickup truck. After they were finished, Mrs. Alemany's car was set on fire, and all of them left in the truck.

Defendant Crews stated he never asked anyone what had happened or how the truck had gotten there. The first time he knew two men were killed was when he was arrested.

The group drove to Dresden, Tennessee, and defendant Crews decided to stay with his family. Debbie Romero also stayed because she wanted to go back to Fort Campbell with him and get a job. Defendant Crews denied ever having told Mrs. Alemany he would harm Debbie if her mother talked to the police, and there was no indication Debbie did not want to stay in Dresden or was doing so involuntarily.

Defendant Turpin presented no evidence.

The trial court charged the jury that they could find either or both defendants guilty of first degree murder, second degree murder or not guilty as to the deaths of Bennie Hudgins and Tommy Norton. The jury found both defendants guilty of two first degree murders. After hearing evidence concerning the sentencing of defendants, the jury recommended life imprisonment for each defendant. After an imposition of two consecutive life sentences for both defendants, they appealed to this Court.

Other facts relevant to the decision will be included in the opinion below.

Jeff P. Hunt for defendant Crews.

Bruce Briggs for defendant Turpin.

Attorney General Rufus L. Edmisten by Associate Attorney Thomas H. Davis, Jr. for the State.

COPELAND, Justice.

For the reasons stated below, we find no prejudicial error in defendants' trial.

This appeal concerns two defendants who submitted separate briefs to this Court. We will deal first with those assignments of

error brought forth by both defendants. We will then discuss the arguments made by defendant Turpin alone and those made by defendant Crews alone, in that order.

Both defendants claim the trial court erred in denying their motions for change of venue or, in the alternative, for a special venire to be summoned from outside Madison County. They based their motions primarily on the pretrial publicity of the crimes that was contained in local newspapers.

Before denying the motions, the trial judge heard arguments from the defendants and the State, and he studied defendants' written motions and the accompanying newspaper articles. The judge stated in his order that he would permit "full inquiry" of each prospective juror to determine whether he or she could give defendants "a fair and impartial trial based on the evidence." If there is any indication to the contrary, "the Court will at that time hear challenge for cause."

Defendants do not contend that any juror was impaneled who was biased or prejudiced in any way. They did not include any of the jury selection proceedings in the record.

> "Defendant's motion for a change of venue was addressed to the sound discretion of the trial court. Where the record discloses . . . that the presiding judge conducted a full inquiry, examined the press releases and the affidavits in support of the motion, and where the record fails to show that any juror objectionable to the defendant was permitted to sit on the panel, or that defendant had exhausted his peremptory challenges before he passed the jury, denial of the motion for change of venue was not error." *State v. Harding*, 291 N.C. 223, 227, 230 S.E. 2d 397, 400 (1976). (Citations omitted.) *See also State v. Harrill*, 289 N.C. 186, 221 S.E. 2d 325 (1976), death penalty vacated in 428 U.S. 904, 49 L.Ed. 2d 1211, 96 S.Ct. 3212 (1976).

This assignment of error is overruled.

[1] The defendants next argue that the trial court erred in denying their motions for severance. We do not agree.

Both defendants in this case were indicted and tried for the murders of Bennie Hudgins and Tommy Norton. "Ordinarily,

unless it is shown that irreparable prejudice will result therefrom, consolidation for trial rather than multiple individual trials is appropriate when two or more persons are indicted for the same criminal offense(s)." *State v. Jones*, 280 N.C. 322, 333, 185 S.E. 2d 858, 865 (1972).

The most common reason for requesting a separate trial is that one defendant has made an extrajudicial statement that would implicate and prejudice the other defendant should the State offer it into evidence at defendants' joint trial. *See State v. Pearson*, 269 N.C. 725, 153 S.E. 2d 494 (1967). *See also Bruton v. United States*, 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620 (1968). In this situation, the State must choose between not using the statement at defendants' joint trial, deleting from the one defendant's out-of-court statement all references to the other defendant(s) or trying the defendants separately. G.S. 15A-927(c).

In this case neither defendant made an extrajudicial statement or confession that was introduced at trial, and neither defendant has shown any prejudice stemming from the joint trial. The question whether to try defendants together or separately is directed to the sound discretion of the trial court. Its ruling will not be disturbed on appeal unless the defendant can show the consolidation deprived him of a fair trial. *See, e.g., State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977). This assignment of error is overruled.

[2] For many years defendant Turpin and the Romero children had been connected with the child welfare division of the San Francisco Department of Social Services. The defendants subpoenaed Ms. Lorraine Costellano Cocke personally from the San Francisco Department of Social Services and requested access to that agency's files through a *subpoena duces tecum*. Ms. Cocke appeared in court with the records and documents on defendant Turpin and the Romero children; however, she was instructed by the San Francisco city attorney not to make them available to anyone unless and until the trial judge inspected them and ordered them released.

The defendants asked the trial judge to conduct an *in camera* inspection of the files and "to release such paper writings to the Defendant Turpin and the Defendant Crews for such purpose and such use as they may be in the defense of these two cases." The

judge did examine the files, and he ordered that they not be released to either the defendants or the State. He then sealed and forwarded them to this Court for review of his ruling.

The defendants also made motions for pretrial discovery of files and reports concerning mental or physical examinations conducted on Lloyd and Raymond Romero. These documents were in the custody of the Blue Ridge Community Mental Health Center in Asheville and the Madison County Department of Social Services. The trial judge also inspected these documents *in camera.* He allowed defendants' motions in part and denied them in part, ordering that copies of certain reports be furnished to both the defense and the State. The records were sent to this Court for our use in reviewing this matter.

The defendants claim the trial court erred in denying them access to all the requested material. We do not agree.

None of the documents and reports in question were within the prosecutor's possession, custody or control; therefore, they were not subject to discovery as a matter of right under G.S. 15A-903(d)[1] or G.S. 15A-903(e).[2] "Within the possession, custody, or control of the State" as used in these provisions means within the possession, custody or control of the prosecutor or those working in conjunction with him and his office. This interpretation is necessary when one considers that in this case the district attorney had neither the authority nor the power to release the requested material to the defendants and, in fact, he was also denied access to the information.

1. G.S. 15A-903(d) Documents and Tangible Objects.—Upon motion of the defendant, the court must order the solicitor to permit the defendant to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the State and which are material to the preparation of his defense, are intended for use by the State as evidence at the trial, or were obtained from or belong to the defendant.

2. G.S. 15A-903(e) Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. In addition, upon motion of a defendant, the court must order the prosecutor to permit the defendant to inspect, examine, and test, subject to appropriate safeguards, any physical evidence, or a sample of it, available to the prosecutor if the State intends to offer the evidence, or tests or experiments made in connection with the evidence, as an exhibit or evidence in the case.

Almost all the material asked for was privileged under G.S. 8-53.3[3] had the Romero children been given the chance to assert the privilege. It consisted primarily of reports and test results on the children by practicing psychologists. The trial judge examined the documents in detail and refused to release them to either the defendants or the State. Under the proviso in G.S. 8-53.3, the judge clearly could have compelled disclosure "if in his opinion the same is necessary to a proper administration of justice." His refusal to do so in this case was not error.

Furthermore, the defendants admit that the trial court issued them copies of some of the requested matter; however, the record does not inform this Court which material they were given. This information should have been included in the record as it was necessary for our understanding of defendants' assignment of error. *See* Rule 9(b)(3) of North Carolina Rules of Appellate Procedure.

[3] Defendant Turpin argues that the guns seized from Tommy Norton's truck in Colorado should have been excluded from evidence at trial because the search of that vehicle was unconstitutional. This contention is without merit.

At defendant Turpin's request, the trial judge conducted a *voir dire* concerning the search in question. He found that the search was lawful and reasonable and that neither defendant had standing to object to the search. We agree with both conclusions; however, we need only discuss the standing question.

The vehicle that was searched in this case belonged to neither defendant, and in fact neither defendant was present at the time of the search. Defendant Crews was in Tennessee with his family and Debbie Romero. Defendant Turpin had fled from the vehicle after being chased by Colorado authorities; he was somewhere at large at the time. The search was conducted after Mrs. Alemany and Lloyd and Raymond Romero had been arrested and after they had told the officers there were several weapons in the truck.

3. G.S. 8-53.3 Communications between psychologist and client.—No person, duly authorized as a practicing psychologist or psychological examiner, nor any of his employees or associates, shall be required to disclose any information which he may have acquired in rendering professional psychological services, and which information was necessary to enable him to render professional psychological services: Provided, that the presiding judge of a superior court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice.

The United States Supreme Court recently addressed the issue of standing to object to a search in *Rakas v. Illinois*, --- U.S. ---, 58 L.Ed. 2d 387, 99 S.Ct. 421 (1978). The Court again emphasized that " 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search," and it noted that some lower courts have erroneously allowed a person in a stolen automobile to object to the search of that vehicle. Id. at ---, 58 L.Ed. 2d at 399-400 n. 9, 99 S.Ct. at 429 n. 9. The *Rakas* decision made it clear that a person can object to a search only if he has "a legitimate expectation of privacy in the invaded place," which means, *inter alia*, an expectation of privacy that society will recognize. Id. at ---, 58 L.Ed. 2d at 401 n. 12, 99 S.Ct. at 430-31 n. 12. Previous possession of a stolen vehicle cannot constitute the basis for a legitimate expectation of privacy; therefore, this assignment of error is overruled.

[4] The defendants' trial was set for 24 October 1977. On 10 October 1977 Judge Thornburg allowed defendant Turpin's request for a pretrial psychiatric examination. On 19 October 1977 defendant Crews made a motion for a pretrial psychiatric examination; however, the only reason stated for the request was that the defendant was charged with a capital crime. The motion was denied because "the Court finds nothing in the motion that would constitute a reasonable ground for allowing the requested examination."

On 24 October 1977, the day of trial, defendant Crews renewed his motion. At this time an affidavit by defendant Crews' attorney was submitted to the trial court stating that defendant Crews' mother and wife had told him that the defendant may have cancer or a brain tumor. According to the affidavit, a doctor at Fort Campbell, Kentucky had mentioned this possibility to defendant Crews' wife. The affidavit went on to state, however, that "the Defendant had no knowledge of having such a malady as cancer, or a brain tumor, and that he had never received any X-rays of the head and had never been treated for a brain tumor or cancer of the head," although defendant Crews had suffered from extreme headaches over the past four years. Moreover, two of defendant Crews' commanding officers at Fort Campbell had been contacted by the attorney. Neither of them had heard "anything at all" about defendant Crews' possible condition, and

both stated that they "would have expected to have been informed" if such had been the case.

We have stated that a defendant does not have an automatic right to a pretrial psychiatric examination and that the resolution of this matter is within the trial court's discretion. *State v. Washington*, 283 N.C. 175, 195 S.E. 2d 534 (1973), *cert. denied* 414 U.S. 1132, 38 L.Ed. 2d 757, 94 S.Ct. 873 (1974). *See also* G.S. 15A-1002(b).

Defendant Crews had been in custody for over four months at the time he first requested a pretrial psychiatric examination, and no showing of any merit was made until the day of trial. He was present at his arraignment and entered a general plea of not guilty; he did not raise any question about his capacity to proceed at that time. The affidavit in support of the motion was more an indication that defendant Crews did *not* have cancer or a brain tumor than that he did. Under these circumstances, the trial court did not abuse its discretion in denying defendant Crews' request. This assignment of error is overruled.

[5] In his next assignment of error defendant Crews contends the trial court erred by allowing Debbie Romero to testify as to his statement to her that he had shot Bennie Hudgins. He claims that the State was required to disclose to him the substance of this statement pursuant to his request for voluntary discovery of "all oral statements made by the defendant which the state intends to offer in evidence, as provided by G.S. 15A-903(a)(2)." We do not agree.

According to the official commentary accompanying it, Article 48 of the North Carolina General Statutes, dealing with pretrial discovery, was modeled after a draft of proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure. *See also State v. Hardy*, 293 N.C. 105, 235 S.E. 2d 828 (1977). Federal Rule 16(a)(1)(A) expressly deals with this problem by stipulating that a defendant may discover "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest *in response to interrogation by any person then known to the defendant to be a government agent*." (Emphasis added.) Although

G.S. 15A-903(a)(2)[4] does not include the language in Federal Rule 16(a)(1)(A) emphasized above, we find the intent of the Legislature was to restrict a defendant's discovery of his oral statements to those made by him to persons acting on behalf of the State.

The official commentary to G.S. 15A-903 relates that a provision requiring disclosure to a defendant of the names and addresses of witnesses to be called by the State was omitted from Article 48 because the witnesses may be subject to "harassment or intimidation." We agree with the opinion of the Attorney General that "[i]t would be illogical to assume the Act intended to require discovery of remarks of the defendant to bystander witnesses but not disclosure of the witnesses' names." 45 N.C.A.G. 60 (1975). "Where possible, the language of a statute will be interpreted so as to avoid an absurd consequence." *State v. Hart*, 287 N.C. 76, 80, 213 S.E. 2d 291, 295 (1975). Furthermore, it is anomalous to think the Legislature granted a defendant indirect access to the names of the State's witnesses when it denied his right to this information directly.

We have found no case in North Carolina in which an oral statement by a defendant to a third party witness was disclosed to him pursuant to G.S. 15A-903(a)(2). In fact, the interpretation urged by defendant Crews was apparently not contemplated when Chief Justice Sharp, speaking for this Court, stated that "defense counsel would be well advised to specifically request the defendant's oral statements when, as here, the client informs him *he has talked to the officers*." *State v. Stevens*, 295 N.C. 21, 37, 243 S.E. 2d 771, 781 (1978). (Emphasis added.) This assignment of error is overruled.

[6] State's Exhibit Number 11 consisted of metal fragments that had been removed from the body of Bennie Hudgins. Mr. Robert Cerwin, a special agent in the ballistics section of the North Carolina State Bureau of Investigation, testified for the State. He had examined State's Exhibit Number 11 and State's Exhibit Number 15, the 30-30 rifle that had been seized from Tommy Nor-

4. G.S. 15A-903. Disclosure of evidence by the State—information subject to disclosure.—(a) Statement of Defendant.—Upon motion of a defendant, the court must order the prosecutor:

• • •

(2) To divulge, in written or recorded form, the substance of any oral statement made by the defendant which the State intends to offer in evidence at the trial.

ton's truck by law enforcement officers in Colorado, to determine whether the bullet fragments had been fired by that rifle. The witness was accepted by the court as an expert in ballistics and firearm identification. He testified that State's Exhibit Number 11 could possibly have been fired from a 30-30.

A *voir dire* was then conducted, and the trial court ruled that "as to any further testimony concerning the bullet fragments previously identified as State's Exhibit 11, any further testimony by this witness, the motion to suppress is allowed, the evidence remains in as previously admitted; however, and the Court does not alter its ruling in that respect." The following exchange on direct examination then took place before the jury:

"Q. Mr. Cerwin, were the jacketing in the State's Exhibit 11 sufficiently large and intact to make a fair comparison with State's Exhibit 15?

OBJECTION.

OVERRULED.

A. (The witness did not respond.)

Q. Mr. Cerwin, 15 is the 30-30.

A. Yes, sir did I make a comparison with State's Exhibit—

Q. Was it sufficiently large jacketing, State's Exhibit 11, for you to make a fair comparison to determine whether or not it was fired by State's Exhibit 15?

A. Yes, I did, sir.

OBJECTION and MOTION TO STRIKE.

DENIED.

Q. Was it sufficiently intact and large enough for you to form an opinion as to whether State's Exhibit 15 discharged State's Exhibit 11?

OBJECTION.

OVERRULED.

A. Oh no sir not for a positive comparison, sir, due to the deformity on State's Exhibit 11, sir."

On cross-examination of this same witness, Mr. Cerwin reiterated that he "could not make a positive comparison between Exhibit 11 and Exhibit 15, due to the deformity of the jacket."

Defendant Crews argues the trial court erred in allowing the State to examine the witness further on the comparison between the two exhibits.

The record does not set forth the *voir dire* proceeding on this matter; therefore, we cannot determine what material the trial judge was excluding by its order. The ruling did specify, however, that the evidence on this question that had already been admitted was to remain in evidence. The testimony further elicited from Mr. Cerwin merely clarified his former statement that State's Exhibit Number 11 "is a deformed copper jacket bullet, it possibly could be from a 30-30." In fact, it appears that Mr. Cerwin's later testimony was beneficial to defendant Crews because the witness then made it perfectly clear that a positive comparison could not be made. This assignment of error is overruled.

[7] Defendant Crews testified at trial. During cross-examination, and over his objection, the State asked whether there was a warrant out against him for car larceny when he left Kentucky. Defendant Crews claims the trial court erred in overruling his objection to this question.

In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), this Court held that "*for purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he has been *accused*, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial." *Id.* at 672, 185 S.E. 2d at 180. (Emphasis in original.) The trial judge should have sustained defendant Crews' objection; however, we find that this error does not constitute a sufficient basis for a new trial. Defendant Crews responded that he knew of no such warrant, and no further inquiry was made by the State. In light of the overwhelming evidence of defendants' guilt, this error was inconsequential. *See State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972).

We have examined all other assignments of error defendants brought forward to this Court and find them to be without merit.

For the foregoing reasons, we find that defendants had a trial free from prejudicial error.

No error.

Justice BROCK took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. EDGAR CURTIS RUOF

No. 15

(Filed 16 March 1979)

1. **Criminal Law § 33— defendant's association with motorcycle gang—motion to exclude all evidence properly denied**

In a prosecution for first degree murder, the trial court properly denied defendant's motion in limine seeking a ruling that all evidence relating to defendant's association with a motorcycle club known as "The Outlaws" be excluded, since the trial judge was not in a position prior to trial to know the context in which the matter defendant sought to exclude would be presented, and defendant retained his right to object to such testimony when it was offered at trial.

2. **Homicide § 20.1— photograph of deceased—admissibility to illustrate pathologist's testimony**

In a prosecution for first degree murder, the trial court did not err in admitting a photograph of deceased into evidence, since the photograph as used by an expert in pathology related to the angle of entry and exit of the fatal bullet which bore on the plausibility of defendant's defense of accident.

3. **Homicide § 20.1— photograph of defendant—admissibility to explain identification testimony**

In a prosecution for first degree murder, the trial court did not err in admitting into evidence a photograph of defendant as he appeared at the time of the crime, since defendant was heavy and had a long beard and long hair at the time of the crime but was slender, clean-shaven and had short hair at the time of the trial, and witnesses, by using the photograph to illustrate their testimony, were able to remove any confusion as to defendant's identity which might have arisen because of the variance in the witnesses' verbal descriptions of defendant on the night of the shooting as compared to defendant's appearance at trial.

4. **Criminal Law § 33.1— defendant as member of motorcycle gang—evidence of identity and motive**

In a prosecution for first degree murder, the trial court did not err in allowing testimony relating to defendant's association with a motorcycle gang since testimony that defendant was dressed in clothes of the motorcycle gang and was in the company of other motorcycle gang members was relevant and admissible for the purpose of identifying defendant; moreover, defendant's association with the gang was evidence of his motive for shooting deceased, who had encroached upon the territory of the gang, and the State could properly show motive even though motive did not constitute an element of the offense charged.

5. **Constitutional Law § 30; Homicide § 20— knife found during trial—evidence made available to defendant**

In a prosecution for first degree murder, the trial court did not err in admitting into evidence a knife found among deceased's personal effects which the State had not produced before trial pursuant to defendant's request for discovery, since the State discovered the knife during trial and advised defense counsel of its existence the next day; defense counsel did not object to introduction of the knife or request a continuance; even so, the trial judge without request took a recess to the end that defense counsel could make such use of the knife as he saw fit; and the introduction of the knife into evidence appeared to bolster rather than weaken defendant's position.

6. **Criminal Law §§ 86.2, 102.5— defendant's prior criminal activity—cross-examination—no question asked in bad faith**

Defendant's contention that the district attorney cross-examined him in bad faith with regard to prior criminal activity or acts of misconduct was without merit where the district attorney indicated that he did not intend to ask any questions in bad faith, and the court was not required to conduct a voir dire to determine whether the district attorney's questions were based on fact and asked in good faith.

7. **Criminal Law § 102.9— district attorney's jury argument—characterizations proper**

The district attorney's characterizations of defendant as an "outlaw," a "violent man," a man who carried an automatic pistol, rode with a motorcycle gang, and had a "violent temper" were supported by the evidence that defendant was a member of a motorcycle gang called "The Outlaws," that he wore a gun and had been convicted of carrying a concealed weapon and possessing a sawed-off shotgun, and that he shot an unarmed man at contact range with little or no provocation; moreover, defense counsel did not object to any of the argument directed to the character of defendant.

8. **Homicide § 14— presumptions of unlawfulness and malice—constitutionality**

The presumptions of unlawfulness and malice arising from the intentional use of a deadly weapon are not unconstitutional.

State v. Ruof

9. Homicide § 21.5— premeditation and deliberation—sufficiency of evidence

Evidence in a first degree murder prosecution was sufficient for the jury to find premeditation and deliberation where such evidence tended to show that deceased was in an establishment dancing with his girlfriend, twirling a knife, and declaring himself to be "the baddest man in the bar"; defendant, a member of a motorcycle gang called "The Outlaws" became enraged, went to a room behind the bar where he obtained his pistol, and returned to the dance area where he observed a friend and deceased, who was unarmed, in a struggle; defendant shot deceased in the back of the head without any warning or any attempt to separate the two men; and defendant then left the scene without offering any assistance of any kind to the wounded man.

APPEAL by defendant from *Thornburg, J.*, 19 June 1978 Schedule "B" Session of MECKLENBURG Superior Court.

Defendant was charged with the crime of murder in the first degree. Prior to trial, his counsel filed a "motion in limine" seeking a ruling that all evidence relating to defendant's association with a motorcycle club known as "The Outlaws" be excluded. Judge Thornburg reserved ruling until the "approximate time during the course of trial."

In summary, the State's evidence was as follows:

Mike Cearley, a student at UNCC, testified that on 25 October 1975 at about 10:30 p.m., he went into an establishment in Mecklenburg County known as "The Hut." After about 45 minutes, he went to the bathroom, and as he returned to the main area of the establishment, he saw three men fighting in the center of the dance floor. As he moved through the crowd toward the fighting men, he observed that there were only two men engaged in the fight. He then saw defendant, whom he described as being about five feet seven inches tall, weighing approximately 215 pounds, wearing a full beard and having long reddish brown hair walk up to the two men and shoot one of them in the back of the head. He was later told that the man who was wounded was Roger Bartee. He noted that at trial defendant was much thinner than he was on the night of the shooting.

Douglas Rhyne, who was also at "The Hut" on the night of 25 October 1975 and the early morning hours of 26 October 1975, stated that he had seen defendant on prior occasions but had never been "introduced" to him. He had noticed defendant because he wore clothes which identified him as belonging to a

motorcycle group known as "The Outlaws." The witness stated that he had known Roger Bartee for over three years. He was standing outside "The Hut" when he heard a "scuffle" and upon entering he saw Roger Bartee and a man he had also previously noticed because he too wore "Outlaw colors." The two were locked together near the juke box. He then saw defendant grab Bartee by the shoulder and shoot him in the back of the head with a .45 caliber automatic pistol. The pistol was about four or five inches from Bartee's head when it was fired. Defendant then left the scene. The witness was shown a photograph of defendant, and he stated that it correctly portrayed defendant's appearance as of October, 1975. He testified that defendant's appearance at trial differed in that at the time of the shooting defendant had long hair, a full beard and was much heavier. The photograph was admitted into evidence over defendant's objection as State's Exhibit 5.

Steve Garcia, the manager and bartender of "The Hut" at the time of the shooting, stated that the establishment was frequented by a motorcycle club known as "The Outlaws." These men would bring pistols to the establishment and store them in an area behind the bar. Donald "Gangrene" Sears and Edgar Curtis "Moe" Ruof were members of "The Outlaws" club. On the night of the shooting, Roger Bartee and his girlfriend were dancing. The witness observed Bartee twirling a two inch knife, and he told Bartee to put the knife away. At this point, "Gangrene" who had been sitting at the bar approached Bartee and a fistfight started between the two. He then saw defendant go behind the bar, return and join in the fight. He saw a handgun in defendant's hand and thereafter heard a shot. After observing Bartee lying on the floor, he called the police. He did not see a weapon in Bartee's hand during the fight.

Debra Jean Payne testified that she accompanied her fiance Roger Bartee to "The Hut" on the night of 25 October 1975. Sometime after midnight, they were standing near the bar talking with friends about an incident which had occurred the night before when a man came up and asked Roger what they were talking about. When Roger answered, the man struck at Roger who then removed and handed her his glasses. The men started a fistfight, and she saw another man, who came from the area of the bar, shoot Roger in the head at close range. She was unable

to make an in-court identification of defendant as the man who did the shooting but identified State's Exhibit 5 as correctly portraying the man who shot Roger.

Scott Moody testified that during the early morning hours of 26 October 1975, he was standing outside "The Hut," and upon hearing a "rumpus," he looked inside. He observed two men wrestling, and he then saw the defendant walk up to the men and shoot Bartee in the head. He knew both Bartee and defendant by sight.

The State offered evidence to the effect that defendant was arrested in Florida where he was living under an assumed name. There was also medical testimony that Bartee died as a result of a gunshot wound to the head fired by a weapon at almost contact range. The State's other evidence was corroborative in nature.

Defendant testified that he was at "The Hut" on the evening of 25 October 1975. He was sitting at the bar with Donald "Gangrene" Sears and some girlfriends when he noticed Roger Bartee standing in the dance floor with an opened knife in his hand. Bartee looked at him and said that he "was the baddest one in the bar." The witness said that he immediately went into the back room behind the bar where he picked up his .45 caliber Colt automatic pistol and stuck it in his belt. When he reentered the main area, he saw Bartee strike Sears in the chest in a manner which drove Sears across the room. Defendant stated that he thought Bartee was stabbing Sears, and he, thereupon, pulled his gun and hit Bartee on the head. The gun accidentally discharged, and he fled because he was frightened. He thought that his pistol was on safety or "half-cocked."

Defendant also offered evidence tending to show that Bartee had the reputation of being a violent fighting man.

In rebuttal, the State offered Eric Johnson, a qualified firearms examiner, who testified that the weapon that defendant used on the morning of 26 October 1975 did not fire in a "half-cocked" position unless the trigger was pulled.

The jury returned a verdict of guilty of murder in the first degree, and defendant appealed from judgment imposing a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by Ben G. Irons II, Assistant Attorney General, for the State.

Michael S. Scofield for defendant appellant.

BRANCH, Justice.

[1] Defendant assigns as error the failure of the trial judge to grant his motion in limine. The thrust of the motion was to prohibit any comment regarding defendant's association with "The Outlaws" motorcycle club. The trial judge considered the written motion and stated that he would rule on it "at the appropriate time during the course of the trial."

Generally, a motion in limine seeks to secure in advance of trial the exclusion of prejudicial matter. North Carolina has no statutory provisions for such a motion, and it is rarely if ever used in this State. In those jurisdictions which recognize the motion, however, the uniform rule appears to be that the decision whether to grant the motion is addressed to the trial judge's discretion. *See*, Annot., 63 A.L.R. 3d 311 (1975).

In instant case, we discern no prejudice resulting from the trial judge's failure to grant defendant's motion in limine. The trial judge was not in a position prior to trial to know the context in which the matter defendant sought to exclude would be presented. Defendant retained his right to object to such testimony when it was offered at trial. We, therefore, hold that the trial judge properly denied defendant's motion.

[2] Defendant argues that the trial judge committed prejudicial error by admitting a photograph of deceased into evidence. We do not agree.

During the testimony of Dr. Wood, an expert in pathology, he was shown a photograph which he stated fairly and accurately portrayed the head of Roger Dale Bartee. The witness then used this photograph to illustrate the entry and exit of the bullet which caused Bartee's death. When the photograph was offered into evidence, defense counsel objected but did not request a limiting instruction as to the use of the photograph. Judge Thornburg overruled defendant's objection and admitted the photograph into evidence.

It is well settled that photographs are admissible into evidence to illustrate the testimony of a witness. *State v. Crowder*, 285 N.C. 42, 203 S.E. 2d 38 (1974), *death sentence vacated*, 428 U.S. 903; *State v. Cutshall*, 278 N.C. 334, 180 S.E. 2d 745 (1971). Such photograph must, of course, be properly authenticated as a correct portrayal of the conditions observed and related by the witness who uses it to illustrate his testimony. *State v. Thomas*, 294 N.C. 105, 240 S.E. 2d 426 (1978). It is the rule in this jurisdiction that photographs are not substantive evidence and may be used only to illustrate or explain the testimony of a witness, and a party is entitled to an instruction to this effect *if he makes a timely request therefor.* 1 Stansbury's North Carolina Evidence (Brandis Rev.), *Witnesses*, Section 34, pages 99-100, and cases there cited.

Defendant relies upon *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), to support his argument. *Mercer* is distinguishable from instant case. The rationale of *Mercer* was that the trial judge erred because he admitted an excessive number of gruesome photographs which added nothing of probative value. Here, defendant contended that his pistol accidentally discharged when he struck Bartee on the head. Thus, the *single* photograph as used by Dr. Wood related to the angle of entry and exit of the fatal bullet which bore on the plausibility of defendant's defense of accident. Obviously, this evidence was relevant and of strong probative value.

[3] Neither do we find merit in defendant's contention that the trial judge committed prejudicial error in admitting into evidence a photograph of defendant as he appeared in October, 1975.

When defendant entered his plea of not guilty, he placed upon the State the burden of proving beyond a reasonable doubt each and every element of the crime of murder in the first degree and that defendant was the person who perpetuated the crime. *State v. Jones*, 280 N.C. 60, 184 S.E. 2d 862 (1971). Thus, it was incumbent upon the State to prove that it was Edgar Curtis Ruof who committed the crime. The State was not required to speculate as to what evidence or admissions defendant might later place before the jury. The photograph of defendant admitted as the State's Exhibit 5 was authenticated as portraying defendant's appearance on the date of the shooting and was used by the

witnesses to explain their testimony relating to identification. The eyewitnesses who observed defendant at the time of the shooting described him as a very heavy man who wore a full beard and had very long reddish brown hair. At trial, defendant was slender, clean-shaven, and had short hair. By using the photograph to illustrate their testimony, the witnesses were able to remove any confusion as to defendant's identity which might have arisen because of the variance in the witnesses' verbal descriptions of defendant on the night of the shooting as compared to defendant's appearance at trial.

[4] Defendant contends that the trial judge erred in allowing testimony relating to defendant's association with "The Outlaws" motorcycle gang because such evidence was irrelevant and was introduced solely to prejudice the jury. We do not agree. Relevant evidence will not be excluded simply because it may tend to prejudice the jury or excite its sympathy. *State v. Hairston*, 280 N.C. 220, 185 S.E. 2d 633 (1972), *cert. denied*, 409 U.S. 888. The witnesses who identified defendant testified that they had seen him at "The Hut" prior to the night in question dressed in "Outlaw" clothes and in the company of other "Outlaws." This testimony was relevant and admissible for the purpose of identifying defendant.

Moreover, the State contends that defendant's association with "The Outlaws" is evidence of his motive for shooting Bartee. The State argues in this regard that "The Hut" was the "home turf" of "The Outlaws" and defendant shot Bartee because he dared to encroach upon their territory. Our cases hold that it is competent to show motive for the commission of a crime though motive does not constitute an element of the offense charged. *State v. Adams*, 245 N.C. 344, 95 S.E. 2d 902 (1957); *State v. Coffey*, 228 N.C. 119, 44 S.E. 2d 886 (1947). In light of the relevance of the challenged testimony, its admission did not constitute error.

[5] Defendant assigns as error the ruling of the trial judge admitting into evidence a knife found among Bartee's personal effects.

Prior to trial, defense counsel made a request for discovery pursuant to G.S. 15A-910 which provides:

> *Regulation of discovery—failure to comply.*—If at any time during the course of the proceedings the court deter-

mines that a party has failed to comply with this Article or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may

(1) Order the party to permit the discovery or inspection, or

(2) Grant a continuance or recess, or

(3) Prohibit the party from introducing evidence not disclosed, or

(4) Enter other appropriate orders.

It is defendant's position that the failure of the State to produce the knife before trial resulted in prejudicial error.

The trial judge found that the State discovered the knife during the trial on the afternoon of 19 June 1978 and advised defense counsel of its existence at 11:00 a.m. on the following day.

In *State v. Shaw*, 293 N.C. 616, 239 S.E. 2d 439 (1977), the defendant was charged with rape and taking indecent liberties with a child. Over defendant's objection, the State offered evidence of a foreign pubic hair found about the private parts of the victim which an expert witness concluded could have come from the body of the defendant. The State did not become aware of this evidence until the trial was in progress, and as soon as the evidence came to the attention of the district attorney, he informed defense counsel of its existence. In finding no error, this Court, speaking through Justice Lake, stated:

> By its express terms, this statute authorizes, but does not require, the trial court to prohibit the party offering nondisclosed evidence from introducing it. This is left to the discretion of the trial court and, under the circumstances disclosed by this record, we perceive no indication of abuse of such discretion. The defendant did not, as he might have done, request a continuance in order to permit him to prepare for cross-examination of these witnesses with reference to this matter.

In the case *sub judice*, defense counsel did not object to the introduction of the knife. He did not request a continuance. Even so, the trial judge without request took a recess to the end that

defense counsel could make such use of the knife as he saw fit. Under these circumstances, we see no error in the trial judge's ruling. Even had there been error in the court's ruling, we fail to discern any prejudice to defendant in the introduction of the knife. It was his position that he struck the deceased because he thought the deceased was knifing his friend. The introduction of the knife into evidence appears to bolster rather than weaken defendant's position.

This assignment of error is overruled.

[6] Defendant next contends that the trial judge erred in allowing improper and prejudicial cross-examination of defendant. More specifically, defendant argues that the district attorney cross-examined defendant in bad faith with regard to prior criminal activity or acts of misconduct. Prior to cross-examination, the jury was excused after a brief bench conference and the district attorney indicated that he did not intend to ask any questions in bad faith concerning prior criminal activity or acts of misconduct which to his knowledge were terminated in defendant's favor. Defense counsel requested that the district attorney be allowed to ask defendant, in the presence of the jury, only about prior criminal acts or acts of misconduct to which defendant admitted. The trial judge denied this request on the grounds that the district attorney presumably had some basis in fact for the questions he proposed to ask since he indicated that he would not ask any question in bad faith. Our case law supports the correctness of the trial judge's ruling. A defendant who elects to testify in his own behalf is subject to impeachment by questions relating not only to his conviction of crime but also to any criminal or degrading acts which tend to discredit his character and challenge his credibility. *State v. Foster*, 293 N.C. 674, 239 S.E. 2d 449 (1977). Such questions, however, must be asked in good faith. *State v. Foster, supra.* Where the record does not indicate that such questions were not asked in good faith, an assignment of error alleging that the district attorney acted in bad faith will not be sustained. *State v. Foster, supra; State v. Gaiten*, 277 N.C. 236, 176 S.E. 2d 178 (1970). In instant case, the record does not indicate that cross-examination of defendant was undertaken in bad faith. Moreover, in North Carolina, a trial judge is not required, as defendant requested, to conduct a voir dire to deter-

mine whether the district attorney's questions were based on fact and asked in good faith. *State v. Gaiten, supra.*

Defendant also complains of the district attorney's cross-examination regarding defendant's association with "The Outlaws" motorcycle gang. As we have noted, when a defendant takes the stand, he is subject to impeachment by questions relating to any criminal or degrading act which tends to discredit his character and challenge his credibility. *State v. Foster, supra.* Whether cross-examination transcends propriety or is unfair is a matter resting largely in the sole discretion of the trial judge, and his ruling thereon will not be disturbed absent a showing of gross abuse of discretion. *State v. Foster, supra; State v. Daye,* 281 N.C. 592, 189 S.E. 2d 481 (1972); *State v. Gaiten, supra.* We have held that the trial judge properly permitted State's witnesses to testify that one of the reasons they noticed and could identify defendant was because he wore "Outlaw" clothes. Certainly, it was proper for the State to buttress its identification testimony by showing that defendant was, in fact, a member of "The Outlaws." Thus, the trial judge did not abuse his discretion by permitting the district attorney to pursue this fair and relevant line of cross-examination.

[7] We turn to defendant's contention that the district attorney's argument to the jury was improper and prejudicial. The portions of the argument which defendant contends are improper and prejudicial are:

> I don't want you to decide this case based on the fact that the defendant is an Outlaw.
>
> * * *
>
> Self defense is not a concept of law, thank goodness, that gives anybody with a hair triggered temper, a chip on his shoulder, any gun toting menace on the street, the right to shoot somebody because they think in their own mind, and their violent world, that it's a threat.
>
> * * *
>
> The circumstances must not be such that it causes this man, that is, I would submit to you, this violent man.
>
> * * *

> Walks around, carrying a [sic] automatic pistol, strapped to his side, rides with a motorcycle gang, whose very name shows the regard with which they hold the laws and their fellow man.
>
> * * *
>
> He's going to do this just long enough for two skilled lawyers that he, or someone, has hired to get him out of this jam that his violent temper has got him in.

In 4 Strong's North Carolina Index 3d, *Criminal Law*, Section 102.9, page 533, we find this pertinent statement:

> Wide latitude must be afforded counsel in the argument, and what constitutes abuse of this privilege must ordinarily be left to the sound discretion of the trial judge. And when the prosecuting attorney does not go outside of the record and his characterizations of defendant are supported by evidence, the defendant is not entitled to a new trial by reason of being characterized in uncomplimentary terms in the argument. . . .

Accord: State v. Westbrook, 279 N.C. 18, 181 S.E. 2d 572 (1971), *death sentence vacated*, 408 U.S. 939; *State v. Christopher*, 258 N.C. 249, 128 S.E. 2d 667 (1962).

In *State v. Westbrook, supra*, this Court stated:

> . . . His [the prosecuting attorney's] characterization of them as "two robbers, two thieves, two gunmen, who practiced their trade with a sawed-off shotgun," cannot be deemed to have prejudiced the defendant unfairly in the eyes of the jury in view of his own testimony that he and Frazier had, a few days prior to the killing of Miss Underwood, held up and robbed a place of business in Concord, using a sawed-off shotgun, had on that occasion and on the one in question stolen one or more automobiles, that he "knew how to steal a long time ago" and was "not only a thief but * * * also a robber." The defendant being charged on this trial with murder in the first degree, it was not improper for the prosecuting attorney to characterize him and his companion as "killers." . . .

This Court considered a similar question in *State v. Frazier*, 280 N.C. 181, 185 S.E. 2d 652 (1972), *death sentence vacated*, 409 U.S. 1004, and disposed of defendant's contention that the prosecuting attorney's argument was improper with this language:

> . . . The reference in the argument to the defendant as a thief and a robber is supported by the defendant's own statement admitted in evidence. We find no statement in the argument of counsel for the private prosecution, set forth in full in the record, which is not supported by the evidence. Consequently, the argument did not go beyond permissible limits.

Here defendant admitted that he belonged to and had been an officer in "The Outlaws." He testified that he and other members of this group wore guns and that he had previously been convicted of carrying a concealed weapon and possessing a sawed-off shotgun. The State's evidence showed that he shot an unarmed man at contact range with little or no provocation. Thus, in our opinion, the district attorney's characterizations of defendant were supported by the evidence.

We note that defense counsel did not object to any of the argument directed to the character of defendant.

Ordinarily, impropriety in the argument should be brought to the attention of the trial judge before the case is submitted to the jury. *State v. Peele*, 274 N.C. 106, 161 S.E. 2d 568 (1968), *cert. denied*, 393 U.S. 1042. However, where there is gross abuse in the argument the court should act *ex mero motu*.

The single objection to the district attorney's argument was directed to the above last quoted portion of the argument. Judge Thornburg immediately sustained the objection, ordered it stricken and instructed the jury not to consider that remark at any point in their deliberations. The judge's prompt action cured any prejudice that might have followed from this part of the argument. *State v. Covington*, 290 N.C. 313, 226 S.E. 2d 629 (1976); *State v. Correll*, 229 N.C. 640, 50 S.E. 2d 717 (1948), *cert. denied*, 336 U.S. 969.

We hold that the district attorney's argument did not prejudicially depart from or distort the record so as to mislead the jury or deprive defendant of a fair trial.

[8] Defendant contends that the trial judge erred in charging the jury on first and second degree murder that they could, but were not compelled to, infer unlawfulness and malice from an intentional killing with a deadly weapon. It is defendant's position that in light of the decision in *Mullaney v. Wilbur*, 421 U.S. 684, 44 L.Ed. 2d 508, 95 S.Ct. 1881 (1975), the presumptions of unlawfulness and malice arising from the intentional use of a deadly weapon are unconstitutional. This position is untenable. Recent decisions of this Court rendered subsequent to *Mullaney* have expressly held that such presumptions or inferences are constitutionally permissible. *State v. Hammonds*, 290 N.C. 1, 224 S.E. 2d 595 (1976); *State v. Williams*, 288 N.C. 680, 220 S.E. 2d 558 (1975). Moreover, in the case of *State v. Harris*, 297 N.C. 24, 252 S.E. 2d 781, we found an instruction on second degree murder virtually identical to the charge objected to in the case *sub judice* to be adequate.

[9] Finally, defendant assigns as error the denial of his motions for judgment as of nonsuit as to the charge of first degree murder and the denial of his motion to set aside the verdict as to murder in the first degree.

Murder in the first degree is the unlawful killing of a human being with malice and with premeditation and deliberation. Premeditation means thought beforehand for some length of time, however short. Deliberation means an intention to kill executed by one in a cool state of blood, 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 some lawful or just cause or legal provocation. *State v. Biggs*, 292 N.C. 328, 233 S.E. 2d 512 (1977); *State v. Smith*, 290 N.C. 148, 226 S.E. 2d 10 (1976), *cert. denied*, 429 U.S. 932; *State v. Benson*, 183 N.C. 795, 111 S.E. 869 (1922). "Cool state of blood" as used in connection with premeditation and deliberation does not mean absence of passion and emotion but means that an unlawful killing is deliberate and premeditated if executed with a fixed design to kill notwithstanding defendant was angry or in an emotional state at the time. 6 Strong's North Carolina Index 3d, *Homicide*, Section 4.3, page 534; *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769 (1961), *cert. denied*, 368 U.S. 851.

We note that defendant does not argue that the State has failed to offer evidence sufficient to go to the jury on the question

of an unlawful killing with malice. It is his position that there was not sufficient evidence of premeditation and deliberation to carry the case to the jury.

Ordinarily, premeditation and deliberation are not susceptible of direct proof and usually must be established by proof of circumstances from which premeditation and deliberation may be inferred. *State v. Smith, supra; State v. Foust, supra.* Some of 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 [citation omitted]; (2) the conduct of defendant before and after the killing [citation omitted]; (3) the dealing of lethal blows after deceased has been felled and rendered helpless [citation omitted]; (4) the vicious and brutal manner of the killing [citation omitted]; (5) the number of shots fired [citation omitted]. . . .

State v. Smith, supra; State v. Davis, 289 N.C. 500, 223 S.E. 2d 296 (1976), *death sentence vacated*, 429 U.S. 809.

The evidence in this case would support reasonable, permissible inferences: (1) that deceased was in "The Hut" dancing with his girlfriend and while twirling a two inch pocket knife said, "I'm the baddest man in the bar."; (2) that defendant, a member of a motorcycle group called "The Outlaws" became enraged and went to a room behind the bar where he obtained his .45 caliber pistol and returned to the dance area where he observed his friend "Gangrene" and Bartee struggling with their arms in a locked position; Bartee was unarmed; (3) that defendant walked up behind Bartee and without any attempt to separate the men or give Bartee any warning of any kind at contact range fired a .45 caliber bullet into the back of Bartee's head; (4) that defendant then left the scene without offering any assistance of any kind to the wounded man.

Applying the above-stated principles of law and considering this evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference therefrom, as we must, we hold that the evidence was sufficient to permit, but not require, the jury to find that defendant after premeditation and deliberation formed a fixed purpose to kill Roger Dale Bartee

and thereafter accomplished that purpose. Therefore, the trial judge properly submitted the charge of first degree murder to the jury.

Since there was sufficient evidence to support the verdict, the trial judge acted within his discretion in denying defendant's motion to set aside the verdict. No abuse of discretion is made to appear. *State v. Leigh*, 278 N.C. 243, 179 S.E. 2d 708 (1971).

Defendant has received a fair trial free of prejudicial error.

No error.

IN THE MATTER OF THE SUSPENSION OF THE RIGHT TO PRACTICE LAW OF WILLIAM CORNELIUS PALMER

No. 90

(Filed 16 March 1979)

1. **Attorneys at Law § 11— judicial disciplinary proceeding—appellate review sought by State—petition for certiorari**

While the State may not appeal a judicial disciplinary proceeding against an attorney as a matter of right, the State may seek review of such a proceeding in the appellate division by petition for a writ of certiorari.

2. **Attorneys at Law § 10— judicial disbarment proceeding—standard of proof**

The standard of proof to be used in judicial disbarment proceedings is proof by clear and convincing evidence.

3. **Attorneys at Law § 12— knowledge of client's fraud on court—failure to withdraw as counsel—censure by Supreme Court**

An attorney is censured by the Supreme Court for his violation of DR 7-102(B)(1) of the Code of Professional Responsibility in failing to withdraw as counsel for a criminal defendant when he knew before trial of an agreement between defendant and a codefendant to perpetrate a fraud upon the court by having the codefendant give false testimony, and defendant refused to rectify the situation.

Justice EXUM concurring in result.

ON certiorari to review decision of the Court of Appeals (*Hedrick, J., Parker* and *Mitchell, JJ.*, concurring), 37 N.C. App. 220, 245 S.E. 2d 791 (1978). Docketed and argued as case No. 115 at Fall Term 1978.

At the October 1976 Session of Catawba Superior Court, presided over by Judge Thornburg, respondent appeared as counsel for Kenneth Darrell Edmisten (Edmisten) who, along with Roger Oliver (Oliver), was placed on trial for manslaughter and leaving the scene of an accident. The charges resulted from a collision between two motor vehicles, one of which was occupied by Edmisten and Oliver.

During the course of the trial Judge Thornburg was advised that although Edmisten was the operator of the vehicle occupied by him and Oliver, they had agreed that Oliver would testify that he was the driver, and that respondent was aware of this agreement.

At the conclusion of the trial Judge Thornburg conducted a hearing to determine if respondent had intentionally and willfully violated the North Carolina State Bar Code of Professional Responsibility. Following the hearing Judge Thornburg entered an order finding facts and concluding that respondent had violated said code and suspending respondent for an indefinite period of time from practicing law in North Carolina.

Respondent appealed to the Court of Appeals. In a decision reported in 32 N.C. App. 449, 232 S.E. 2d 497 (1977), that court concluded that respondent had not received due process, vacated Judge Thornburg's order and remanded the cause for hearing after notice to respondent.

Following remand and notice to respondent, Judge Snepp, on 29 May 1977, conducted a hearing after which he found the following facts:

1. The respondent Palmer, is a member of the North Carolina State Bar, duly licensed to practice law in the State of North Carolina.

2. On 11 June 1976, Kenneth Darrell Edmisten was driving a truck on a public highway in Catawba County. Roger Oliver was a passenger. The truck struck a motorcycle at an intersection, and the rider was killed.

3. Edmisten and Oliver left the scene of the accident. They then agreed that since Edmisten had previously been convicted of driving under the influence, and might go to

prison as a result of the collision, that Oliver, who had no record, would say that he had been driving. They then called the police.

4. Later that night, Oliver gave Captain O. M. McGuire of the Hickory Police Department a written statement to the effect that he had been the driver of the truck at the time of the collision.

5. Edmisten retained Palmer as his attorney, and in the course of the attorney-client relationship told Palmer that he was in fact driving the truck at the time of the collision, that Oliver had agreed to say that he was the driver, and that Oliver had given a statement to that effect to the police.

6. Palmer told Edmisten that Oliver might be wrongfully convicted, and advised Edmisten to tell the truth and permit him, Palmer, to negotiate a plea. Edmisten thereafter informed Palmer that he wanted to plead not guilty and be acquitted.

7. A preliminary hearing was held in the District Court on 6 July 1976, and probable cause was found as to charges of involuntary manslaughter and the felony of leaving the scene of an accident involving personal injury in Edmisten's cases. Edmisten and Oliver were thereafter indicted for those offenses.

8. Oliver was represented throughout by Lewis Waddell, a member of the Catawba County Bar.

9. At arraignment, both Edmisten and Oliver entered pleas of not guilty.

10. Trial was had before the Superior Court, Honorable Lacy Thornburg, Judge Presiding, at the 27 October 1976 Session for Catawba County. Upon motion of the State, the cases were consolidated for trial without objection by either defendant.

11. During the trial, only one of the State's witnesses, a Miss Lowdermilk, identified Oliver as the driver of the truck at the time of the collision, but later testified that she could not "swear with certainty" that Oliver was the driver, and

admitted that she had never been able to identify Oliver positively as the driver.

12. At some point during the trial, Palmer told Edmisten that it did not look good for Oliver, and that if the case was dismissed as to Edmisten, Edmisten could thereafter admit he was the driver without incriminating himself.

13. The State called as its witness Captain McGuire of the Hickory police, who was asked by the District Attorney if Oliver had made a statement to him. Both defendants objected, and a hearing was held outside of the presence of the jury. The Court recessed for the evening before making its findings.

14. During or immediately after the hearing, Oliver for the first time told his lawyer, Waddell, that he was not the driver, but had said he was because of his agreement with Edmisten, and that Palmer knew this. Waddell thereupon informed the Court.

15. The next morning, in the absence of the jury, Oliver changed his plea to guilty, pursuant to a plea agreement to testify truthfully against Edmisten.

16. The trial then continued as to Edmisten, and Oliver testified for the State. Edmisten did not take the witness stand or present any evidence.

17. The jury found Edmisten guilty as charged in each of the cases.

In a memorandum opinion Judge Snepp observed that the appellate courts of this state apparently have not decided the standard of proof that should be applied in judicial disbarment proceedings. He concluded that a standard of proof higher than that applied in ordinary civil cases should be required and adopted the "clear and convincing" rule. He further concluded that he was not satisfied by clear and convincing evidence that respondent willfully and intentionally violated any provision of Disciplinary Rule 7-102, and dismissed the proceeding.

The Court of Appeals granted the state's petition for a writ of certiorari to review Judge Snepp's order. Thereafter, the Court

of Appeals concluded that the state has no right of appeal in a disbarment proceeding, that to allow certiorari is to permit indirectly that which is not permissible directly, and that certiorari was improvidently granted. The Court of Appeals thereupon "dismissed" the proceeding.

The state's petition to this Court for a writ of certiorari to review the Court of Appeals decision and Judge Snepp's order was allowed.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Joan H. Byers, for the state.

McElwee, Hall & McElwee, by William H. McElwee, III, and Robert A. Melott, for the appellee.

Harold D. Coley, Jr., Amicus Curiae, for The North Carolina State Bar.

BRITT, Justice.

[1] The first question for our consideration is whether Judge Snepp's order is reviewable by the appellate division. We hold that it is.

In holding that this cause is not reviewable at the behest of the state, the Court of Appeals relied upon the decision of this Court in *In re Stiers*, 204 N.C. 48, 167 S.E. 382 (1933), a case involving suspension of an attorney's privilege to practice law. There, an attorney who had entered a plea of *nolo contendere* in the United States District Court to a felony charge was suspended from practicing law in that court during a period of probation. On the basis of that action, the state, through the district solicitor, instituted disbarment proceedings in the superior court. The proceeding was dismissed when the trial judge determined that a plea of *nolo contendere* was not equivalent to a confession of guilty of a felony. The state appealed. In holding that the proceeding was not appealable by the state, this Court held:

> "It is an elementary proposition of law that the State cannot appeal either in civil or criminal actions unless such right is given by the lawmaking power of the State. It is apprehended that the reason for such a policy is built upon the idea that when the State in its sovereign capacity brings a

citizen into its own tribunals, before its own officers, and in obedience to its own processes, and loses, that its avenging hand should be stayed except in unusual cases where the power to appeal is expressly conferred. The right of appeal is given the State in C.S., 215, but C.S., 215 is a part of chapter 941 of the Public Laws of 1907, which committed disbarment proceedings, for causes therein specified, to the initiative of the grievance committee of the North Carolina State Bar Association. Chapter 64 of the Public Laws of 1929, in accordance with which the present proceeding was conducted, is a complete act in itself and confers no right or power of appeal upon the State. . . ." 204 N.C. 49-50.

Substantial change in the statutory law dealing with the discipline of attorneys dictates that the Court reach a result in the case *sub judice* which is different from that reached in *Stiers*.

C.S. 205 (chapter 64 of the 1929 Session Laws), the authority upon which the proceeding in *Stiers* was brought, was derived from the Revisal of 1905, Section 211, which was in turn based upon Chapter 216, Section 4, of the Session Laws of 1870-71. In *In the Matter of Ebbs*, 150 N.C. 44, 63 S.E. 190 (1908), the Court had held that the Act of 1871 was a "disabling" statute which restricted the inherent power of the courts to discipline attorneys for the commission of crimes that had "no direct connection with their practical and immediate relation to the courts." When the appealability question was decided in *Stiers*, the Supreme Court was not concerned with the inherent power of the appellate court to review disciplinary proceedings against an attorney in lower courts. The court, instead, was attempting to ensure that a limited type of statutory disciplinary proceeding was conducted in accord with established principles governing the right to appeal.

C.S. 204 through C.S. 215, the disciplinary provisions considered and relied upon by the Court in *Stiers*, were expressly repealed by Chapter 210, Section 20, of the Session Laws of 1933. Chapter 210 (now G.S. 84-15, et seq.) also created the North Carolina State Bar as an agency of the state and granted to that agency considerable power in the licensing and disciplining of attorneys. Chapter 210 itself was modified by Chapter 51, Section 4, of the Session Laws of 1937, now G.S. 84-36, which provides that "[n]othing in this Article shall be construed as disabling or abridg-

ing the inherent powers of the court to deal with its attorneys." This final change had but one purpose—to make clear to the bar and to the courts that the Legislature had removed the disabling effect of C.S. 205.

The effect of these several changes was considered by the court soon thereafter. In *State v. Spivey*, 213 N.C. 45, 47, 195 S.E. 1 (1938), we find:

> As was said in *In the Matter of Ebbs*, 150 N.C., 44, "We do not entertain any doubt that, in the absence of restrictive legislation, the courts have an inherent power to strike from their rolls names of attorneys who are found by reason of their conduct unfit and unworthy members. The decisions to this effect are numerous and uniform." As was also said in *Haywood, Ex parte*, 66 N.C., 1, "The Act of 1871 takes from the court the common-law power to purge the bar of unfit members, except in specified cases, and it fails to provide any other power to be used in its place." The Act of 1871, which became C.S., 204 and 205, was repealed *eo nomine* by section 20, chapter 210, Public Acts 1933, and thereby the restriction upon the inherent power of the courts to strike from the rolls the names of unworthy attorneys was removed.
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> While the Act of 1933, being an act to organize The North Carolina State Bar, provides a method and procedure for disbarment of attorneys, such method is not exclusive, and does not fetter the courts in the exercise of their inherent power to disbar unworthy attorneys. To remove any doubt as to the method of disbarment of attorneys provided therein being a restriction upon the courts, the Act of 1933 was amended by section 4, chapter 51, Public Laws 1937, by adding thereto section 18a, which reads: "Nothing contained in this act shall be construed as disabling or bridging the inherent powers of the court to deal with its attorneys."
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> As was said by the present *Chief Justice* in discussing a proceeding brought under the Act of 1933, "There are two methods by which an attorney may be disbarred: (1) The one judicial. *Attorney-General v. Gorson*, 209 N.C., 320, 183 S.E., 392; *Attorney-General v. Winburn*, 206 N.C., 923, 175 S.E., 498; *In re Stiers*, 204 N.C., 48, 167 S.E., 382. (2) The other legislative. *In re Parker*, 209 N.C., 693, 184 S.E., 532; *Commit-*

tee on Grievances v. Strickland, 200 N.C., 630, 158 S.E., 110." *In re West*, 212 N.C., 189.

Accord, In Re Burton, 257 N.C. 534, 126 S.E. 2d 581 (1962); *In Re Northwestern Bonding Co.*, 16 N.C. App. 272, 192 S.E. 2d 33, *appeal dismissed*, 282 N.C. 426, 192 S.E. 2d 837 (1972).

It appears that appellate review of statutory disciplinary proceedings is now available.

G.S. 84-28.1 (Ch. 582 1975 S.L.) provides for a disciplinary hearing commission of the State Bar. This commission, or any committee thereof, "is authorized to hold hearings in discipline, incapacity and disability matters, to make findings of fact and conclusions of law after such hearings, and to enter orders necessary to carry out the duties delegated to it by the council" of the State Bar.

On 21 June 1977 this Court, pursuant to authority granted by § 13(2) of Article IV of the State Constitution, amended Rule 19 of the Rules of Appellate Procedure, 287 N.C. 671, 727, in the following manner:

> Rule 19, "PARTIES TO APPEAL FROM AGENCIES," is hereby amended by adding a new paragraph to read as follows:
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> > "(d) *From the Disciplinary Hearing Commission of The North Carolina State Bar.* The complainant in the original complaint before the Disciplinary Hearing Commission, each of the other parties to the proceeding, the Chairman of the Hearing Committee or the Chairman of the Commission may be parties of record to and participate in the appeal as appellants or appellees according to their respective interests." 292 N.C. 739, 739-40.

Thus, it appears that under our statutory method of disciplining attorneys "any party", including the attorney in question and the State Bar, may appeal from a decision of the disciplinary hearing commission.

The remaining question is whether the proceedings under the judicial method of disciplining attorneys are also properly the subject of appellate review when the decision therein is in favor of the attorney. We believe that they should be and that the court has ample authority for reviewing such proceedings.

Prior to the adoption of the Act of 1871 the court had exercised its inherent power to discipline attorneys. *In Ex Parte Biggs*, 64 N.C. 202 (1869), Biggs, an attorney who also published a newspaper, printed an article written by him which unfavorably commented upon an action taken by a superior court judge. The judge, exercising his inherent power, ordered Biggs disbarred. Biggs petitioned the Supreme Court for a writ of *mandamus* ordering the superior court judge to show cause why Biggs should not be reinstated as an attorney. *Mandamus* was refused. The court held that an attorney had no right to appeal from the judge's exercise of his inherent authority. It further held that Article IV, § 10, Const. 1868, accorded the court power to issue remedial writs "necessary to give it a general supervision and control of the inferior courts." The court then concluded that *certiorari* was the proper method for obtaining review of the judicial disbarment proceeding.

When attorneys are licensed to practice law in North Carolina, they are licensed to practice in all the state courts; therefore, the courts of the appellate division have an interest in the integrity and competency of those engaged in the practice of law in this state. Article IV, § 12, of our present constitution retains the provision granting the Supreme Court the power to issue remedial writs necessary to exercise supervision and control over the other courts. G.S. 7A-32(c) grants similar authority to the Court of Appeals necessary to supervise and control the proceedings of the courts of the trial division. Under these provisions the courts of the appellate division have power to review judicial disciplinary proceedings whether the attorney or the state has prevailed in the trial court.

Worthy of note is the apparent increase in the use of the judicial method of disciplining attorneys. Among the cases that have found their way to the appellate division recently are *In re Hunoval*, 294 N.C. 740 (1977); *In re Robinson*, 37 N.C. App. 671, 247 S.E. 2d 241 (1978); and *In re Dale*, 37 N.C. App. 680, 247 S.E. 2d 246 (1978).

[1] We, therefore, hold that the state may seek review by the appellate division of proceedings disciplining attorneys under the judicial method. However, we further hold that the state may not appeal in such cases as a matter of right but must seek appellate review by petition for writ of certiorari. *Ex Parte Biggs, supra.*

[2] The second question for our consideration is whether Judge Snepp properly adopted the "clear and convincing" rule as the standard of proof that should be used in judicial disbarment proceedings. We hold that he did.

This likewise appears to be a question of first impression in this jurisdiction. It further appears that a far greater number of our sister states which have considered this question have followed the "clear and convincing" rule or its equivalent rather than a rule requiring a lesser standard of proof. States coming within the former category, and their decisions following the rule, include: Arizona, *Matter of Lurie*, 113 Ariz. 95, 546 P. 2d 1126 (1976) (Clear and convincing); California, *Davidson v. State Bar*, 131 Cal. Rptr. 379, 551 P. 2d 1211 (1976) (Convincing proof to reasonable certainty); Colorado, *People ex rel. Dunbar v. Weinstein*, 135 Colo. 541, 312 P. 2d 1018 (1957) (Substantial, clear, convincing and satisfactory); Florida, *Florida Bar v. Rayman*, 238 So. 2d 594 (Fla. 1970) (Mere preponderance is not sufficient); Georgia, *Cushway v. State Bar*, 120 Ga. App. 371, 170 S.E. 2d 732 (1969), *cert. denied*, 398 U.S. 910, 26 L.Ed. 2d 71, 90 S.Ct. 1705 (1970) (Beyond reasonable doubt); Idaho, *In re May*, 96 Idaho 858, 538 P. 2d 787 (1975) (Clear showing of bad intent); Illinois, *In re Bossov*, 60 Ill. 2d 439, 328 N.E. 2d 309, *cert. denied*, 423 U.S. 928, 46 L.Ed. 2d 256, 96 S.Ct. 275 (1975) (Clear and convincing); Iowa, *Iowa State Bar v. Kraschel*, 260 Ia. 187, 148 N.W. 2d 621 (1967) (Convincing preponderance—less than in criminal, more than in civil); Kansas, *State v. Turner*, 217 Kan. 574, 538 P. 2d 966 (1975) (Substantial, clear and convincing); Louisiana, *La. State Bar v. Edwins*, 329 So. 2d 437 (La. 1976) (Clear and convincing); Maryland, *Bar Assoc. of Baltimore v. Posner*, 275 Md. 250, 339 A. 2d 657, *cert. denied*, 423 U.S. 1016, 46 L.Ed. 2d 388, 96 S.Ct. 451 (1975) (Clear and convincing); Massachusetts, *In re Mayberry*, 295 Mass. 155, 3 N.E. 2d 248 (1936) (Fair preponderance, but not beyond reasonable doubt); Nebraska, *State ex rel. Neb. State Bar v. Cook*, 194 Neb. 364, 232 N.W. 2d 120 (1975) (Clear preponderance); New Jersey, *In re Gross*, 67 N.J. 419, 341 A. 2d 336 (1975) (Clear and convincing); Oregon, *In re Gygi*, 273 Or. 443, 541 P. 2d 1392 (1975) (Clear and convincing); Pennsylvania, *In re Shigon*, 462 Pa. 1, 329 A. 2d 235 (1974) (Clear and satisfactory); South Carolina, *In re Friday*, 263 S.C. 156, 208 S.E. 2d 535 (1974) (Clear and convincing); South Dakota, *In re Jaquith*, 79 S.D. 677, 117 N.W. 2d 97 (1962) (Clear,

undoubted preponderance); Utah, *In re McCullough*, 97 Utah 533, 95 P. 2d 13 (1939) (Convincing proof and a fair preponderance); Vermont, *In re Wright*, 131 Vt. 473, 310 A. 2d 1 (1973) (Clear and Free from doubt); Virginia, *Va. State Bar v. Gunter*, 212 Va. 278, 183 S.E. 2d 713 (1971) (Clear proof, but not beyond reasonable doubt); Washington, *In re Little*, 40 Wash. 2d 421, 244 P. 2d 255 (1952) (Clear preponderance); West Virignia, *W. Va. State Bar v. Daniel*, 235 S.E. 2d 369 (W. Va. 1977) (Full, preponderating and clear evidence); Wisconsin, *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W. 2d 878 (1973) (Clear and satisfactory—the middle burden of proof).

The reason for the clear and convincing rule is well stated by the Supreme Court of New Jersey as follows:

> "The proceeding is not criminal in character; it is *sui generis*, stemming from the inherent power of the court to regulate the practice of law and the admission of persons to engage in that practice. But it is essentially civil in nature. Because of the dire consequences which may flow from an adverse finding however, we regard as necessary to sustain such a finding the production of a greater *quantum* of proof than is ordinarily required in a civil action, *i.e.*, a preponderance of the evidence, but less than that called for to sustain a criminal conviction, *i.e.*, proof of guilt beyond a reasonable doubt. Although the specific rule has not been articulated previously in this State, we declare it to be that discipline or disbarment is warranted only where the evidence of unethical conduct or unfitness to continue in practice against an attorney is clear and convincing. (Citations omitted.) IN RE PENNICA, 36 N.J. 401, 177 A. 2d 721, 730 (1962)."

We understand that the State Bar has adopted the "preponderance of the evidence" rule for proceedings under the statutory method. Be that as it may, we feel that the "clear and convincing" rule is more appropriate when the judicial method is followed.

[3] The third question is whether Judge Snepp erred in concluding as a matter of law that respondent did not violate any disciplinary rule set forth in the Code of Professional Responsibility. We hold that he did.

Judge Snepp found as facts that on the occasion in question Edmisten was the driver of the vehicle occupied by him and Oliver; that immediately thereafter they agreed that since Edmisten had previously been convicted of driving under the influence, that Oliver, who had no record, would say that he was the driver; that later that night Oliver gave a police officer a written statement to the effect that he was the driver of the vehicle; that Edmisten retained respondent as his attorney and during the course of the attorney-client relationship he told respondent that he was the driver of the truck at the time of the collision, but that Oliver had agreed to say that he was the driver and had given a statement to that effect to the police; that at some point during the trial Palmer told Edmisten that it did not look good for Oliver but that if the case was dismissed as to Edmisten, he could thereafter admit he was the driver without incriminating himself; that following a voir dire hearing during the trial, Oliver for the first time told his lawyer that he was not the driver but had said he was because of his agreement with Edmisten; and that Palmer knew of this agreement; and that Oliver's attorney thereupon informed the presiding judge. There was no exception to these findings of fact.

Judge Snepp then concluded as a matter of law that respondent had not violated DR 7-102 or DR 1-102 or any other Disciplinary Rule of the Code of Professional Responsibility, 283 N.C. 783 (1973). This conclusion of law is erroneous. Upon the facts found by Judge Snepp, we conclude that respondent has violated the Code of Professional Responsibility and that he should be censured.

The Code of Professional Responsibility provides, *inter alia*, that in the representation of a client, a lawyer shall not "[k]nowingly use perjured testimony or false evidence"; nor shall he "[c]ounsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." Code of Professional Responsibility, DR 7-102(A)(4) and (A)(7), 283 N.C. 783, 835. *See also* DR 7-102(A)(6), *id.*

DR 7-102(B)(1) provides as follows:

> "(B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribu-

> nal shall promptly call upon his client to rectify the same, and if the client refuses or is unable to do so, he shall discontinue his representation of the client in that matter; and if the representation involves litigation, the lawyer shall (if applicable rules require) request the tribunal to permit him to withdraw but without necessarily revealing his reason for wishing to withdraw." 283 N.C. 783, 836.

It is clear that before the trial respondent knew of the agreement between Edmisten and Oliver to perpetrate a fraud upon the court by having Oliver give false testimony. At that point it was respondent's duty to "call upon his client to rectify the same" and if his client refused, to discontinue his representation of Edmisten in the case. "It is axiomatic that the right of a client to effective counsel in any case (criminal or civil) does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence." American Bar Association Committee on Ethics and Professional Responsibility, Informal Opinion No. 1314 (March 25, 1975). *See, United States ex rel. Wilcox v. Johnson*, 555 Fed. Rptr. 2d 115, 122 (3d Cir. 1977); *State v. Henderson*, 205 Kan. 231, 468 P. 2d 136, 64 A.L.R. 3d 375 (1970). Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court, he must withdraw from representation of the client, seeking leave of the court, if necessary. *Wilcox, supra;* American Bar Association Committee on Ethics and Professional Responsibility, Informal Opinion 1318 (January 13, 1975) and Informal Opinion No. 1314 (March 25, 1975); ABA Standards Relating to the Prosecution Function and the Defense Function, Standard 7.5 at 268, Standard 7.7 at 275 (Approved Draft, 1971).

We note that this case does not raise the difficult issues which confront the attorney who does not discover the fraud until some later point in his representation of the client; for instance, after trial has begun or after trial has ended. *See* American Bar Association Committee on Ethics and Professional Responsibility, Formal Opinion No. 287 (June 27, 1953) and Formal Opinion No. 341 (September 30, 1975). We, therefore, need not attempt to reconcile the tension which exists between DR 4-101 and DR

7-102. Nor must we decide here what standard of conduct is appropriate when an attorney's request to withdraw is refused. *See, e.g., State v. Robinson*, 290 N.C. 56, 224 S.E. 2d 174 (1976); 55 N.C. L. Rev. 321; American Bar Association Standards 7.7 at 276. Here, respondent, who was aware of the fraudulent course of action which his client proposed to follow well before trial, made no attempt to withdraw.

We recognize that an attorney has a dual responsibility to his client. He is both advisor and advocate. Code of Professional Responsibility, E.C. 7-3. It is to respondent's credit that he told his client that Oliver might be wrongfully convicted, advised his client to tell the truth and urged his client to allow him to negotiate a plea. Indeed, this was his duty as an attorney. When it became apparent, however, that Edmisten had rejected this advice and could not be dissuaded from pursuing the fraudulent scheme which he and Oliver had devised, respondent had an equally clear duty to withdraw his representation.

We, therefore, exercise our inherent authority to discipline respondent. It is ordered by this Court in conference that William Cornelius Palmer be, and he hereby is, censured by this Court. This 16 March 1979.

The decision of the Court of Appeals is reversed and that part of Judge Snepp's judgment inconsistent with this opinion is vacated.

Justice EXUM concurring in result.

I disagree with the majority's conclusion that under the facts as found by Judge Snepp, respondent was ethically required to withdraw from representing Edmisten. So far as these findings go, Edmisten did not perpetrate a fraud on the Court or anyone else after respondent became his counsel. He did nothing but plead not guilty at his own insistence against the advice of respondent. His choosing to so plead, a choice which he alone could make, did not of itself require respondent to withdraw. There is no finding that either Edmisten or respondent intended to offer an untruthful witness or that Edmisten himself intended to testify falsely. Clearly nothing of this sort transpired. So far as we know respondent properly advised Edmisten that all he was

ethically permitted to do was to enter on Edmisten's behalf a plea of not guilty and put the State to its proof. On this basis respondent was ethically permitted to continue his representation.

Before the attorney-client relationship arose between Edmisten and respondent, however, Edmisten had engaged in fraudulent conduct. Edmisten advised respondent of this during the course of respondent's representation. During the trial respondent positively counseled Edmisten that if the case against him were dismissed he "could thereafter admit he was the driver without incriminating himself." This amounted to more assistance than respondent was required to give at that point to insure that Edmisten received a fair trial. This advice had the effect of assisting Edmisten in the fraud which he had committed prior to his having consulted respondent and which, respondent knew, might, through no fault of his own, intrude on the trial itself. In this, I think respondent ethically transgressed. I, therefore, concur in the result.

STATE OF NORTH CAROLINA v. BRYAN BOARD

No. 95

(Filed 16 March 1979)

Narcotics § 4.1 — possession and sale of 3, 4-methylenedioxyamphetamine charged — proof of possession and sale of MDA — entrapment — conviction reversed

Conviction of defendant for possession, possession with intent to sell, and sale of MDA is reversed, three judges being of the opinion that nonsuit should have been granted because defendant was charged with possession with intent to sell and sale of 3, 4-methylenedioxyamphetamine but there was no evidence that 3, 4-methylenedioxyamphetamine and MDA were the same thing, and three judges being of the opinion that the conviction should be reversed under *S. v. Stanley*, 288 N.C. 19, because the evidence showed entrapment as a matter of law.

Justice BRANCH concurring.

Justices COPELAND and BRITT join in the concurring opinion.

Justice BROCK dissenting.

ON defendant's petition for discretionary review of decision of the Court of Appeals, 37 N.C. App. 581, 246 S.E. 2d 581 (1978),

upholding judgment of *Judge Collier* entered at the 17 October 1977 Session of ROWAN Superior Court. This case was docketed and argued as No. 120 at the Fall Term 1978.

Defendant was charged in four separate bills of indictment, proper in form, with the following crimes: (1) Possession with intent to sell, 3, 4-methylenedioxyamphetamine, a Schedule I controlled substance, on 8 February 1975; (2) sale of 3, 4-methylenedioxyamphetamine to SBI Agent J. R. Adcox on 8 February 1975; (3) possession with intent to sell 3, 4-methylenedioxyamphetamine on 14 February 1975; and (4) sale of 3, 4-methylenedioxyamphetamine to SBI Agent J. R. Adcox on 14 February 1975.

The State's principal witnesses were Earnest F. Casey, Jr., and J. R. Adcox. Casey testified that he was twenty years of age and a long-time friend of defendant who was a junior in high school and seventeen years of age. Both Casey and defendant attended the First Baptist Church of China Grove in Rowan County. Defendant and his family were active members of the church, and Casey was the coach of the church basketball team on which defendant played.

In January 1975 Casey was trying to start a career in law enforcement and agreed to work as an undercover agent for the SBI under the supervision of J. R. Adcox, a special agent. After accepting such role, he went around the China Grove area talking with different people to find out if there was any drug traffic in that area. Defendant stated on Casey's first inquiry that he did not know where any drugs could be obtained. Casey went to defendant a second time and told him a man from Charlotte was trying to make contacts in Rowan County to purchase drugs; that while he, Casey, was in the Air Force he had been into drugs in Mississippi and was able to get a lot of high-grade marijuana (a statement which Casey admitted was untrue). Casey visited in the home of defendant several times and asked defendant in the presence of his parents to join a scout troop which was being organized. He also saw defendant in Sunday school and at basketball practice and made many inquiries concerning the purchase of drugs.

On 7 February 1975 Casey told defendant a man from Charlotte named Jim "was going to come down and was going to make some contacts with people down here"; that "Jim was into

drugs in Charlotte"; that he wanted to introduce him to Jim. The introduction took place in the Methodist Church parking lot in China Grove about 8 p.m. that evening. At that meeting "Jim" (who was SBI Agent J. R. Adcox) gave defendant $50 with which to purchase "MDA." They agreed to meet later that night for delivery of the "MDA," but the meeting never took place because Casey was stopped by the local police and given a traffic ticket. The following morning Casey talked with defendant and arranged for Casey and "Jim" to meet defendant at his home that afternoon. When they arrived at the house, Casey entered and went to defendant's room where defendant showed him a white "baggy" with a white powdery substance in it (State's Exhibit 1). Casey told him to carry it out to Adcox who had remained in the car, and defendant did so. This transaction gives rise to charges (1) and (2).

The next day, 9 February 1975, Casey talked with defendant at church and asked him "if he knew where he could get any more drugs. He said that he would do what he could. And so, on the 14th he did obtain some for me. I was the one that asked him if he knew where he could get anything like that, but he did turn it over to Agent Adcox. The 14th was the next time that Mr. Board brought drugs to Agent Adcox."

J. R. Adcox testified that he was a special agent with the State Bureau of Investigation; that on the afternoon of 8 February 1975 defendant gave him the "baggy" which contained three quarters of a gram of "MDA" and returned $15 in change, saying he had been unable to purchase a full gram. They discussed drugs generally for a few minutes, and Agent Adcox told defendant he would purchase a gram of "crystal." He gave defendant $25 and they agreed to meet again at approximately 9:30 p.m. at the China Grove Junior High School at which time Adcox was to pay an additional $25—making a total of $50—for the gram of crystal.

Later that evening defendant left word to meet him at the King of Pizza in Kannapolis, and the parties met there around 9 p.m. The defendant, with three friends, approached Casey's car and defendant handed Adcox another "baggy." They discussed the price and Adcox finally gave defendant $10, making a total price of $35. Subsequent analysis of the contents in this "baggy" revealed that it was not a controlled substance.

Thereafter, on Friday, 14 February 1975, Casey called defendant to inquire about buying another gram of "MDA." Adcox and Casey met defendant about 4 p.m. in the A & P parking lot and, as they drove around together, defendant said "here you go, Jim" and handed Adcox a small clear plastic bag containing a powder (State's Exhibit 2). This transaction is the basis for indictments (3) and (4). Adcox commented that he was disappointed about the previous purchase made at the King of Pizza because it was not a drug. Defendant said he was sorry and told Adcox he could taste the substance defendant had just handed to him. Adcox then gave defendant $45 and asked if that particular "MDA" came from the Moores, and defendant replied he got it from "the little Moore — that Ricky was not at home and the little Moore appeared to have been left in charge."

Defendant testified in his own behalf. His evidence tends to show that defendant was in the twelfth grade, had known Earnest Casey most of his life, went to school and to church with him, and played on a church basketball team which Casey coached. In early 1975 defendant saw Casey two or three nights a week. One night "all of a sudden" Casey started asking where he could get some drugs and continued to ask that question every time they were together. Defendant repeatedly stated he did not know where drugs could be obtained. Eventually Casey said he was working at the bank and they were going to have a bank party and he needed some drugs. Defendant said he would ask people at school where drugs could be obtained. Casey said he had a friend named Jim who worked at the bank with him and that Jim was coming down one night to get the drugs and Casey wanted defendant to meet Jim. As a result of his inquiries, defendant learned where he could get some drugs, so informed Casey, and they agreed to meet at the parking lot of the First Methodist Church. They met that night and Jim was introduced by Casey as "a friend of mine that works at the bank." Jim said he would like to buy some drugs and gave defendant $50 with which to purchase them. Defendant testified he then went to the Moores and bought drugs, and the next day Casey and "Jim" came to his home. Casey came to the bedroom and defendant, as directed, took the drug outside and gave it to "Jim" together with $15 in change. Jim thereupon returned the $15 plus an additional $10 with which to buy more drugs. Defendant went back to the Moores' house

but they didn't have any and referred him to a girl. Defendant said he bought what he thought was a drug from the girl and later delivered it to Jim at the pizza place.

Between February 8 and 14 defendant said Casey called practically every day wanting more drugs "for the coming weekend." During that period Casey brought an Explorer Scout Troop application blank to defendant's home, said they were starting a new post and wanted defendant to join it.

On 14 February defendant met Casey and "Jim" in the A & P parking lot as prearranged, got in their car and gave Jim what he had previously bought for him. Defendant testified that he did all these things because Casey wanted him to and he was doing it for Casey as a friend. That afternoon as they rode around Casey and Jim wanted more drugs and defendant agreed to take them to a trailer where they could get some. When they got there defendant recognized cars belonging to people he did not want to associate with and refused to go in.

Defendant further testified that Casey smoked marijuana with defendant and another fellow one night after a basketball game, talked about his days in the Air Force in Mississippi when he was on drugs, continuously encouraged drugs and never said there was anything wrong with using them. Finally, Casey's insistence that defendant get more and more drugs for him became so bothersome that defendant refused to take telephone calls from Casey and refused to get any more drugs for him.

Defendant testified that he did not make any profit from any of the transactions with Jim and Casey, always returning the difference between what he paid for the drugs and the sum they had given him. And there is no evidence to the contrary.

The testimony of defendant's father and mother tends to corroborate defendant's testimony.

On cross-examination both defendant and his father testified they had heard of the case of *State v. Stanley* (288 N.C. 19, 215 S.E. 2d 589 (1975)). Defendant said he hadn't read it but had "seen it and heard Mr. Davis talk about it." Defendant further admitted on cross-examination that he had been convicted of simple possession of marijuana in December 1976 while this case was on appeal to the Court of Appeals.

The jury rendered the following verdict: In case (1)—guilty of simple possession of "MDA" on 8 February 1975; in case (2)—not guilty of the sale of "MDA" on 8 February 1975; in case (3)—guilty of possession of "MDA" with intent to sell on 14 February 1975; and in case (4)—guilty as charged of sale of "MDA" on 14 February 1975. Defendant appealed from a consolidated judgment imposing imprisonment for a maximum term of eighteen months as a committed youthful offender. The Court of Appeals found no error, and we allowed defendant's petition for discretionary review.

Rufus L. Edmisten, Attorney General, by James Peeler Smith, Assistant Attorney General, for the State.

Robert M. Davis, for defendant appellant.

HUSKINS, Justice.

Since we dispose of the case on other grounds, the question of entrapment, vigorously debated in the briefs, is not reached.

For reasons which follow, we hold that defendant's motion for judgment of nonsuit at the close of all the evidence should have been allowed.

To withstand a motion for nonsuit there must be substantial evidence against the accused of all material elements of the offense. *State v. Lee*, 294 N.C. 299, 240 S.E. 2d 449 (1978), and cases cited therein; *State v. Allred*, 279 N.C. 398, 183 S.E. 2d 553 (1971), and cases cited therein. Evidence which is sufficient only to raise a suspicion or conjecture of guilt is insufficient to withstand nonsuit. *State v. Lee, supra*; *State v. McKinney*, 288 N.C. 113, 215 S.E. 2d 578 (1975).

Defendant was tried upon four separate bills of indictment charging him with possession with intent to sell and selling, on two separate occasions, 3, 4-methylenedioxyamphetamine, a Schedule I controlled substance. *See* G.S. 90-89(c)1. A material element common to the offenses charged is the *identity of the substance* possessed and sold by defendant. In the present case the crucial question is whether the State offered substantial evidence that the drug possessed and sold by defendant was 3, 4-methylenedioxyamphetamine.

The only proof that the drug possessed and distributed by defendant was 3, 4-methylenedioxyamphetamine, as charged, is found in the cross-examination of J. R. Adcox, Special Agent, as follows: "Two of the three substances that I purchased from Mr. Board were MDA. The third was not a controlled substance." This testimony tends to show that Adcox purchased "MDA," a "controlled substance," from defendant. This testimony, however, does not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in the bills of indictment.

Schedule I controlled substances include those listed in G.S. 90-89 "by whatever official name, common or usual name, chemical name, or trade name *designated*." (Emphasis added.) At all times pertinent to this case that list embraced forty-three substances enumerated in G.S. 90-89(a), twenty-three additional substances enumerated in subsection (b), and eighteen additional substances enumerated in subsection (c). The designation "MDA" nowhere appears in Schedule I or any of the other schedules of controlled substances. *See* G.S. 90-89 through 90-94. The significance of the designation "MDA" is thus left to conjecture and the jury is left to speculate whether "MDA" refers to the controlled substance named in the bills of indictment.

Is "MDA" an abbreviation, common or usual name, chemical name, trade name or even the "street" name for the drug 3, 4-methylenedioxyamphetamine? The witnesses do not say. The record tends to show that the white powdery substances purchased from defendant on February 8 and February 14, 1975 (State's Exhibits 1 and 2) were mailed to the Chemical Laboratory of the State Bureau of Investigation for analysis and were duly returned. The exhibits were then turned over to the Clerk of Superior Court of Rowan County and were offered in evidence at trial. For reasons not readily apparent the chemical analysis was never offered in evidence. Did the analysis show that the substances possessed and sold by defendant were 3, 4-methylenedioxyamphetamine? The record provides no answer.

In *State v. McKinney*, supra, we stressed that identification of a controlled substance by an abbreviation not designated by the schedules of controlled substances does not constitute substantial evidence that the substance distributed by defendant was the controlled substance alleged in the indictments. McKin-

ney was indicted for the felonious sale and distribution of tetrahydrocannabinols, a controlled substance included in Schedule VI of the North Carolina Controlled Substances Act. *See* G.S. 90-94. The State's evidence tended to show that defendant distributed a substance identified as "THC, a substance similar to marijuana like drugs." The abbreviation THC was not used in Schedule VI. The State never established whether THC was an abbreviation for tetrahydrocannabinols. We concluded that the State's evidence was insufficient to establish that the substance distributed by defendant was in fact tetrahydrocannabinols. *Held*: Defendant's motion for nonsuit should have been granted.

To withstand a motion for judgment as of nonsuit there must be substantial evidence of all material elements of the offense charged, and whether the State has offered such evidence is a question of law for the trial court. *State v. Everette*, 284 N.C. 81, 199 S.E. 2d 462 (1973); *State v. Evans*, 279 N.C. 447, 183 S.E. 2d 540 (1971); *State v. Allred, supra*. Here, the State has failed to offer substantial evidence that the substance distributed by defendant was in fact 3, 4-methylenedioxyamphetamine, as charged in the bills of indictment. This failure requires dismissal. *State v. McKinney, supra*; *State v. Bass*, 253 N.C. 318, 116 S.E. 2d 772 (1960); *State v. Edwards*, 224 N.C. 577, 31 S.E. 2d 762 (1944).

For the reasons stated the decision of the Court of Appeals is reversed. The case is remanded to that court for further remand to the Superior Court of Rowan County for entry of judgment dismissing the charges in accordance with this opinion.

Reversed and remanded.

Justice BRANCH concurring.

For the reasons stated in *State v. Stanley*, 288 N.C. 19, 215 S.E. 2d 589 (1975), I concur in result.

Justices COPELAND and BRITT join in this concurring opinion.

Justice BROCK dissenting.

The majority dismisses these charges against the defendant because no witness testified that MDA was in fact an abbreviation for 3, 4-methylenedioxyamphetamine. The majority then

reasons that testimony that defendant possessed and delivered MDA "does not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine as charged in the bills of indictment."

I disagree with the majority opinion for what I consider to be two substantial reasons.

First: The Courts are not required nor expected to be more blind than other segments of society to facts which are commonly known or to facts which are readily verifiable. "Many facts . . . are so indisputable, and so generally known or so readily verifiable that it would be a waste of time and a perversion of the judicial function to require them to be proved. A court will take *judicial notice* of facts of this character, *i.e.*, it will assume or declare them to exist without requiring the production of evidence to establish them." 1 Stansbury's North Carolina Evidence, Judicial Notice, § 11, p. 24 (Brandis Rev. 1973). *Drug Laws of North Carolina (Including Regulations)* issued by North Carolina Drug Authority (now North Carolina Drug Commission) sets out on page 121 the Common or Trade Name for the Statutory or Legal name of Schedule 1 Controlled Substances. MDA is listed as the Common or Trade Name for 3, 4-methylenedioxyamphetamine. This source is readily available and the abbreviation is readily verifiable. The trial judge took judicial notice of this fact when he instructed the jury as follows:

> "Now, the defendant in these cases has been accused of possession of methylenedioxyamphetamine, a controlled substance, with the intent to sell it, and sale of this same controlled substance. Now, for the purposes of clarification, I will refer to that alleged substance by the term, MDA, which is the common way that it is referred to. It is the common abbreviation for the controlled substance, methylenedioxyamphetamine. In these instructions, when I use the abbreviations MDA, you will know that that is the alleged substance to which I refer."

The State's witnesses, the district attorney, counsel for defendant, and the defendant himself referred to the drug as MDA. No objection or exception was taken by the defendant to the trial judge's taking notice, and instructing the jury, that MDA was the common abbreviation for 3, 4-methylenedioxyamphet-

amine. If defendant had objected, I think it would have been without merit. But the point is that defendant himself is satisfied with the trial judge's action in this regard. For this Court to say the evidence of defendant's possession and delivery of MDA does not constitute substantial evidence that the drug possessed and sold by defendant was in fact 3, 4-methylenedioxyamphetamine is tantamount to saying that the trial judge abused his discretion in judicially noticing this fact. In my opinion the trial judge was correct.

Second: The primary argument of defendant, both in the Court of Appeals and in this Court, is that the evidence establishes entrapment as a matter of law. At no point does defendant argue that the evidence that he possessed and delivered MDA does not constitute substantial evidence that he sold and delivered 3, 4-methylenedioxyamphetamine as charged in the bills of indictment. He, in effect, took notice of that fact himself.

SALLIE WALSTON WHITE v. JAMES EDGAR WHITE

No. 67

(Filed 16 March 1979)

1. **Judgments § 10— consent judgment—modification**

As a general rule a consent judgment cannot be modified or set aside except by agreement of the parties since it is merely a contract between the parties which has been approved by the court.

2. **Divorce and Alimony § 16.5; Husband and Wife § 11— consent judgment—court order to pay alimony—modification**

When the trial court in a consent judgment adopts the agreement of the parties as its own determination of their respective rights and orders the husband to pay the specified amounts as alimony, the consent judgment is not merely a contract between the parties but a decree of the court which is both modifiable and enforceable by the court's contempt power. G.S. 50-16.9(a).

3. **Divorce and Alimony § 19.5— consent judgment—court order to pay alimony—modification**

A consent judgment was an order of the court which could be modified pursuant to G.S. 50-16.9(a) where the trial judge adopted the agreement of the parties as his own determination of their respective rights and obligations and "ordered, adjudged and decreed," among other things, that defendant pay $100 per week to plaintiff until her death or remarriage.

4. Divorce and Alimony § 19.5— consent judgment—alimony and division of property—separability—modification of support payments

Even though denominated as such, periodic support payments to a dependent spouse may not be "alimony" within the meaning of G.S. 50-16.9(a) and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other.

5. Rules of Civil Procedure § 12; Divorce and Alimony § 19.5—findings on motion to dismiss—appellate court not bound

A trial court cannot make "findings of fact" conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6), since the resolution of evidentiary facts is not within the scope of the Rule. Therefore, the appellate court was not bound by the trial court's "finding" on a motion to dismiss that the support and property division provisions of a consent judgment were not separable.

6. Divorce and Alimony § 19.5— consent judgment—support and property division—separability—situation of parties when judgment entered

Where a consent judgment provided for (1) support payments to plaintiff, and (2) a division of property, but it is not clear from the language of the consent judgment, its purpose and its subject matter whether the parties intended the support payments and property division to be reciprocal consideration for each other or independent and separable, evidence of the situation of the parties at the time they consented to the judgment is essential to resolution of that issue.

7. Divorce and Alimony § 19.3— modification of alimony—allegation of changed circumstances

Plaintiff's allegation that the support payments she is receiving are totally inadequate under current circumstances is a sufficient allegation of changed circumstances to support modification of the support payments under G.S. 50-16.9(a).

8. Divorce and Alimony § 19.5— separation agreement or consent judgment adopted by court—presumption of separability of provisions—burden of proof

In cases in which the issue of separability of provisions in a separation agreement or consent judgment adopted and made a part of its order by the court is not adequately addressed in the document itself, there is a presumption that the provisions therein are separable and subject to modification by the court upon an appropriate showing of changed circumstances, and the party opposing modification has the burden of proof on the issue of separability by a preponderance of the evidence.

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

ON appeal pursuant to G.S. 7A-30(2) from a decision of the Court of Appeals, reported at 37 N.C. App. 471, 246 S.E. 2d 591, opinion by Chief Judge, now *Justice, Brock* with *Judge Hedrick*

concurring and *Judge Mitchell* dissenting, reversing an order entered by *Judge Harrell* on 18 May 1977 in WILSON District Court. Docketed and argued as No. 69 at the Fall Term 1978.

Moore, Diedrick, Whitaker & Carlisle, by J. Edgar Moore, Attorneys for plaintiff appellee.

Biggs, Meadows, Batts, Etheridge & Winberry, by Charles B. Winberry, and Farris, Thomas & Farris, by Allen G. Thomas, Attorneys for defendant appellant.

EXUM, Justice.

Plaintiff wife filed a motion in the cause to increase certain periodic payments made to her by defendant husband under an earlier consent judgment. On motion of defendant, the district court dismissed plaintiff's motion without a hearing on the grounds that (1) the consent judgment was not modifiable, and (2) even if it was, plaintiff had failed to make a sufficient allegation of changed circumstances to support modification. The Court of Appeals, with one judge dissenting, reversed the order of the district court, concluding (1) there is nothing on the face of the earlier consent judgment to preclude modification, (2) plaintiff's motion alleges sufficient grounds to support modification, and (3) plaintiff is entitled to a hearing on her motion. We agree with the majority of the Court of Appeals and affirm.

On 22 June 1966 plaintiff filed a claim against defendant for alimony without divorce. Defendant answered, denying the principal allegations of plaintiff's complaint, and counterclaimed for divorce on several grounds. Both plaintiff's claim and defendant's counterclaim were resolved by two judgments entered on 17 November and 24 November 1969, respectively, by Judge Carlton. The 17 November judgment read as follows:

> "This cause coming on to be heard and being heard before the Honorable J. Phil Carlton, Chief Judge, Seventh Judicial District, District Court Division; and it appearing to the Court that this is an action for alimony and divorce and that a duly verified complaint and answer have been filed; and that all things and matters in controversy arising out of the actions and pleadings have been agreed upon and settled; and the Court finding as a fact that said agreement is just

and agreeable with respect to both parties and adopting the agreement of the parties as its own determination of their respective rights and obligations;

IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED:

1. That James Edgar White shall pay to Sallie Walston White as permanent alimony the following sums:

(a) $100.00 per week beginning November 17, 1969 and $100.00 on each and every Monday thereafter as like payment until the remarriage or death of Sallie Walston White, whichever occurs first;

(b) $1,000.00 in (1) lump sum payment;

2. That said James Edgar White shall convey to Sallie Walston White by warranty deed his one-half interest in their home located at 306 South Deans Street, Wilson, North Carolina, free and clear of all liens and encumbrances; and that she shall also receive all the right, title and interest in and to all the furnishings and household goods located in said home;

3. That the defendant, James Edgar White, shall pay the costs of this action as taxed by the Clerk.

This the 17 day of November, 1969.

s / J. PHIL CARLTON
Judge Presiding

CONSENTED TO:

s / SALLIE WALSTON WHITE, Plaintiff
s / JAMES EDGAR WHITE, Defendant

MOORE AND DIEDRICK
Attorneys for Plaintiff
s / By: T. J. Diedrick

FARRIS AND THOMAS
Attorneys for Defendant
s / By: Allen G. Thomas"

The 24 November 1969 judgment granted defendant an absolute divorce based on one year's separation.

By motion filed 13 October 1976 plaintiff sought to have the court "increase the amount of support that the Defendant has to pay to the Plaintiff as permanent alimony." Defendant filed a motion to dismiss for failure to state a claim under Rule 12(b)(6), which was granted by the trial court. In its order of dismissal, the trial court made a number of "findings of fact" and "conclusions of law." Finding of Fact #16 was that: "The support provisions and the provision for the division of property are not separable." Conclusion of Law #3 was that: "The support provision and the provision for the distribution of real and personal property are not separable and may not be changed."

[1] The principal issue is whether the court has the power to modify the amount of the weekly payments provided for in the consent judgment. As a general rule a consent judgment cannot be modified or set aside except by agreement of the parties. *Holden v. Holden*, 245 N.C. 1, 95 S.E. 2d 118 (1956). The basis for this rule is that the consent judgment is merely a contract between the parties which has been approved by the court. *Davis v. Davis*, 213 N.C. 537, 196 S.E. 819 (1938). A consent judgment can be set aside unilaterally, though, in case of fraud or mutual mistake, *Holden v. Holden, supra*, neither of which was alleged here.

[2] Such limitations on a court's power to modify are present, however, only in the case of a purely contractual consent judgment, one in which "the court merely approves or sanctions the payments which the husband has agreed to make for the wife's support and sets them out in a judgment against him." *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E. 2d 240, 242 (1964). A different situation exists when the trial court "adopts the agreement of the parties as its own determination of their respective rights and obligations and orders the husband to pay the specified amounts as alimony." *Id.* In that case the consent judgment is both modifiable and enforceable by the court's contempt power. The rationale for this distinction is that such a consent judgment is not merely a contract between the parties but rather a decree of the court. *Id.* at 70, 136 S.E. 2d at 243.

This distinction has been adopted in a number of our cases. *See Holsomback v. Holsomback*, 273 N.C. 728, 161 S.E. 2d 99 (1968); *Sayland v. Sayland*, 267 N.C. 378, 148 S.E. 2d 218 (1966);

Bunn v. Bunn, supra, 262 N.C. 67, 136 S.E. 2d 240; *Seaborn v. Seaborn*, 32 N.C. App. 556, 233 S.E. 2d 67 (1977). It is also now embodied in G.S. 50-16.9(a):

> "An *order of a court* of this State for alimony or alimony pendente lite, *whether contested or entered by consent*, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested. This section shall not apply to orders entered by consent before October 1, 1967." (Emphasis added.)

The order in question was entered on 17 November 1969; therefore, if it meets the requirements of G.S. 50-16.9(a) it is modifiable.

[3] For a court to have power to modify a consent judgment, the first requirement of the statute, as with our case law, is that the judgment consented to be an order of a court. The judgment here meets this requirement. Judge Carlton in his order of 17 November 1969 adopted the agreement of the parties as his own determination of their respective rights and obligations and "ordered, adjudged and decreed," among other things, that defendant pay $100 per week to plaintiff until her death or remarriage. The consent judgment is clearly an order of the court. *See Sayland v. Sayland, supra*, 267 N.C. 378, 148 S.E. 2d 218.

[4] The second essential requirement is that the order be one to pay alimony. Even though denominated as such, periodic support payments to a dependent spouse may not be alimony within the meaning of the statute and thus modifiable if they and other provisions for a property division between the parties constitute reciprocal consideration for each other. As explained by Justice, now Chief Justice, Sharp in *Bunn v. Bunn, supra*, 262 N.C. at 70, 136 S.E. 2d at 243:

> "[A]n agreement for the division of property rights and an order for the payment of alimony may be included as separable provisions in a consent judgment. In such event the division of property would be beyond the power of the court to change, but the order for future installments of alimony would be subject to modification in a proper case. (Citations omitted.) *However, if the support provisions and the division of property constitute a reciprocal consideration so that the*

entire agreement would be destroyed by a modification of the support provision, they are not separable and may not be changed without the consent of both parties." (Emphasis added.)

Defendant contends that as a matter of law the provisions for weekly support payments to plaintiff and for the transfer to her of certain real and personal property are not separable and that the consent judgment is not subject to modification. We do not agree.

[5] Defendant argues at the outset that we are bound on this issue by the trial court's finding of fact that the support provision and the provision for division of property are not separable because plaintiff has not excepted to this finding. There are two replies to this argument. First, this "finding" is, as the trial court later called it, really a conclusion of law, which is subject to review under plaintiff's exception to the signing and entry of the order. *See Greensboro v. Black*, 232 N.C. 154, 59 S.E. 2d 621 (1950).

Second, a trial court cannot make "findings of fact" conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6). The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed. *Sutton v. Duke*, 277 N.C. 94, 176 S.E. 2d 161 (1970). In deciding such a motion the trial court is to treat the allegations of the pleading it challenges as true. *Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E. 2d 282 (1976). "The function of a motion to dismiss is to test the law of a claim, not the facts which support it." *Niece v. Sears, Roebuck & Co.*, 293 F. Supp. 792, 794 (N.D. Okla. 1968) (applying Federal Rule 12(b)(6)). Resolution of evidentiary conflicts is thus not within the scope of the Rule. We are not bound by the trial court's "finding" that the support and property division provisions are not separable.

[6] The question, then, is whether the provision for support payments and the provision for property division in the 17 November 1969 consent judgment are independent and separable. The answer depends on the construction of the consent judgment as a contract between the parties. "The heart of a contract is the intention of the parties. The intention of the parties must be determined from the language of the contract, the purposes of the

contract, the subject matter and the situation of the parties at the time the contract is executed." *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 492, 219 S.E. 2d 190, 196 (1975).

The parties here have not indicated their intent regarding separability of the two provisions by the language of the contract itself. They did not make the provisions clearly separable as did the parties in *Britt v. Britt*, 36 N.C. App. 705, 711, 245 S.E. 2d 381, 385 (1978), by use of language like the following:

> "The provisions for the support, maintenance and alimony of wife are independent of any division or agreement for division of property between the parties, and shall not for any purpose be deemed to be a part of or merged in or integrated with a property settlement of the parties."

Nor did they express an intent that the provisions be considered reciprocal consideration for each other and thus inseparable in the manner described by the California Supreme Court in *Plumer v. Plumer*, 48 Cal. 2d 820, 825, 313 P. 2d 549, 552 (1957):

> "An agreement providing that the purpose of the parties is to reach a final settlement of their rights and duties with respect to both property and support, that they intend each provision to be in consideration for each of the other provisions, and that they waive all rights arising out of the marital relationship except those expressly set out in the agreement, will be deemed conclusive evidence that the parties intended an integrated agreement."

The purpose of the consent judgment was apparently to settle "all things and matters in controversy arising out of the actions and pleadings." This language clearly shows that the parties wished to resolve their then outstanding differences. It does not show, however, that they intended to foreclose any future modification of the support payments. That the payments were denominated "alimony" militates against such an intent, but again it is far from conclusive on the issue.

The subject matter of the judgment was (1) a provision for support payments to plaintiff and (2) a division of property. Defendant argues that the inclusion of both these provisions in the same instrument conclusively points to an intent that they be reciprocal. We do not agree. As this Court stated in *Bunn v.*

Bunn, supra, 262 N.C. at 70, 136 S.E. 2d at 243, "[A]n agreement for the division of property rights and an order for the payment of alimony *may* be included as separate provisions in a consent judgment." (Emphasis added.) That both provisions are included in the judgment is, standing alone, inconclusive.

The only remaining factor which may be appropriately considered in discerning the intent of the parties to this judgment is their respective circumstances at the time they consented to it. Here we are handicapped by the trial court's failure to hold a hearing before dismissing the motion. The record is devoid of any facts bearing on the negotiations between the parties, their financial situations before and at the time they consented to the judgment, and their motivation for entering into an agreement with these particular terms. There are some allegations in the documents before us about the parties' finances, but no significant admitted or proven facts. The parties argue a number of inferences from scant information in the record, but their arguments are not persuasive.

In summary, it is not clear from the language of the consent judgment, its purpose and its subject matter what the parties intended on the issue of separability. Evidence of the situation of the parties at the time they consented to the judgment is therefore essential to resolution of the issue.

[7] Defendant contends nevertheless that the order of dismissal by the trial court should be upheld because plaintiff failed to allege properly the third essential element of G.S. 50-16.9(a), changed circumstances. Plaintiff alleged in her motion:

> "That the Plaintiff Sallie Walston White is informed and believes and therefore alleges that the Defendant is currently earning in excess of $100,000.00 per year, which amounts to a substantial change in circumstances warranting an increase in the amount of permanent alimony that is to be paid to her by the Defendant, since the amount of $100.00 per week as set forth in the Judgment of November 17, 1969, is totally inadequate under the current circumstances."

Defendant argues that the only changed circumstance alleged by this language is increased income on the part of defendant and that this standing alone cannot amount to the required showing of

changed circumstances, citing *Arnold v. Arnold*, 332 Ill. App. 586, 76 N.E. 2d 335 (1947). The quoted language should not be read so restrictively. It contains two allegations: (1) that defendant's increased income amounts to changed circumstances; and (2) that the payments of $100 per week to plaintiff are totally inadequate under current circumstances. Changed circumstances do not have to be pled with specificity. *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E. 2d 506 (1969). Plaintiff's allegation that the payments she is receiving are totally inadequate under current circumstances is sufficient to withstand a motion to dismiss under Rule 12(b)(6). We do not therefore decide whether the other alleged ground is sufficient in itself to withstand defendant's motion.

An evidentiary hearing is thus necessary to determine (1) whether the 17 November 1969 consent judgment is modifiable, and (2) whether there have been sufficient changed circumstances to support modification. Evidence on the first point should be limited to that tending to show whether the support payments and the property division were intended as reciprocal consideration for each other.[1]

The parties here entered into a fairly routine agreement that plaintiff receive (1) $100 per week in "alimony" from defendant until her death or remarriage; (2) a $1000 lump sum payment; and (3) ownership of the home and its furnishings that had belonged to her and defendant. With regard to their common provisions this consent judgment is almost identical to the one in *Bunn v. Bunn*, *supra*, 262 N.C. 67, 136 S.E. 2d 240. There the judgment provided: (1) defendant husband was to pay plaintiff wife $125 per month until her death or remarriage; (2) until their children reached the age of 21 years or married, defendant was to pay $100 per month for their support; (3) plaintiff was to have custody of the children and defendant visiting rights; and (4) defendant was to convey his interest in their home to plaintiff. In discussing this judgment the Court noted, *id.* at 71, 136 S.E. 2d at 244, "While not an issue here, it is clear that the agreement and decree that defendant convey to plaintiff, as a home for herself and the two

1. Such evidence might be, for example, that plaintiff agreed to take lesser support payments in return for a greater share of property than she might have expected; or, alternatively, that she opted for higher support payments while foregoing most of her claims to joint property. This would tend to show that the provisions were reciprocal consideration for each other. On the other hand the evidence might show there was little or no disagreement about the property division or little property to be divided and plaintiff accepted $100 per week in support payments because that is all defendant could pay at that time. This would tend to show the provisions were independent and separable.

minor children, the property which they owned as tenants by the entirety was separable from the support provisions."

[8] While not controlling here, the comment from *Bunn* is persuasive. It represents a common sense view that provisions in a routine agreement for support payments to a dependent spouse and the transfer of the supporting spouse's interest in the family residence are, in the absence of clear language in the agreement to the contrary, generally separable rather than mutually dependent. If, however, the burden of proof on the issue of separability in such cases is on the party seeking modification, the result when it is difficult to marshal satisfactory evidence is that such party either loses outright or is given the opportunity to show changed circumstances only on the basis of the finest distinctions in the wording of a consent judgment or separation agreement. *See* Annotation, Modification of Divorce Decree—Alimony, 61 A.L.R. 3d 520 §§ 19-23 (1975). As the Idaho Supreme Court stated in *Phillips v. Phillips*, 93 Idaho 384, 386, 462 P. 2d 49, 51 (1969):

> "It is our belief that in its attempts to determine the intent of the parties regarding integration or non-integration of the provisions of separation agreements, this Court has been forced to indulge in technical hair-splitting. In some cases the court has held agreements to be integrated . . . while in other cases agreements that were substantially the same but for a word or two have been held to be non-integrated."

As a solution to this problem, the Court in *Phillips* adopted the following rule, *id.* at 387, 462 P. 2d at 52:

> "[W]hen parties enter into an agreement of separation in contemplation of divorce and thereafter the agreement is presented to a . . . court in which a divorce action is pending and the court is requested to approve, ratify or confirm the agreement, certain presumptions arise. In the absence of clear and convincing evidence to the contrary, it will be presumed that each provision of such an agreement is independent of all other provisions and that such agreement is not integrated. . . ."

We think this procedure offers a sensible approach for dealing with the issue of separability of provisions in a consent judgment

or separation agreement in cases in which the question is not adequately addressed in the document itself.[2] We therefore hold that in such cases there is a presumption that provisions in a separation agreement or consent judgment made a part of the court's order are separable and that provisions for support payments therein are subject to modification upon an appropriate showing of changed circumstances.[3] The effect of this presumption is to place the burden of proof on the issue of separability on the party opposing modification. Unlike *Phillips*, however, we hold that the policies underlying the presumption require that this burden be discharged only by a preponderance of the evidence. *See* Stansbury's North Carolina Evidence § 220 (Brandis rev. 1973) (discussing quantum of evidence necessary to overcome presumptions).

In summary, plaintiff is entitled to an evidentiary hearing on her motion in the cause. It is clear that the 17 November 1969 judgment was consented to by the parties and made a part of the court's order. The judgment itself does not adequately address the issue of separability of its key provisions. It is therefore presumed that the provisions in the judgment for support payments and division of property are separable. If plaintiff can show changed circumstances then the support payments may be modified accordingly unless defendant can show by a preponderance of the evidence that the provisions were not intended to be separable.

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

Affirmed.

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

2. We regard the approach of *Phillips* as applicable either to separation agreements or to consent judgments adopted and made a part of its order by the Court. The two are quite similar in this respect, and we have in the past applied our rules to them interchangeably. *See Levitch v. Levitch*, 294 N.C. 437, 241 S.E. 2d 506 (1978).

3. The burden of showing changed circumstances remains on the party seeking modification. *See* G.S. 50-16.9(a).

STATE OF NORTH CAROLINA v. LARRY DALE HOPKINS AND VIRGINIA LEWIS PETTY HOPKINS

No. 58

(Filed 16 March 1979)

1. Criminal Law § 87.1— leading questions proper

In a prosecution for armed robbery, felonious larceny of an automobile, and kidnapping, the trial court did not err in allowing the State to use leading questions during the direct examination of the main prosecuting witness since the witness had trouble understanding the gist of the questions posed to him by the State, and the answers he gave were often cursory and unresponsive.

2. Criminal Law § 34.4— subsequent offenses by defendants—admissibility of evidence

In a prosecution for armed robbery, felonious larceny of an automobile, and kidnapping, the trial court did not err in allowing testimony concerning offenses which defendants allegedly committed in Tennessee some four hours after the crimes for which they were being tried occurred, since the testimony complained of was introduced as the State was trying to show the circumstances under which the victim's car, which was the subject of the automobile larceny charges, and two guns, which were directly involved in the armed robbery charges, were recovered, and this testimony was essential to show that the objects at trial were the same as those involved in the crimes in question before the State could introduce the photographs of the car and guns themselves into evidence.

3. Searches and Seizures § 8— search of defendant several hours after arrest—search incident to arrest—probable cause

Officers had probable cause to search the female defendant where, upon arrest of the defendants, Tennessee authorities searched the male defendant and seized one gun; a visual search of the female defendant yielded nothing; a deputy sheriff from N.C. went to Tennessee later the same morning and informed officers that he had reason to believe the defendants had two guns; and the female defendant was then searched more fully and a gun was found concealed in her blouse. Moreover, the circumstances were such that it was impractical to obtain a search warrant, and the fact that the search was made some six or seven hours after the female defendant was arrested did not make it too remote in time or place to be a search incident to a lawful arrest.

4. Criminal Law § 88.1— cross-examination limited—questions answered anyway—defendants not prejudiced

Defendants were not prejudiced by the trial court's sustaining of the State's objections to defense counsel's questioning of the prosecuting witness since the witness answered most of the questions anyway, no motion was made to strike, and defendants therefore had the practical benefit of the evidence.

5. Criminal Law § 166— the brief—factual summary required

An appellant should include in his brief a non-argumentative factual summary in addition to a concise statement of the case dealing with the procedural posture of the case. Rules of Appellate Procedure 28(b)(2).

Justice BROCK took no part in the consideration or decision of this case.

APPEAL by defendants from the judgment of *Howell, J.*, entered in the 15 December 1977 Session of WATAUGA County Superior Court. This case was docketed as Number 18 in the Fall Term 1978.

The defendants were each charged, in separate indictments, proper in form, with armed robbery, felonious larceny of an automobile and kidnapping. Both defendants entered pleas of not guilty as to all the charges. The cases were consolidated for trial with the consent of the parties.

At trial the evidence for the State tended to show the following:

On 26 May 1977, around 11:00 p.m., Howard Miller was returning home from a friend's house in his 1965 Pontiac. The defendants were parked in a red Mustang on the road in front of Mr. Miller's house. Mr. Miller knew both the defendants. In the past he had dated the female defendant [hereinafter referred to as defendant Virginia].

Mr. Miller stopped his car beside the Mustang because the road was too narrow for two cars to pass. Defendant Virginia asked, "Are you Howard Miller?" and he indicated that he was. Defendant Larry Hopkins [hereinafter referred to as defendant Larry] came over to the driver's side of Mr. Miller's car and placed a .22 caliber pistol at his head. He got into the car and ordered Mr. Miller to turn his car around and drive down the road. Defendant Virginia followed them in the Mustang.

Defendant Larry then made Mr. Miller stop the car, get into the Mustang and drive down the road. He ordered Mr. Miller out of the car, and defendant Virginia pointed a .25 caliber pistol at him and demanded that he give her his money. He gave her $6.00, which was all he had, "because I [Mr. Miller] was afraid not to." Defendant Virginia then stated that she had to borrow $75.00 and

would make Howard Miller borrow it. Mr. Miller said that he would go to Archie Roark's house and try to borrow the money.

The two defendants and Mr. Miller drove the Pontiac and the Mustang to Mr. Roark's house. Mr. Miller alone went into the house and told Mr. Roark and his wife what had happened. Defendant Virginia came into the house and asked Howard Miller to go with her. He refused. Defendant Larry came in and got defendant Virginia, and they drove away in both Mr. Miller's car and the Mustang. Mr. Miller then contacted the police and told them what had happened.

Mr. and Mrs. Roark both corroborated the portion of the story that concerned them. They stated that Howard Miller appeared nervous and upset when he was at their home. A deputy sheriff of Watauga County also testified. He had talked with Mr. Miller on 27 May 1977 between 2:00 and 3:30 a.m. The officer recounted what Howard Miller had told him on that date, which was virtually identical to what Mr. Miller testified at trial.

On 27 May 1977 at about 4:35 a.m., Mike Donally, a detective with the Elizabethton Police Department went to the Rainbow Restaurant in Elizabethton, Tennessee to investigate a complaint about a man with a gun. He saw both defendants sitting in a booth in the restaurant, and he noticed a pistol sticking out of defendant Larry's waistband. Defendant Larry was arrested for public drunkenness and for possessing a weapon for the purpose of going armed; defendant Virginia was arrested for public drunkenness. Eventually two guns, a .22 caliber pistol and a .25 caliber pistol, were seized from defendants' persons. A 1965 blue Pontiac bearing a North Carolina license plate, later identified as Mr. Miller's car, was parked in front of the restaurant.

Later that morning, at about 6:30 a.m., defendant Larry called Jerry Vaughn, a deputy sheriff of Watauga County. He asked him to contact defendant Virginia's mother and have her bring $200 to the Elizabethton Police Department to get defendants out of jail on bond. Detective Vaughn and another officer went to Elizabethton and brought the defendants back to North Carolina because of warrants outstanding against them for auto larceny, armed robbery and kidnapping.

The evidence for defendants tended to show the following:

Lizzie Ellison, defendant Virginia's mother, testified that Howard Miller came to her home on 26 May 1977 at about 6:00 or 6:30 p.m. and asked for defendant Virginia. Mrs. Ellison told Mr. Miller that defendant Virginia was married and did not live there anymore; she told him to leave her daughter alone. Mr. Miller had previously been to Mrs. Ellison's home looking for defendant Virginia. Another witness, Lois Miller, testified that on 26 May 1977 Howard Miller came to her house and asked for defendant Virginia.

The two guns that were taken from defendants in Tennessee belonged to defendant Virginia but were kept at her mother's house. Mrs. Ellison last saw them in her house on 26 May 1977 at approximately 10:00 p.m. before going to work. When she returned the next morning, both guns were gone.

On 26 May 1977, at about 9:30 p.m., both defendants went to the home of Earl Lewis, defendant Virginia's father. They were having trouble with the lights and the rear tires of their Mustang. They left Mr. Lewis' home, which is approximately fifteen miles from Howard Miller's house, around 11:00 p.m. in their car.

Defendant Virginia took the stand. She testified that on 26 May 1977 she and defendant Larry, her husband, were at her mother's house around 7:00 p.m., and her mother told her that Howard Miller had been looking for her. The defendants left there and went to visit some of defendant Larry's relatives. At about 9:00 p.m. they went to the home of defendant Virginia's father so that he could fix the lights on their car.

Thereafter defendants went to Howard Miller's house because they knew he was looking for defendant Virginia and because they wanted to ask him about getting some new tires for their car. Neither defendant had any weapons at that time.

After Howard Miller returned home, the two defendants got into his car with him and the three of them talked and drank some beer. Mr. Miller took a piece of tinfoil out of his wallet, said it was LSD and asked defendant Larry if he wanted some. He refused. Mr. Miller then consumed two or three pills from another container which he claimed to be nerve pills he had gotten from his doctor.

The defendants asked Mr. Miller about some tires for their car, and he told them they could buy some inexpensive ones at a service station in Mountain City, Tennessee. Mr. Miller offered to loan the defendants his car to drive there, but he wanted it back in two hours.

Defendant Virginia then asked Mr. Miller if he could loan them some money, and Mr. Miller said yes but he only had $6.00. The defendants took the money and put some tools in Mr. Miller's car "to stand good for the money." Defendant Virginia mentioned that she needed to borrow $75.00, and Mr. Miller suggested that maybe he could borrow it from Archie Roark.

As the defendants and Howard Miller were going to Mr. Roark's house, Mr. Miller "was acting like he was scared or something. I [defendant Virginia] don't know what was wrong with him." Mr. Miller went into the house and then defendant Virginia went in to see if she could take him home. Mr. Miller refused, so the defendants left and took his car "because [Mr. Miller] had told us that we could borrow the car." Defendant Virginia denied that either defendant had a gun in Howard Miller's presence, took any money from him at gunpoint or held him against his will.

Thereafter the defendants went to the home of defendant Virginia's mother and got two guns, a .22 caliber pistol and a .25 caliber pistol. They wanted to have one gun for protection and the other one to sell if necessary. They drove to Tennessee but got lost and could not find the service station Mr. Miller had earlier described. The defendants were unable to return Mr. Miller's car to him within the time he specified because they were picked up by policemen in Elizabethton, Tennessee.

As to each defendant, the trial judge submitted the charges of armed robbery, felonious larceny of an automobile and kidnapping to the jury. The jury found both defendants guilty of armed robbery and felonious auto larceny and not guilty of kidnapping. Each defendant received a sentence of life imprisonment on the armed robbery conviction and a sentence of imprisonment for ten years on the auto larceny conviction, to run concurrently with the life imprisonment sentence. The defendants appealed to this

Court on their armed robbery convictions, and we granted their motions to bypass the Court of Appeals on their auto larceny convictions.

Other facts relevant to the decision will be related in the opinion below.

James M. Deal, Jr., for defendant Larry Dale Hopkins.

Stacy C. Eggers III, for defendant Virginia Lewis Petty Hopkins.

Attorney General Rufus L. Edmisten by Assistant Attorney General Thomas B. Wood, for the State.

COPELAND, Justice.

For the reasons stated below, we find no error in defendants' trial.

[1] In their first assignment of error, defendants claim the trial court erred in allowing the State to use leading questions during the direct examination of Howard Miller, the main prosecuting witness.

The general rule in North Carolina is that a party cannot use leading questions during direct examination of his own witness. *See, e.g., State v. Greene*, 285 N.C. 482, 206 S.E. 2d 229 (1974). This rule is subject to various exceptions, one of which is if the witness "has difficulty in understanding the question because of immaturity, age, infirmity or ignorance." *Id.* at 492, 206 S.E. 2d at 236. Furthermore, because of the trial court's opportunity to personally observe the witness, we recognize its superior ability to make a decision on this matter. Its ruling will be disturbed only upon showing an abuse of discretion. *Id.*

An examination of the record in this case shows that Mr. Miller had trouble understanding the gist of the questions posed to him by the State. The answers he gave were often cursory and unresponsive. One portion of the examination of which defendants complain is as follows:

> "Q. Now, I hand you State's Exhibit '4' [a photograph] and ask you what that is if you know.
>
> A. It's a Pontiac.

Q. Is that the same Pontiac as State's Exhibit '3?'

A. [Witness nods his head in the affirmative.]

Q. Except a different position?

A. Yea.

Q. And that is your car?

A. Yea.

Q. And where is that sitting?

A. Police Station.

Q. At Elizabethton, Tennessee?

A. Yea."

The trial judge stated for the record, in the absence of the jury, that "the Court in this case finds and has permitted the prosecution latitude and the defendants in cross examination latitude [in] examination of this witness . . . on the ground that the witness has difficulty in understanding the questions because of immaturity, age, infirmity or ignorance and because the examinations [are] directing his attention to the subject at hand without suggesting answers and the mode of questions by both State and defendants is collated to elicit truth." Under the circumstances, there was no need for the judge to conduct a formal *voir dire* to reach this conclusion. Furthermore, there has been no showing of prejudice to the defendants, *see State v. Young*, 291 N.C. 562, 231 S.E. 2d 577 (1977); therefore, this assignment of error is overruled.

[2] The defendants also contend that the court erred in allowing testimony concerning the offenses they committed in Tennessee some four hours after the crimes for which they were being tried occurred. We do not agree.

The testimony complained of was introduced as the State was trying to show the circumstances under which Mr. Miller's car, which was the subject of the auto larceny charges, and the two guns, which were directly involved in the armed robbery charges, were recovered. This testimony was essential in order to show that the objects at trial were the same as those involved in

the crimes in question before the State could introduce the photographs of the car and the guns themselves into evidence. *See State v. Harbison*, 293 N.C. 474, 238 S.E. 2d 449 (1977). This Court has stated:

> "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 facts it will not be excluded merely because it also shows him to have been guilty of an independent crime." *State v. Poole*, 289 N.C. 47, 50-51, 220 S.E. 2d 320, 323 (1975) (quoting 1 Stansbury, North Carolina Evidence § 91 (Brandis rev. 1973)).

This assignment of error is overruled. Defendants' claim that they were entitled to a mistrial because of the admission of the above "prejudicial matter" likewise is without merit.

The defendants bring forth several assignments of error relating to the searches of them conducted in Tennessee after they were arrested in that state.

Defendant Larry claims that the introduction of the gun that was taken from him after being arrested in Tennessee "was remote and unduly prejudicial to the defendant's case before the jury." He cites no authority for this proposition. As we previously stated, the introduction of the guns and the circumstances under which they were obtained by the State were relevant and necessary. This argument is without merit.

[3] Defendant Virginia attacks the search of her person at the Tennessee jail on the ground that the officers lacked probable cause. We cannot agree.

Upon the arrest of defendants, the Tennessee authorities immediately frisked the male defendant and seized the gun that was in plain sight in the waistband of his pants. At that time they also arrested the female defendant for public drunkenness but conducted only a visual search of her, finding and seizing nothing. Jerry Vaughn, a deputy sheriff of Watauga County, went to Tennessee later that morning and informed the officers that he had reason to believe the defendants had two guns. Defendant

Virginia was then searched more fully, and a gun was found concealed in her blouse. It was seized and introduced at trial.

Clearly there was probable cause for the officers to fully search defendant Virginia at this time, and the circumstances were such that it was impractical to obtain a search warrant.

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated." *Chimel v. California*, 395 U.S. 752, 762-63, 23 L.Ed. 2d 685, 694, 89 S.Ct. 2034, 2040 (1969).

The fact that the search was made some six or seven hours after defendant Virginia was arrested did not make it too remote in time or place to be a search incident to a lawful arrest. *See generally Preston v. United States*, 376 U.S. 364, 11 L.Ed. 2d 777, 84 S.Ct. 881 (1964). This assignment of error is overruled.

[4] Defendant Larry argues that the trial court improperly limited his cross-examination of Howard Miller. His complaint relates to the following exchange:

> "Q. You need a lot of help, don't you, try and get your story out.
>
> OBJECTION.
>
> SUSTAINED.
>
> Q. Mr. Miller, are you still selling LSD?
>
> A. I don't sell LSD.
>
> OBJECTION.
>
> SUSTAINED.
>
> Q. Are you giving it away?
>
> OBJECTION.
>
> SUSTAINED.
>
> A. I don't have none.
>
> Q. Well, you've sold drugs on several occasions, haven't you?

OBJECTION.

SUSTAINED.

A. I do on numerous occasions take nerve pills which have been prescribed for me.

Q. Oh, so you do take drugs, sometimes?

OBJECTION.

SUSTAINED."

In spite of the fact that the judge sustained the State's objections, the witness answered most of the questions, and no motion was made to strike. Therefore, the defendants had the practical benefit of the evidence and were not prejudiced by the judge's rulings. *See State v. Hodges*, 296 N.C. 66, 249 S.E. 2d 371 (1978); *State v. Edmondson*, 283 N.C. 533, 196 S.E. 2d 505 (1973). The other two questions were merely argumentative or repetitious, and it was within the trial court's discretion to exclude the witness' answers. *See State v. Bumper*, 275 N.C. 670, 170 S.E. 2d 457 (1969). This assignment of error is overruled.

Defendants brought forward other assignments of error to this Court. We have examined them all and find them totally without merit.

[5] We note that Rule 28(b)(2) of the North Carolina Rules of Appellate Procedure requires the appellant to include "a short, non-argumentative summary of the essential facts underlying the matter in controversy where this will be helpful to an understanding of the questions presented for review" in his brief. This is in addition to the requirement that he include a concise statement of the case, dealing with the procedural posture of the case to date. As neither defendant-appellant supplied a factual summary, it was difficult for us to ascertain the facts by sifting through this lengthy record. Thus, our review of this case was more complicated than should have been necessary. *See State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977).

In defendants' trial we find

No error.

Justice BROCK took no part in the consideration or decision of this case.

LINDA D. VAUGHN v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 91

(Filed 16 March 1979)

1. **Principal and Agent § 9— liability of principal for torts of agent—degree of control**

Whenever the principal retains the right to control and direct the manner in which details of work are to be executed by his agent, the doctrine of respondeat superior operates to make the principal vicariously liable for the tortious acts committed by the agent within the scope of his employment. Conversely, a principal is not vicariously liable for the tortious acts of an agent who is not subject to the control and direction of the principal with respect to the details of the work and is subordinate only in effecting a result in accordance with the principal's wishes.

2. **State § 6— Tort Claims Act—foster home program—County Director of Social Services**

A County Director of Social Services and his staff are agents of the Social Services Commission of the Department of Human Resources with respect to the placement of children in foster homes since the Social Services Commission has been given the right to control and direct the manner in which the County Director and his staff are to place children in foster homes. Therefore, the Department of Human Resources is liable under the doctrine of respondeat superior for the negligent acts of the County Director and his staff with respect to the placement of children in foster homes, and the Industrial Commission has jurisdiction under the Tort Claims Act of a claim based on such alleged negligence of the County Director and his staff.

ON defendant's petition for discretionary review of the decision of the Court of Appeals, 37 N.C. App. 86, 245 S.E. 2d 892 (1978), affirming the order of the North Carolina Industrial Commission entered 3 February 1977. This case was docketed and argued as No. 116 at the Fall Term 1978.

This is a claim against the Department of Human Resources which has not yet been heard on the merits. It was filed with the

North Carolina Industrial Commission pursuant to the provisions of the Tort Claims Act, G.S. 143-291. In her accompanying affidavit, claimant alleges that a foster child was negligently placed in her home by the Durham County Department of Social Services. The employees who placed the child in her home knew the child was a carrier of cytomegalo virus. The claimant had previously advised her caseworker that she was attempting to become pregnant; and subsequently, the claimant did become pregnant. While pregnant, the claimant was infected with cytomegalo virus. Upon advice of her physicians, the claimant was forced to abort her pregnancy because of the high risk of birth defects to the unborn child due to the cytomegalo virus. The abortion and its aftermath have resulted in great physical pain and mental anguish to the claimant.

Claimant named the County Director of Social Services, Mr. Thomas W. Hogan, and five of his caseworkers as the negligent employees. Counsel have stipulated that at the times complained of Thomas Hogan was the Director of the Durham County Department of Social Services; that either he or his predecessor in office was responsible for the hiring of the named caseworkers; that all of said individuals at the times complained of were employees of the Durham County Department of Social Services.

The Department of Human Resources moved to dismiss the claim for lack of jurisdiction, contending the Durham County Department of Social Services is not a State department and the Director and employees thereof are not State employees within the meaning of G.S. 143-291.

The motion came on for hearing before the Industrial Commission and, after finding facts, Commissioner Stephenson held that the Industrial Commission had jurisdiction to hear and determine this claim. On defendant's appeal Commissioner Stephenson's order was affirmed by the Full Commission and, on further appeal, by the Court of Appeals. We allowed defendant's petition for discretionary review.

Powe, Porter, Alphin & Whichard, P.A., by Charles R. Holton and Willis P. Whichard for plaintiff appellee.

Rufus L. Edmisten, Attorney General, by William Woodward Webb and Ralf F. Haskell, Assistant Attorneys General, for the State.

HUSKINS, Justice.

The sole question posed on this appeal is whether the North Carolina Industrial Commission has jurisdiction to hear and determine this claim.

Under The Tort Claims Act the North Carolina Industrial Commission (Commission) is "constituted a court for the purpose of hearing and passing upon tort claims against the . . . departments, institutions, and agencies of the State." G.S. 143-291. The Commission is authorized to determine "whether or not each individual claim arose as a result of a negligent act of any officer, employee, involuntary servant or agent of the State while acting within the scope of his office, employment, service, agency or authority, under circumstances where the State of North Carolina, if a private person, would be liable to the claimant in accordance with the laws of North Carolina." *Id.*

Claimant alleges that the Director of the Durham County Department of Social Services and his staff negligently placed in her home a foster child who was a carrier of cytomegalo virus with knowledge that claimant was attempting to become pregnant. Claimant subsequently became pregnant. While pregnant, claimant became infected with cytomegalo virus. Upon advice of her physician, claimant was forced to abort her pregnancy because of the high risk of birth defects to the unborn child due to the cytomegalo virus.

In order for the Commission to assert jurisdiction over this claim there must be a showing that the Director of the Durham County Department of Social Services and his staff were acting as the "involuntary servants or agents" of a "State Department" under circumstances in which the State, if a private person, would be liable for the negligent acts of the named servants or agents. G.S. 143-291. Claimant contends (1) that the Director of the Durham County Department of Social Services (County Director) and his staff act as agents for the Social Services Commission of the Department of Human Resources with respect to the placement of children in foster homes, and (2) that the degree of control exercised by the Social Services Commission over the manner in which the County Director is to administer the placement of children in foster homes requires imposition of liability on the State under the rule of respondeat superior for the negligent acts

of the County Director and his staff with respect to the placement of foster children.

Is the State liable for the negligent acts of the County Director and his staff with respect to the placement of children in foster homes? Application of the principles of agency law and respondeat superior to the statutory scheme for the delivery of foster care services leads us to conclude that liability may exist and that the Industrial Commission may therefore "hear and pass upon" the merits of this claim pursuant to the provisions of the Tort Claims Act.

[1] Whenever the principal retains the right "to control and direct the manner in which the details of the work are to be executed" by his agent, the doctrine of respondeat superior operates to make the principal vicariously liable for the tortious acts committed by the agent within the scope of his employment. *Hayes v. Elon College*, 224 N.C. 11, 29 S.E. 2d 137 (1944); *Harmon v. Contracting Co.*, 159 N.C. 22, 74 S.E. 632 (1912). *See also, Scott v. Lumber Co.*, 232 N.C. 162, 59 S.E. 2d 425 (1950). Conversely, a principal is not vicariously liable for the tortious acts of an agent who is not subject to the control and direction of the principal with respect to the details of the work and is subordinate only in *effecting a result* in accordance with the principal's wishes. *Harmon v. Contracting Co., supra. See generally*, Restatement (Second) of Agency § 2 (1957). In sum, a principal's vicarious liability for the torts of his agent depends on the degree of control retained by the principal over the details of the work as it is being performed. The controlling principle is that vicarious liability arises from the right of supervision and control. *Accord, Hayes v. Elon College, supra. See also*, 8 N.C. Index 3d, Master and Servant, § 3 and cases collected therein.

[2] Analysis of the statutory scheme adopted by the General Assembly for the delivery of foster care services indicates that the County Director of Social Services is the agent of the Social Services Commission of the Department of Human Resources with respect to the placement of children in foster homes and that the Social Services Commission is given the right to control and direct the manner in which the County Director is to place children in foster homes. Moreover, the conclusions we reach with respect to the status of the County Director as an agent of the

Department of Human Resources and with respect to the vicarious liability of the Department for the negligent acts of the County Director are equally applicable, under principles of sub-agency, to the five caseworkers named by claimant. *See generally*, W. Seavey, Law of Agency, § 7 (1964).

The County Director of Social Services is given the duty and responsibility "[t]o accept children for placement in foster homes and to supervise placement for so long as such children require foster home care." G.S. 108-19(15). However, the actions of the County Director with respect to the placement of children in foster homes must comply with the rules and regulations of the Social Services Commission, which has the "power and duty to establish standards and adopt rules and regulations: * * * * For the placement and supervision of dependent and delinquent children and payment of necessary costs of foster home care for needy and homeless children as provided by G.S. 108-66. * * * * For the inspection and licensing of child-care institutions as provided by G.S. 108-78." G.S. 143B-153(2)c and (3)c. *See also* G.S. 108-7 (Interim Supp. 1978).

Pursuant to this mandate the Social Services Commission has adopted comprehensive standards which detail the manner in which the County Director and his staff are to supervise the placement of children in foster homes and the role which the County Director and his staff are to play in the licensing of foster homes. See Manual—Welfare Programs Division, Volume I, Chapter IV, "Foster Care Services" (Plaintiff's Exhibit 2). These mandatory standards on foster care services instruct the County Director of Social Services on virtually all aspects of foster care. Among the topics covered by the standards are the following: (1) Under what circumstances should the County Director petition a court for the separation of a child from his natural parents? (2) In what manner should the natural parents be involved in the foster care process? (3) What constitutes a suitable foster home? (4) What type of medical care, clothing and nourishment must be provided for foster children? (5) How often and in what manner must each foster care case be evaluated? (6) How should judgments be formulated with respect to the duration of placement in a foster home?

The selection of a suitable foster home is obviously one of the keys to the successful placement of children in need of foster

care. Control over the manner in which this vital task is to be accomplished is vested in the State. G.S. 108-78(a) charges the Department of Human Resources with licensing and inspecting "child-caring institutions in the State under rules and regulations adopted by the Social Services Commission. . . ." In its regulations the Social Services Commission instructs the County Director of Social Services and his staff to inspect prospective foster homes under criteria established by the Commission. The County Director is to report his findings to the Department of Human Resources which decides whether to grant or renew the license as the case may be. Additionally, in its regulations the Social Services Commission specifies that the County Director may place children only in those foster homes which are licensed by the Department of Human Resources. Thus, the role of the County Director in the critical task of finding a suitable foster home is limited to conducting investigations for the Social Services Commission and, assuming there is a choice, to determining into which of several State-licensed foster homes a child will be placed.

The funding power of the Department of Human Resources in the field of foster care services also constitutes another source of State control over the manner in which the County Director and his staff administer the placement of children in foster homes. Pursuant to the provisions of the State Foster Home Fund, G.S. 108-66, a substantial percentage of the funding for the foster care programs administered by the County Director is provided by the Department of Human Resources in the form of reimbursement for funds expended by the county for the care of needy children who are placed in foster homes. Significantly, eligibility for reimbursement from the State Foster Home Fund is not conditioned solely on the financial need of the particular child being aided but also on the quality of foster care being provided by the county to the child. G.S. 108-66(a) authorizes reimbursement only when the needy child is placed in a foster home "in accordance with the rules and regulations of the Social Services Commission." Thus a county is not entitled to reimbursement for funds expended for a needy child unless it places the child in a foster home licensed by the Department of Human Resources as the rules and regulations of the Social Services Commission require that all foster children be placed in licensed homes. Similarly, in order to continue to receive reimbursement from the Foster

Home Fund a county must show that the foster care it is giving to the needy child complies with the comprehensive foster care standards promulgated by the Social Services Commission. Accordingly, every six months the county is required to submit reports to the Department of Human Resources on the following items:

> "Dates of visits with the child and a description of the services he is receiving, his adjustment in the home, community and school, and any medical care received during the period.
>
> The child's reaction to separation from his own family and the ways by which he maintains contact with them.
>
> Date of interviews with the child's parents.
>
> Description of the family's current situation. This includes the whereabouts of both parents, their attitude toward the child, their use of visiting rights, their efforts to improve the home situation and to plan for the child's return and any change in the family situation as it was described six months ago and the amount and source of income to the family—including employment history of the parents.
>
> If the parents were not living together at the time of placement, description of what has been done to involve the absent parent.
>
> Relatives contacted by the agency in an effort to interest them in the child's welfare.
>
> Services which have been offered to the child's family since the child was removed from the home.
>
> What specific and more permanent plan of care, other than continuing foster care, has been discussed with the parents and/or relatives? What is their attitude toward the plan?
>
> If the child has been released for adoption, what steps have been taken to place the child in a suitable adoptive home?
>
> Is the agency recommending continued foster care as the best possible plan of care at this time? Give reasons for this recommendation." Manual—Welfare Programs Division, supra.

If the county does not provide satisfactory answers to these questions further reimbursement could be denied and the county would be forced to turn to other revenue sources to cover the expenditures it had made for the needy child. It is evident, then, that the funding power of the Department of Human Resources in the field of foster care services is utilized to control the manner in which the County Director and his staff are to supervise the placement of children in foster homes.

Significantly, G.S. 108-19(5) provides that the County Director of Social Services is "[t]o act as *agent* of the Social Services Commission in relation to *work required* by the Social Services Commission in the county." (Emphasis added.) The rules and regulations adopted by the Social Services Commission with respect to the placement of children in foster homes specify part of the "work required by the Social Services Commission in the county." Thus, in defining the duties of the County Director of Social Services the General Assembly envisaged that he would be the agent responsible for executing whatever work was required by the Social Services Commission in his county. The nomenclature utilized by the General Assembly accurately describes the role played by the County Director in the delivery of foster care services. This statutory scheme gives the Department of Human Resources, through the Social Services Commission, control over the delivery of foster care services and designates the County Director as the person responsible for carrying out the policies formulated by the Department. Thus, in practice, as well as in name, the role of the County Director in the delivery of foster care services is that of an agent. Like the agent, the County Director acts on behalf of the Department of Human Resources and is subject to its control with respect to the actions he takes on its behalf. *See* W. Seavey, Law of Agency, § 3, p. 4 (1964).

Review of the statutory scheme for the delivery of foster care services indicates that the County Director of Social Services is the agent of the Social Services Commission with respect thereto and that the Department of Human Resources through the Social Services Commission has the right to control the manner in which the County Director of Social Services and his staff are to place children in foster homes. We therefore hold that the Department of Human Resources is liable under the rule of

respondeat superior for the negligent acts of the County Director of Social Services with respect to the placement of children in foster homes. It follows therefore that the Industrial Commission has jurisdiction under the Tort Claims Act to determine whether claimant's injuries arose as a result of a negligent act of the County Director of Social Services or his staff while acting within the scope of their obligation to place children in foster homes.

In concluding that the Social Services Commission has the right to control the acts of the County Director with respect to the placement of children in foster homes, we are cognizant of the fact that the Social Services Commission does not have the exclusive power to hire, discharge, or compensate the County Director. Those powers are vested in the County Board of Social Services. See G.S. 108-17 and 108-18. The members of the County Board of Social Services are appointed in part by the Social Services Commission. See G.S. 108-9. It is fair to say, then, that through its minority representation on the County Board of Social Services the Social Services Commission exercises some influence in the hiring, discharge and compensation of the County Director. We note, however, that exclusive power over the hiring, discharge, and compensation of an agent is not a prerequisite to a finding that the right of control exists; rather, it is one of many circumstances to be considered in determining whether the principal has the right to control the acts of his agents. *See Standard Oil Co. v. Anderson*, 212 U.S. 215, 53 L.Ed. 480, 29 S.Ct. 252 (1909). Thus, lack of power over hiring, discharge, and compensation does not preclude a finding of control where, as in this case, other circumstances support such finding. *See Hayes v. Elon College, supra.*

The case of *Turner v. Board of Education*, 250 N.C. 456, 109 S.E. 2d 211 (1959), cited by defendant as dispositive of this appeal, is factually distinguishable. In *Turner* this Court held that the State Board of Education was not vicariously liable for the negligent acts of a lawn mower operator employed by the Gastonia City Board of Education. The holding in *Turner* is premised on a finding that the State Board did not have the right to control the actions of the lawn mower operator. The facts in this case, unlike those in *Turner*, warrant a finding that the Department of Human Resources has the right to control the actions

of the County Director of Social Services with respect to the placement of children in foster homes.

In this case we hold only that the Department of Human Resources is liable for the negligent acts of its agents, the Durham County Director of Social Services and his subordinates, with respect to the placement of children in foster homes. Our holding is narrowly premised on the ground that the Department of Human Resources through the Social Services Commission has the right to control the manner in which the County Director is to execute his obligation to place children in foster homes. We express no opinion on whether the Department of Human Resources might also be liable for negligent acts of the County Director outside the scope of his obligation to place children in foster homes. In every instance the liability of the Department of Human Resources depends upon application of the principles of agency and respondeat superior to the facts in the case under consideration. *See Snow v. DeButts*, 212 N.C. 120, 193 S.E. 224 (1937).

Defendant has excepted to the findings of fact made by the Industrial Commission. Since the facts found by the Commission are jurisdictional they are not binding on this Court. *See, e.g., Hicks v. Guilford County*, 267 N.C. 364, 148 S.E. 2d 240 (1966); *Askew v. Tire Co.*, 264 N.C. 168, 141 S.E. 2d 280 (1965). Nonetheless, all the findings made by the Industrial Commission, save one, are supported by competent evidence. The Commission found that the Durham County Board of Social Services consisted of three members. Contrary to this finding the record indicates that the actual number of board members is five. However, since jurisdiction in this case does not turn on the composition of the Durham County Board of Social Services, we conclude that the Commission's error was harmless. Defendant's exceptions to the Commission's findings of fact are overruled.

For the reasons stated the decision of the Court of Appeals is

Affirmed.

STATE OF NORTH CAROLINA v. HARRIS KELTON WILLIAMS

No. 22

(Filed 16 March 1979)

1. **Criminal Law § 101— juror speaking to husband—no admonitions required—no showing of prejudice**

Defendant failed to show any prejudice to himself where the trial court apparently allowed a juror to step out into the courtroom or to the door of the courtroom and deliver a set of keys to her husband and the court did not provide the juror with admonitions as required by G.S. 15A-1236, since the admonitions prescribed by that statute are not required in a situation like the one involved here, and since there was nothing to suggest that the court permitted the juror to converse with her husband concerning the case.

2. **Homicide § 15.4— answer to hypothetical question—defendant's responsibility—expert's opinion admissible**

Though a hypothetical question asked of defendant's expert witness on cross-examination was not very clear, it and the witness's answer were not prejudicial to defendant, since, by his answer, the witness: (1) stated his conclusion that alcoholic intoxication precipitated commission of the offenses, and intoxication was at least a part of defendant's defense; (2) presumed that the intoxication was voluntary, and there was no evidence to the contrary, and (3) assumed that defendant would be responsible for his actions, which was, in effect, a statement of the witness's opinion that defendant was responsible for his criminal behavior.

3. **Homicide § 7.1— defendant intoxicated—instruction on unconsciousness not required**

In view of the overwhelming evidence that defendant's mental state at the time of the commission of the offenses in question was brought about by his excessive consumption of intoxicants, the trial court did not err in refusing to instruct the jury on the defense of unconsciousness.

4. **Homicide § 30.2— failure to submit lesser offense of voluntary manslaughter—no error**

The trial court in a murder prosecution did not err in failing to submit voluntary manslaughter as an alternate verdict since there was no merit to defendant's contention that, when the husband of one of the murder victims stood up and told defendant to leave his home, that was sufficient provocation to incite him to commit an unintentional act.

5. **Burglary and Unlawful Breakings § 6.4— jury instructions—consent—no error**

Defendant's contention that the trial court erred in its jury instruction relating to breaking and entering in that it did not explain adequately the element of consent was without merit; and even if defendant's argument were valid, he failed to show prejudice since the court consolidated the misdemeanor breaking and entering conviction with the felonious assault conviction for purpose of judgment and imposed one sentence within the limits allowed for the felony.

State v. Williams

APPEAL by defendant from *Collier, J.*, 7 August 1978 Mixed Session of BLADEN Superior Court.

Upon pleas of not guilty, defendant was tried on bills of indictment charging him with (1) murdering Ramonia Nichols, (2) assaulting Robert F. Nichols with a deadly weapon with intent to kill inflicting serious bodily injuries, and (3) breaking into and entering the residence of Robert F. Nichols with intent to commit a felony therein.

Evidence presented by the State tended to show:

At around 5:00 or 5:30 p.m. on 23 March 1978 Mr. Nichols, who is a minister, his wife, his eight-year-old daughter, his three-year-old son, defendant's wife and defendant's two-year-old son were at the Nichols' home. They were preparing to eat supper when defendant, without knocking, opened a screen or storm door and walked into the room where the others were. Mr. Nichols asked defendant how he was doing, and defendant answered "[n]ot too damn good". Mr. Nichols then stood up and told defendant if he was going to curse to leave his home immediately.

Defendant proceeded to pull a gun from underneath his shirt and shot Mr. Nichols in his right shoulder. As Mr. Nichols turned and took a step to his left, defendant shot him in his hip. Defendant then shot Mrs. Nichols who ran to another part of the house where she died within minutes from the gunshot wound. In an effort to calm defendant, his wife put her arms around him, led him to one of the bedrooms and kept him there until police arrived.

Mr. Nichols received extensive medical treatment for his injuries.

Defendant's testimony is summarized in pertinent part as follows: The incidents in question occurred on Thursday and he had been drinking very heavily since the preceding Saturday. On that Thursday he began drinking early in the morning and during the day he went to various places where he drank whiskey and beer. He had known Mr. and Mrs. Nichols for several years, attended Mr. Nichols' church, considered them his friends and had no animosity against either of them. He did not remember going to the Nichols home, or shooting anyone, but did remember being in the bedroom of the home when the police arrived. For many

years he had suffered from bad headaches and had sought medical treatment. On several occasions he had suffered from lapse of memory and would not recall where he had been or what he had done.

On cross-examination defendant admitted to prior convictions of fornication and adultery, nonsupport, assault with a deadly weapon, breaking and entering, simple assault and other charges.

Defendant presented other evidence tending to show that he had drunk 19 pints of liquor during the five days preceding the shootings; that he had suffered blackout spells during previous years even when he was not drinking; and that he had committed minor acts of violence that he could not remember committing.

Other parts of the evidence pertinent to the questions raised on appeal will be referred to in the opinion.

The jury returned verdicts finding defendant guilty of second-degree murder, nonfelonious breaking and entering, and assault with a deadly weapon with intent to kill inflicting serious injury. On the murder count, the court entered judgment imposing a sentence of life imprisonment. The court consolidated the other two counts for purpose of judgment and imposed a prison sentence of not less than 15 nor more than 20 years, this sentence "to run consecutively with" sentence imposed on the murder count.

Defendant appealed from the judgments and we allowed motion to bypass the Court of Appeals in the breaking and entering and felonious assault cases.

Attorney General Rufus L. Edmisten, by Assistant Attorney General Richard L. Griffin, for the State.

Herbert J. Zimmer for defendant-appellant.

BRITT, Justice.

[1] By his first assignment of error defendant contends the trial court erred in permitting a juror to leave the jury box "and/or the courtroom" during the trial without providing the juror with proper admonitions as required by G.S. 15A-1236. We find no merit in this assignment.

The record discloses that during the direct examination of witness Rollins, the following transpired:

"COURT: (TO JUROR NO. ONE.) You may step out there and speak to him if you like. She left home with both sets of keys. Her husband's outside and he's a little upset. (JUROR LEAVES AND RETURNS.) All right, sir."

The foregoing is the only information we have with respect to the incident complained of. That being true, we can only speculate as to exactly what took place. To us the record indicates that the trial judge merely permitted the juror to step out into the courtroom, or to the door of the courtroom, and deliver a set of keys to her husband. There is nothing to suggest that the court permitted the juror to converse with her husband concerning the case—only that the court permitted the juror to speak to her husband briefly in connection with delivering him the keys.

We do not think the admonitions prescribed by G.S. 15A-1236 are required in a situation like the one we envision here. Furthermore, the rule is well settled in this jurisdiction that the burden is on defendant not only to show error but also to show that the error was prejudicial to him, the presumption being in favor of the regularity of the trial. *State v. Paige*, 272 N.C. 417, 158 S.E. 2d 522 (1968); *State v. Jarrett*, 271 N.C. 576, 157 S.E. 2d 4, *cert. denied*, 389 U.S. 865, 19 L.Ed. 2d 135, 88 S.Ct. 128 (1967); 4 Strong's N.C. Index 3d, Criminal Law § 167.

We hold that defendant has failed to show error by his first assignment.

[2] By his second assignment of error defendant contends the trial court erred in allowing his witness, Dr. Bob Rollins, to give an answer to "an improperly-formed question". We find no merit in this assignment.

The record reveals the following:

"CROSS EXAMINATION by Lee J. Greer:

Q. All right. Now Doctor, you concluded that the defendant in this case was able to cooperate with his attorney, and too, that he was able to understand his legal situation.

A. Yes.

Q. Did you also conclude that the events leading up to the crime was likely the result of alcoholic intoxication and since that intoxication was presumably voluntary, that you assumed that he would be considered responsible for his actions?

MR. WALTON: OBJECTION.

COURT: OVERRULED.

A. Yes.

EXCEPTION NO. 2."

The challenged question is not a model in clarity; however, considered in context, we hold that it and the answer to it were not prejudicial to defendant. Since the printed record does not include all of the examination and cross-examination of Dr. Rollins, by consent of the parties, we have obtained a copy of the transcript of his testimony.

Dr. Rollins was presented as a witness for defendant. The state stipulated that he was an expert in the general field of medicine, specializing in forensic psychiatry.

On direct examination the witness stated that he examined defendant at Dorothea Dix Hopsital between 13 April and 27 April 1978; that he had five or six conferences with defendant during that time; that he was trying to determine if defendant was mentally able to stand trial, whether he could give an opinion as to defendant's condition at the time of the offenses, whether defendant had some mental illness, and whether some treatment might be advisable; and that he concluded that defendant had a long-standing problem with alcohol addiction but that he was able to stand trial and confer with his attorney in preparation for trial. In response to a hypothetical question based on testimony regarding the amount of alcohol defendant had consumed over a period of two weeks prior to the shootings, Dr. Rollins stated that in his opinion defendant's excessive drinking could have prevented him from being able to form an intent to kill.

The challenged question is in three parts. By his affirmative answer, the witness (1) repeated his conclusion that alcoholic intoxication precipitated commission of the offenses, (2) presumed that the intoxication was voluntary, and (3) assumed that defend-

ant would be responsible for his actions. Clearly, defendant was not prejudiced by (1) as intoxication was at least a part of his defense. As to (2), we find nothing in the record to show that defendant's intoxication was other than voluntary. With respect to (3), the witness in effect was stating his opinion that defendant was responsible for his criminal behavior; certainly this was a proper inquiry for cross-examination.

It will be noted again that the question complained of was asked on cross-examination. This court has said many times that "[t]he limits of legitimate cross-examination are largely within the discretion of the trial judge, and his ruling thereon will not be held for error in the absence of showing that the verdict was improperly influenced thereby." *State v. McPherson*, 276 N.C. 482, 172 S.E. 2d 50 (1970); *State v. Edwards*, 228 N.C. 153, 44 S.E. 2d 725 (1947); 4 Strong's N.C. Index 3d, Criminal Law § 88.1.

We cannot believe the verdict in this case was improperly influenced by the challenged question and answer. Assignment of Error No. 2 is overruled.

[3] By his third assignment of error, defendant contends the trial court erred in failing to give requested jury instructions on the defense of unconsciousness. We find no merit in this assignment.

The defense of unconsciousness, or automatism, a relatively new development in the criminal law, is now recognized in this jurisdiction. The first of our opinions on the subject appears to be *State v. Mercer*, 275 N.C. 108, 165 S.E. 2d 328 (1969), written by Justice (later Chief Justice) Bobbitt. In *Mercer*, the Court quoted from numerous treatises and opinions from other states; among the quotations are the following:

> "If a person is in fact unconscious at the time he commits an act which would otherwise be criminal, he is not responsible therefor. The absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability." 1 Wharton's Criminal Law and Procedure (Anderson), § 50, p. 116.

"Unconsciousness is a complete, not a partial, defense to a criminal charge." 21 Am. Jur. 2d, Criminal Law § 29, p. 115.

275 N.C. 108, 116.

In *Mercer*, the Court also quoted from the opinion in *People v. Wilson*, 59 Cal. Rptr. 156, 427 P. 2d 820 (1967), in which that court held that the defendant was entitled to the following jury instruction:

"Where a person commits an act without being conscious thereof, such act is not criminal even though, if committed by a person who was conscious, it would be a crime.

"*This rule of Law does not apply to a case in which the mental state of the person in question is due to insanity, mental defect or voluntary intoxication* resulting from the use of drugs or intoxicating liquor, but applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind.

"When the evidence shows that a person acted as if he was conscious, the law presumes that he then was conscious. The presumption, however, is disputable and may be overcome or questioned by evidence to the contrary." (Emphasis added.) 275 N.C. 108, 118.

In *Mercer*, the defendant was charged with murdering his estranged wife and her girl friend and son. The state's evidence showed: The victims lived in Wilson, N. C., while defendant was serving in the Army in another state. Learning that his wife was having affairs with other men, defendant went to Wilson for the purpose of seeing his wife and straightening out their marital troubles. His wife refused to see him and tried to secrete herself from him. On the evening in question defendant went to the house where he was sure his wife was and knocked on the door several times. When no one answered, defendant shot at the door twice, pushed it open with his foot and went inside. At that time a light

came on and someone said, "Ervin, don't do that". Defendant proceeded to fire three or four shots, killing his wife instantly and fatally wounding the other two victims. Defendant testified that when he went to the door and knocked, his wife hollered out from inside the house and told him if he did not leave she would call the police; that at that point his mind went blank and he had no recollection of anything else that happened at the house; and that the only intoxicants he had consumed that day consisted of two drinks of Vodka.

For failure of the trial court to instruct the jury on the defense of unconsciousness, and other errors, Mercer was given a new trial. It will be noted, however, that this court in awarding the new trial pointed out that there was *no evidence that Mercer was under the influence of intoxicants* or narcotics at the time of the offenses.

In *State v. Caddell*, 287 N.C. 266, 215 S.E. 2d 348 (1975), in an opinion by Justice Lake, this court reiterated its recognition of the defense of unconsciousness. However, the court overruled the holding in *Mercer* that unconsciousness is never an affirmative defense. The decision in *Caddell* is summarized in the opinion as follows (page 290):

> "We now hold that, under the law of this State, unconsciousness, or automatism, is a complete defense to a criminal charge, separate and apart from the defense of insanity; that it is an affirmative defense; and that the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury."

In *Lewis v. State*, 196 Ga. 755, 27 S.E. 2d 659 (1943), the Supreme Court of Georgia held in a situation analogous to the one at bar that while somnambulism or sleepwalking is a legal defense to a charge of crime, it is not so if artificially induced by the accused by willfully drinking intoxicants to excess. That same rule governs the case before us.

In the case at hand defendant testified that on the morning of the day in question he drank two pints of Canadian Mist; that he was up and drinking until 5:00 a.m. the preceding night; and that he went to several places during the day where he continued

to drink beer and other intoxicants. There was no evidence that his drinking was not voluntary.

In view of the overwhelming evidence that defendant's mental state at the time of the commission of the offenses in question was brought about by his excessive consumption of intoxicants, we hold that the trial court did not err in refusing to instruct the jury on the defense of unconsciousness.

[4] By his fourth assignment of error, defendant contends the trial court erred in not submitting voluntary manslaughter as an alternate verdict for the jury to return on the murder charge. We find no merit in this assignment.

On the murder charge, the court instructed the jury that they might find defendant guilty of first-degree murder, guilty of second-degree murder, guilty of involuntary manslaughter or not guilty. While it might have been prudent for the court to submit voluntary manslaughter as an alternate verdict, we hold that its failure to do so, under the facts in this case, was not error.

Voluntary manslaugher has been defined many times in this state as the unlawful killing of a human being, without malice, express or implied, and without premeditation or deliberation. *State v. Wrenn*, 279 N.C. 676, 185 S.E. 2d 129 (1971); *State v. Benge*, 272 N.C. 261, 158 S.E. 2d 70 (1967); *State v. Foust*, 258 N.C. 453, 128 S.E. 2d 889 (1963); *State v. Kea*, 256 N.C. 492, 124 S.E. 2d 174 (1962). It is also well settled that one who kills a human being while under the influence of passion or in the heat of blood produced by adequate provocation is guilty of manslaughter. *State v. Wynn*, 278 N.C. 513, 180 S.E. 2d 135 (1971); *State v. Cooper*, 273 N.C. 51, 159 S.E. 2d 305 (1968); *State v. Watson*, 222 N.C. 672, 24 S.E. 2d 540 (1943).

Defendant argues that there was sufficient evidence at the time he shot Mrs. Nichols that he was "under the influence of passion or in the heat of blood", produced by reasonable provocation, to require the submission of voluntary manslaughter as an alternate verdict. Specifically, he argues that when Mr. Nichols stood up and told him to leave the Nichols home, that was sufficient provocation to incite him to commit an unintentional act. We find this argument unpersuasive. Mere words are not sufficient provocation to reduce murder in the second degree to

manslaughter, but legal provocation must be circumstances amounting to an assault or threatened assault. *State v. Watson*, 287 N.C. 147, 214 S.E. 2d 85 (1975); *State v. Hightower*, 226 N.C. 62, 36 S.E. 2d 649 (1946).

Defendant's assignment of error No. 4 is overruled.

[5] Finally, in his fifth assignment of error, defendant contends the trial court erred in its jury instructions relating to breaking and entering in that it did not explain adequately the element of consent. This assignment has no merit.

Defendant argues that the evidence shows that only Mr. and Mrs. Nichols did not give him consent to enter the house; that the evidence did not show that they were the owners or occupants of the house; that defendant's wife was in the house at the time he entered; and that there is nothing to show that she did not have standing to give him permission to enter the house and did not do so. This argument is not persuasive. Although all of the evidence presented at trial is not included in the record on appeal, that which is included is sufficient to raise strong inferences that the house was the home of Mr. and Mrs. Nichols and that defendant's wife was merely a guest at the time in question.

Furthermore, assuming defendant's argument is valid, he fails to show prejudice. It will be noted that defendant was found guilty of misdemeanor breaking and entering, that the court consolidated this charge with the felonious assault charge for purpose of judgment and imposed one sentence within the limits allowed for the felony. That being true, the verdict in the felonious assault case supports the judgment and defendant is in no position to complain about error in the misdemeanor case. *State v. Morgan*, 268 N.C. 214, 150 S.E. 2d 377 (1966); 4 Strong's N.C. Index 3d, Criminal Law § 171.1.

For the reasons stated, in defendant's trial, and the judgments appealed from, we find

No error.

STATE OF NORTH CAROLINA v. HOWARD KEITH THOMPSON AND JIMMY DALE HARDEE

No. 87

(Filed 16 March 1979)

Searches and Seizures §§ 12, 34— detaining occupants of van for investigation and identification—reasonableness—officer's observation of hashish while leaning into van

Officers were reasonably warranted in approaching and detaining the occupants of a van for purposes of investigating their activities and determining their identity where the van and a motorcycle were located at 12:30 a.m. in a public parking area in an isolated region of New Hanover County at the end of a State highway; the officers were aware that break-ins involving a van had recently been reported in the vicinity; the front passenger and side doors of the van were observed to be open; and the officers observed six persons in and around the van, since such facts would justify a reasonable suspicion by the officers that the occupants of the van might be engaged in or connected with criminal activity. Furthermore, an officer's act of leaning into the van through the open front passenger door to obtain identification from the driver after the front passenger had stepped from the van did not constitute an unreasonable intrusion on the expectation of privacy of the van occupants, and the officer's seizure of hashish which he saw in an open, recessed area of the dashboard while leaning into the van was lawful.

Justice BRITT took no part in the consideration or decision of this case.

Justice EXUM dissenting.

THIS case is before us on appeal from a decision of the Court of Appeals affirming the Judgment of Superior Court, NEW HANOVER County, finding both defendants guilty of felonious possession of hashish. The opinion of the Court of Appeals was by *Britt, Judge*, with *Clark, Judge*, concurring and *Erwin, Judge*, dissenting. Defendants appealed as a matter of right under G.S. 7A-30(2). This case was argued as No. 112 at the Fall Term 1978.

The factual occurrences underlying the convictions of the defendants are amply set out in the opinion of the Court of Appeals at 37 N.C. App. 628, 246 S.E. 2d 827 (1978) and will be restated here only in connection with our consideration of appellants' assignments of error.

Our discussion of the various assignments of error raised by defendants is limited to their common assignment of error to the trial court's refusal to suppress evidence relating to and stem-

ming from the discovery by the investigating officers of a quantity of hashish in an open, recessed area in the dashboard of the van in which the defendants were located at the time the officers approached them. The other assignments of error raised by defendants have been given careful consideration, but we find them to be without merit. Therefore, we affirm and adopt that portion of the opinion of the Court of Appeals directed to them.

The determinative issue with respect to appellants' assignments of error to the admission of evidence relating to and stemming from the discovery of the hashish is whether the initial intrusion by the officers, which put them in a position to see the hashish which they seized, infringed defendants' rights under the Fourth Amendment to the U.S. Constitution. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed. 2d 564 (1971), clearly established that objects in the plain view of an officer who has a right to be in the position to have that view may be seized without obtaining a search warrant. *Harris v. United States*, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed. 1067 (1968). "What the 'plain view' cases have in common is that the police officer in each of them had a prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused." *Coolidge v. New Hampshire, supra*, at 466, 91 S.Ct. at 2038, 29 L.Ed. at 583.

Testimony by the officers who arrested defendants, given at a *voir dire*, pre-trial hearing, indicated: In the early morning hours of 17 April 1977 at approximately 12:30 a.m., Officers Wolak and Lee, members of the Narcotics Bureau of the New Hanover County Sheriff's Department, were on patrol in the Fort Fisher area of New Hanover County. They pulled their car off the public highway and parked in the lighted parking lot of a public boat landing located near Fort Fisher. The officers observed a motorcycle and a van parked near them. The van and the motorcycle were then moved away from the officers approximately 40 yards. The officers observed six persons in and around the van. Earlier that evening the officers had heard reports of break-ins having occurred in the Fort Fisher area involving the use of a van. Believing the situation warranted investigation, the officers approached the van, driving their car directly up to the side of the van with the car's bright lights on. The interior light in the van was on. The passenger door and side door of the van were open, and the

officers observed two males seated in the two front seats of the van and four persons in the rear. Officer Wolak identified himself and approached the van. He asked the individual seated in the passenger seat in the front of the van, subsequently identified as defendant Thompson, for some identification. As he took the identification defendant Thompson proffered, Officer Wolak asked Thompson to step from the van. After defendant Thompson complied with this request, Officer Wolak asked the individual seated in the driver's seat of the van to produce some identification. As the driver reached in his pocket for his identification, Officer Wolak leaned across the empty passenger seat to get the identification from him. As he did so, he noticed several tinfoil wrappers, one of which was open, in an open, recessed area of the dashboard in front of the passenger's seat where a glove compartment would normally be located. Officer Wolak, whom the court found to be an expert in the identification of narcotics, recognized the substance lying inside the open tinfoil wrapper to be hashish. The court's findings of fact conformed to the testimony of the officers, and the hashish and other evidence discovered as a result of the ensuing arrest and search of the individuals in the van was admitted over objection by the defendants.

Coleman, Bernholz, and Dickerson, by Steven A. Bernholz and Patricia Stanford Hunt for defendant-appellant Thompson.

Burney, Burney, Barefoot, & Bain, by Roy C. Bain for defendant-appellant Hardee.

Attorney General Rufus L. Edmisten, by Associate Attorney S. Lucien Capone III for the State.

BROCK, Justice.

We observe first that it is problematic whether the officers' conduct in this instance constituted a "seizure", thus invoking the protection of the Fourth Amendment. " 'No one is protected by the Constitution against the mere approach of police officers in a public place.' *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. 1972)." *State v. Streeter*, 283 N.C. 203, 208, 195 S.E. 2d 502, 506 (1973). Because we consider the officers' conduct to be constitutionally permissible under the standards governing an actual "seizure", however, our consideration will proceed on the assump-

tion that the officers indeed effected a "seizure" of the occupants of the van.

The officers' conduct in this instance is governed by the standards set forth in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). *Terry* involved the constitutionality under the Fourth Amendment of a "stop and frisk" by a police officer. Because there was no "frisk" in this case, we examine only whether the officers were entitled to approach and detain the occupants of the van for purposes of investigation and the reasonableness of their conduct in doing so. The Supreme Court's analysis in *Terry* was "a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20, 88 S.Ct. at 1879, 20 L.Ed. 2d at 905. The standard set forth in *Terry* for testing the conduct of law enforcement officers in effecting a warrantless "seizure" of an individual is that "the police officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Id.* at 21, 88 S.Ct. at 1880, 20 L.Ed. 2d at 906. In *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed. 2d 612, 617 (1972), the Court reaffirmed the principle of *Terry* that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." The standard set forth in *Terry* and reaffirmed in *Adams* clearly falls short of the traditional notion of probable cause, which is required for an arrest. We believe the standard set forth requires only that the officer have a "reasonable" or "founded" suspicion as justification for a limited investigative seizure. *United States v. Constantine*, 567 F. 2d 266 (4th Cir. 1977); *United States v. Solomon*, 528 F. 2d 88 (9th Cir. 1975). Thus we must examine both the articulable facts known to the officers at the time they determined to approach and investigate the activities of the occupants of the van and the rational inferences which the officers were entitled to draw from those facts. In doing so, however, we do not believe the circumstances should be analyzed in isolation, but that they should be viewed as a whole "through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training." *U.S. v. Hall*, 525 F. 2d 857, 859 (D.C. Cir. 1976).

Relying on the findings of fact on *voir dire* which are supported by competent evidence and thus conclusive, *State v. Crews*, 286 N.C. 41, 209 S.E. 2d 462 (1974), on what facts and inferences was the officers' conduct predicated? The van and a motorcycle were located in a public parking area in an isolated region of New Hanover County at the end of State Highway 421. The hour was late, approximately 12:30 a.m. The officers were aware that break-ins involving a van had been reported recently in the vicinity. The front passenger door and the side door of the van were observed to be open. A not unreasonable inference to be drawn from these empirical facts was that the occupants of the van might be in some way connected with the reports of recent break-ins in the vicinity. Indeed, even absent the reports of recent break-ins, given the late hour, the isolated location of the van in a public place, and the considerable activity around it observed by the officers, the inference might reasonably be drawn that the situation warranted investigation. These facts and the reasonable inferences to be drawn, when viewed as a whole and through the eyes of experienced police officers, would, we believe, justify a reasonable suspicion that the occupants of the van might be engaged in or connected with criminal activity. On that basis, we find that the officers acted within the limits of the Fourth Amendment in approaching the van and seeking identification from the occupants.

Appellants further contend, however, that Officer Wolak's act of leaning into the van through the open front passenger door after defendant Thompson had stepped from the vehicle constituted an unreasonable intrusion of their expectation of privacy and thus a violation of their Fourth Amendment rights. With this contention we cannot agree. Officer Wolak's purpose in leaning into the van and reaching across to the driver was to obtain the identification the driver had been asked to show him. It was this act which put Officer Wolak in a position to observe, in plain view, the hashish. We cannot say, however, that the officer's conduct was unrelated in scope to the circumstances which justified the initial approach to investigate. *Terry v. Ohio, supra.* The court found as a fact that Officer Wolak asked defendant Thompson to step out, and Thompson voluntarily complied with that request. From the position in which Officer Wolak was standing we cannot say it was unreasonable for him to reach across the seat

for the driver's identification. *See United States v. Anderson*, 552 F. 2d 1296 (8th Cir. 1977); *United States v. Bradshaw*, 490 F. 2d 1097 (4th Cir. 1974). Therefore Officer Wolak had a right to be in the position he was in when he discovered, in plain view, the hashish. Evidence of that discovery and other evidence subsequently discovered as a result was properly admitted. The opinion of the Court of Appeals is

Affirmed.

Justice BRITT took no part in the consideration or decision of this case.

Justice EXUM dissenting.

I fully agree with the majority's analysis of the legal problem presented. The majority has correctly identified the applicable legal principles by which the conduct of the police officers here must be judged. There was, in my view, a seizure of the occupants of the van, particularly the defendant Thompson, pursuant to which Officer Wolak got himself in a position to observe the hashish "in plain view" inside the van. The majority so assumes.

The question, therefore, is whether this seizure was justified under the circumstances present here. The majority concludes that it was. It is with this conclusion that I disagree. The state has shown no "specific and articulable facts," *Terry v. Ohio*, 392 U.S. 1 (1968), giving rise to inferences which in turn could form the basis of a reasonable or founded suspicion even through the eyes of reasonable and trained officers that the occupants of the van might have been engaged in particular criminal activity so as to justify the officers' intrusion.

It is important first to note that at the time of this incident the Wilmington Azalea Festival, an old and well-known celebration marking the coming of spring and blossoming of azaleas, was in progress. The festival attracts tens of thousands of people to the area. Overnight accommodations are at an expensive premium and thousands of young people opt for traveling and sleeping in van-type motor vehicles as the young people in this case were obviously doing in a parking area open to the public at large. The

occupants of the van were equipped with sleeping bags. The parking area was at the very end of U.S. Highway 421 close to a boat ramp—a natural place under the circumstances to settle in for the night.

I simply cannot conclude, as the majority does, that the mere existence of this van and its occupants at the location described somehow gives rise to a reasonable suspicion that criminal activity was afoot. Neither do general reports of unspecified "break-ins" in the area involving an unspecified van of which the officers had no description give rise to a reasonable suspicion that *this* van and *these* persons were engaged in such activity.

The majority relies on *Terry v. Ohio, supra*, 392 U.S. 1, and *Adams v. Williams*, 407 U.S. 143 (1972). Both these cases are distinguishable. In *Terry* a policeman of some 39 years experience observed three men standing on a corner for ten to twelve minutes. Two of them took turns walking down the street to a particular store and looking in the window. They would then return and confer. This pattern was repeated ten to twelve times. This behavior led the officer to believe they were planning a robbery. They were, in his words, " 'casing a job, a stick-up.' " *Id.* at 6. Upon going to them to investigate, the officer frisked defendant Terry, found a gun on him and placed him under arrest. The United States Supreme Court concluded that his actions were reasonable and justified under the Fourth Amendment.

Likewise, in *Adams v. Williams, supra*, there was a reasonable suspicion that a suspect had committed, or was about to commit, a particular crime. In *Adams* a police officer was on patrol in a "high-crime neighborhood." He received a tip from an informant that an individual seated in a nearby car was carrying narcotics and had a gun at his waist. On approaching the car, the officer reached in and removed a loaded revolver from the individual's waistband. He then placed him under arrest and upon searching the car found other weapons and narcotics. Again, his actions were found sustainable under the Fourth Amendment.

In both *Terry* and *Adams*, police officers were possessed of specific facts which indicated that specific indivduals might have committed or were planning to commit particular crimes. While these facts were not considered sufficient to rise to the level of

probable cause, they were enough to give rise in each case to a reasonable suspicion in the officers' minds. There are no such facts in this case.

This case is instead quite like *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), which I believe controls it. There officers of the Border Patrol were on lookout near the Mexican border late at night for illegal aliens. They pursued defendant's car and stopped it, finding two illegal aliens in it. Defendant was arrested and convicted for transporting illegal immigrants. Aside from the facts that it was late at night and near the border (i.e., at a time and place where such illegal activity would normally occur), the only reason the officers could articulate for having pursued and stopped the car was that the occupants appeared to be of Mexican descent. On appeal, the United States Supreme Court reversed defendant's conviction. It held: (1) while Border Patrol officers could make roving-patrol stops they had to have a reasonable suspicion to do so; and (2) while appearance of Mexican descent was a relevant factor it was not under these circumstances justification for a stop.

In the case at bar, the officers were unable to point to *any* untoward activity on the part of the individuals involved as the officers in both *Terry* and *Adams* were able to do. Instead they could articulate only a generalized suspicion based apparently on the time, the place, and the facts that "a van" was involved and they had reports of unspecified "break-ins" involving a van in the area. Lacking more specific information about the break-ins which would tie this particular van or even one fitting its description to the "break-ins," the officers here had no more reason to suspect criminal activity than the Border Patrol in *Brignoni-Ponce*.

For these reasons I believe there was error in failing to allow defendants' motion to suppress the hashish seized and I vote for a new trial.

STATE OF NORTH CAROLINA v. WILLIE WILLIAM STEPTOE

No. 8

(Filed 16 March 1979)

1. **Criminal Law § 75.5— statement by defendant—warning required for admissibility**

As a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial interrogation, *Miranda v. Arizona*, 384 U.S. 436, requires that the suspect be advised in unequivocal terms (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer present during interrogation; and (4) that if he is indigent and unable to employ a lawyer, counsel will be appointed to represent him.

2. **Constitutional Law § 49; Criminal Law § 75.10— right to counsel—waiver**

After having been advised of his rights, an accused may waive the privilege against self-incrimination provided the waiver is made voluntarily, knowingly and intelligently.

3. **Constitutional Law § 40— right to counsel—assertion of right during interrogation—cessation of interrogation required**

If an accused indicates in any manner and at any stage of the interrogation process that he wishes to consult with an attorney before speaking, there can be no questioning.

4. **Constitutional Law § 49— right to counsel—waiver not made voluntarily and understandingly**

Evidence was insufficient to support the trial court's finding that defendant was fully informed of his rights and knowingly, understandingly and voluntarily waived his right to counsel where the evidence tended to show that defendant wanted a lawyer, did not know a lawyer to call and wanted the court to appoint one, refused to sign what an officer had written down, was told that appointment was done through the court, that neither the officer nor the sheriff's department could appoint him a lawyer, that he would be brought before a judge and if the judge saw fit to appoint him a lawyer he would be assigned one, and only then did defendant agree to talk without benefit of counsel.

DEFENDANT appeals from unpublished decision of the Court of Appeals, 38 N.C. App. 243, 247 S.E. 2d 737 (1978), upholding judgment of *Webb, J.*, entered 29 September 1977, NEW HANOVER Superior Court. This case was docketed and argued as No. 121 at the Fall Term 1978.

Defendant was tried upon a bill of indictment charging him with the armed robbery of Mrs. Jean Prince, manager of the Zip Mart located at 653 Castle Hayne Road in New Hanover County.

The State's evidence tends to show that a black male, later identified as Joseph Bethea, entered the Zip Mart at 653 Castle Hayne Road about 2 p.m. on 30 June 1977, approached the manager Jean Prince and demanded money. The robber was wearing a stocking over his face and a paper bag over his hand. The manager gave him in excess of $100 cash and he fled the scene.

Mrs. Betty Herman lived one-fourth mile from the Zip Mart. At approximately 2 p.m. she saw a blue two-door Ford pull into her front yard with two black men in it who said they were out of gas. Mrs. Herman obtained a can and walked with the driver to the gas station across the road where he purchased gas and returned to the car. Upon their return, the second man in the car had left on foot and was walking down the street. The driver poured the gas in his tank, got in his car and drove away.

The New Hanover County Sheriff's Department received a call that a robbery had occurred at the Zip Mart at 2:15 p.m., and Deputy Sheriff Guy arrived on the scene at 2:20 p.m. Mrs. Prince told him about the robbery and furnished a description of the robber. Within a few minutes Officer Guy received a call by radio from his supervisor demanding immediate back-up at the 7-Eleven Store about one block south of the Zip Mart. He drove to the 7-Eleven Store immediately and observed a black male walking from the front door and getting into a two-door late model blue Ford Torino. There was no one else in the car. The man who entered the car was defendant Willie Steptoe. He was arrested and Detective Causey took him to the sheriff's office in Wilmington.

Approximately two hours later Detective Causey gave defendant the *Miranda* warnings, interrogated him, and obtained the following incriminating statement:

> "He told me that he had borrowed a car, this car he was in from a friend; that he was driving towards Castle Hayne and picked up a subject he did not know, thumbing and that they had gone and stopped and this subject had left and went into the store and told him to wait there. He said at that time he did not know what he was doing. I questioned him further about this and about this being the truth. I asked him did he know the subject. He said he did not. After

talking to Steptoe further, he told me that Bethea was the other subject with him and that he, Bethea, had borrowed the car from a girl friend by the name of Mary Patrick and that he was driving and Steptoe was riding; that they had went to the Wrightsboro area and parked in this yard, the yard on Sheridan Drive and Bethea told Steptoe to wait and to drive and he would be back in a minute. He told me that they had gone to this area to see what they could get into. I asked him about what he meant by getting into something. He avoided my question, saying just to see what they could get into. He would not write me a statement. After this he became evasive, and would not answer my questions. I stopped questioning him and placed him in jail."

At a pretrial voir dire hearing on defendant's motion to suppress his incriminating statement, Detective S. A. Causey was the only witness examined. He testified in pertinent part as follows:

"I contacted Mr. Steptoe the first time at the 7-11 Store about two blocks away from the Zip Mart that was robbed and talked briefly with him there. I then learned from a witness that the subject that was originally in the store that committed the actual robbery was believed to have gotten in and out of the car Mr. Steptoe was driving at this time. I again talked with Mr. Steptoe . . . at the Sheriff's office at approximately 4:34 the same day. . . . After first advising him of his rights, I questioned him. . . . I seated Mr. Steptoe in the interview room and at 4:34 I started advising him of his rights. I used the standard rights form used by our department. I have it right here.

I told Mr. Steptoe to listen to my statements and if he understood to answer yes or no, that I was advising him of his constitutional rights against self-incrimination. At that time I placed his name and address he gave me, age, the date and the time on the top of the sheet. I put June 30, 1977—4:34 P.M. At that time I asked if he understood that he must understand his rights. He replied 'yes.' I next told him he had the right to remain silent and he said he didn't understand this. I asked him what he did not understand. He again answered that he didn't understand. I read to him, 'Anything you say can and will be used against you as

evidence in a court of law, do you understand this?' He answered no. At that time I asked him did he not understand or was he trying to be difficult to talk to. He indicated that he was trying to be difficult and he said he would answer my questions correctly. I started again at the top and asked him 'Before I ask you any questions you must understand your rights. Do you understand this?' He replied that he did. I read the rest of the rights to him and he replied that he understood all of them. I asked him did he want to call a lawyer at this time and he said yes to this. I showed him the phone and told him to call any lawyer he wanted. He related to me that he did not know a lawyer and wanted the Court to appoint him a lawyer. I advised him this would have to be done through the court and asked him if he would talk to me without a lawyer and he said yes.

. . . I asked him if he could read. He indicated that he could and that he finished the 12th grade in school. This was at 4:41 p.m. I showed him what I had filled out and asked him to read it and sign it which he refused to do. I filled in my name and the time, his sex and age and answered 'yes,' could he read or not. After that I had a conversation with Mr. Steptoe in relation to the armed robbery. . . . I talked with him for about two hours."

On cross-examination, Officer Causey testified:

"After I asked him if he wanted to call a lawyer, I did not ask him to sign because I hadn't finished reading. I had another question to ask about him talking and then I let him read it and look at it and then I asked him to sign it. He didn't want to sign, refused to sign it. I asked him did he want to waive his rights when I asked if he wanted to talk to me. He then told me that he would talk to me and I had already written in 'Refused to Sign' and as I recall, he then said he would sign his name. He printed his name under where I wrote 'Refused to Sign.' He refused and then I asked him would he talk to me without a lawyer and he said he would and then he signed his name. I asked him if he wanted to call a lawyer and he said yes. He said he didn't know one to call and that he wanted the Court to appoint him a lawyer. I told him that would be done through the court, that I could

not appoint him a lawyer; that he would be brought before a Judge and that if the Judge saw fit to appoint him a lawyer that is where his lawyer would come from, not from me or the department. At that point I did not get in touch with a Judge or a court official to try to see that he got a lawyer because at that point I planned to talk to him no further. Then I asked him would he talk to me without a lawyer and he said yes. After he refused to sign the form I asked him one question, that being if he would talk to me without a lawyer and he said yes. I then continued to question him."

Based on Officer Causey's testimony the trial court found as a fact that Officer Causey interviewed defendant on 30 June 1977 and fully advised him "of his right to remain silent, of his right to have an attorney, and of his right to have the State provide an attorney for him if he could not afford one. That the defendant first told Mr. Causey that he would not waive his right to an attorney. That Mr. Causey then stated to the defendant that the court would have to provide an attorney for him and that he could not, that is, Mr. Causey could not do it. Mr. Causey then asked the defendant to talk to him, and the defendant said, 'all right. I'll give you a statement.' That the defendant fully understood his rights, that he knowingly, understandingly and voluntarily waived his right to remain silent and waived his right to have an attorney present at any questioning. The statement that he made to Sid Causey at that time is admissible in evidence. The defendant's motion to suppress is overruled."

Officer Causey was permitted, over objection, to relate defendant's incriminating statement to the jury.

Defendant did not testify and offered no evidence. The jury returned a verdict of guilty as charged, and defendant was sentenced to prison for thirty years. On appeal, the Court of Appeals found no error, and defendant appealed to this Court on constitutional grounds discussed in the opinion.

Rufus L. Edmisten, Attorney General, by T. Michael Todd, Associate Attorney, for the State.

Ernest B. Fullwood, for defendant appellant.

HUSKINS, Justice.

Defendant challenges the competency of his incriminating statement on the ground that it was obtained in violation of his constitutional rights delineated in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed. 2d 694, 86 S.Ct. 1602 (1966). We first examine the governing principles enunciated in that case.

[1-3] As a constitutional prerequisite to the admissibility of statements obtained from an accused during custodial interrogation, *Miranda* requires that the suspect be advised in unequivocal terms (1) that he has a right to remain silent; (2) that anything he says can and will be used against him in court; (3) that he has a right to consult with a lawyer and to have a lawyer present during interrogation; and (4) that if he is indigent and unable to employ a lawyer, counsel will be appointed to represent him. After having been so advised, an accused may waive the privilege against self-incrimination these warnings are designed to protect provided the waiver is made *voluntarily, knowingly,* and *intelligently.* ". . . [A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver, will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation." *Miranda v. Arizona, supra.* If the accused indicates in any manner and at any stage of the interrogation process that he wishes to consult with an attorney before speaking, there can be no questioning.

The admission of an incriminating statement is rendered incompetent by any circumstance indicating coercion of involuntary action. *State v. Guffey*, 261 N.C. 322, 134 S.E. 2d 619 (1964). The totality of circumstances under which the statement is made should be considered when passing on admissibility. *State v. Chamberlain*, 263 N.C. 406, 139 S.E. 2d 620 (1965). *See State v. Wright*, 274 N.C. 84, 161 S.E. 2d 581 (1968).

[4] Measured by *Miranda* standards we hold that the findings of fact are not supported by the voir dire testimony of Officer Causey. Rather, the officer's testimony, when fairly considered in light of *Miranda* requirements, shows that defendant (1) wanted a lawyer; (2) did not know a lawyer to call and wanted the court to appoint one; (3) refused to sign what Officer Causey had written

down; (4) was told that appointment of counsel was done through the court, that neither Officer Causey nor the Sheriff's Department could appoint him a lawyer, that he would be brought before a judge and *if the judge saw fit to appoint him a lawyer* he would be assigned one. Defendant was then asked whether he would talk to Officer Causey without a lawyer. Defendant replied that he would, and Officer Causey continued to question him.

The foregoing scenario woefully fails to demonstrate the use of "procedural safeguards effective to secure the privilege against self-incrimination" as mandated by *Miranda*. Instead, it tends to show that Officer Causey, in obvious contradiction to the warnings previously read to defendant from the "standard rights form," discouraged the appointment of counsel by telling defendant he would be brought before a judge and "if the judge saw fit to appoint him a lawyer that is where his lawyer would come from." Only after this statement did defendant agree to talk without benefit of counsel. Essentially, the officer advised defendant of his rights and then quite effectively blocked their assertion by emphasizing the difficulties involved in obtaining them. Thus the officer's testimony on voir dire is insufficient to support the finding that defendant was fully informed of his rights and *knowingly, understandingly and voluntarily* waived his right to counsel. The holding in *Miranda*, as interpreted and applied by this Court in numerous decisions, provides that waiver of the right to counsel during custodial interrogation will not be recognized unless the accused has been fully informed of his constitutional rights and the right to counsel has been voluntarily, knowingly and intelligently waived. *See, e.g., State v. Connley*, 295 N.C. 327, 245 S.E. 2d 663 (1978), *petition for cert. filed*, 47 U.S.L.W. 3351 (U.S. Oct. 6, 1978) (No. 78-583); *State v. Butler*, 295 N.C. 250, 244 S.E. 2d 410, *cert. granted*, 99 S.Ct. 720 (1978); *State v. Siler*, 292 N.C. 543, 234 S.E. 2d 733 (1977); *State v. Biggs*, 289 N.C. 522, 223 S.E. 2d 371 (1976); *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); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). Unless and until such warnings and waiver "are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him." *Miranda v. Arizona, supra.*

Since the evidence offered on voir dire in this case is insufficient to support the crucial findings, it necessarily follows that

defendant's incriminating statement to Officer Causey was erroneously admitted. This entitles defendant to a new trial because we cannot say that there was no reasonable possibility that the evidence complained of contributed to defendant's conviction so as to render its admission harmless. *Chapman v. California*, 386 U.S. 18, 17 L.Ed. 2d 705, 87 S.Ct. 824 (1967); *State v. Taylor*, 280 N.C. 273, 185 S.E. 2d 677 (1972).

Cases cited and relied on by the Court of Appeals are factually distinguishable. In *State v. Riddick*, 291 N.C. 399, 230 S.E. 2d 506 (1976), defendant stated he would not answer further questions and wanted to consult a lawyer which request was scrupulously honored. Thereafter, defendant reflected upon the incredibility of his original story in light of the evidence against him, decided to change his statement to the officers to make it more plausible, and invited them to listen while he related his revised version. This statement was held to be competent and rightly so.

In *State v. Jones*, 278 N.C. 88, 178 S.E. 2d 820 (1971), defendant stated when arrested that "he would rather not talk about it right now." Nothing indicates that the officers attempted to question him further at that time. Thereafter defendant, after having been fully advised of his constitutional rights, not only freely consented but invited the police officer to resume talks with him. His statement was held to be competent and rightly so.

In *State v. Bishop, et al.*, 272 N.C. 283, 158 S.E. 2d 511 (1968), the evidence on voir dire was to the effect that defendants were informed of their rights prior to interrogation on their first day in custody but made no statements at that time. One defendant expressly declined to talk until he consulted a lawyer. On the following day, after again being informed of their rights, defendants made inculpatory statements to the police. Held: The fact that defendants declined to make any statements in their first interrogation did not render incompetent any subsequent statements made to police officers, it affirmatively appearing that defendants were adequately advised of their constitutional rights at each interrogation and that their statements were in fact freely and understandingly made.

Michigan v. Mosley, 423 U.S. 96, 46 L.Ed. 2d 313, 96 S.Ct. 321 (1975), holds that the decision in *Miranda* establishes standards to

protect the constitutional privilege against compulsory self-incrimination during police interrogation but does not establish a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. *Mosley* recognizes that the *Miranda* rule does not bar a subsequent statement by a defendant who, after having been fully advised of his constitutional rights, freely and voluntarily waives his right to remain silent and his right to counsel and invites the officer to resume talks with him.

For reasons stated, defendant's motion to suppress his incriminating statement should have been allowed. The decision of the Court of Appeals is therefore reversed and defendant is awarded a

New trial.

STATE OF NORTH CAROLINA v. JAMES EARL COWARD

No. 9

(Filed 16 March 1979)

1. **Criminal Law § 111.1— instructions—reading charge in indictment for which defendant was not on trial—harmless error**

The trial court in a prosecution for first degree burglary erred in reading to the jury a portion of the bill of indictment charging felonious larceny when defendant had not been arraigned and was not being tried on the larceny charge. However, such error was not prejudicial where it clearly appears that defendant, defense counsel, the court and the jury knew at all stages of the trial that defendant was not being tried for felonious larceny, and the trial judge was required to explain and relate the crime of larceny or intent to commit larceny to the charge of first degree burglary.

2. **Criminal Law § 114.2— instructions—reference to "this meat"—no assumption of fact of identification**

In a first degree burglary prosecution in which the evidence tended to show that a quantity of meat had been stolen from the victim's freezer, the trial judge did not assume the fact of identification of the stolen meat by his instruction that the State offered testimony that defendant offered to sell a quantity of meat to a neighbor who declined to buy it and that "this meat" was left in the clothes basket of another neighbor and was ultimately returned to the burglary victim.

3. Criminal Law § 112.4— refusal to instruct on circumstantial evidence—absence of timely request

Where no special request for instructions on circumstantial evidence was timely made, the trial judge's refusal to charge on the probative value of circumstantial evidence was within his sound discretion and not error.

4. Constitutional Law § 30; Bills of Discovery § 6; Criminal Law § 128— denial of discovery motion—refusal to set aside verdict—due process

The trial court did not abuse its discretion in the denial of defendant's motion to set aside the verdict because defendant's pretrial motion for discovery had been denied where the prosecutor advised the court that he did not have most of the items requested, the State did not offer any in-custody, incriminating statement by defendant, the district attorney exceeded statutory requirements in agreeing to furnish defense counsel a list of the State's witnesses, and the court stated for the record that any evidence offered at trial which was within the purview of the motion for discovery would be excluded upon timely motion. Furthermore, the denial of defendant's motion to set aside the verdict did not amount to a denial of due process where there was nothing in the record indicating that the State suppressed any evidence favorable to defendant.

APPEAL by defendant from *Tillery, J.*, at the 5 June 1978 Session of PITT County Superior Court. This case was docketed and argued as No. 130 at the Fall Term 1978.

Defendant was charged in a bill of indictment with first degree burglary and felonious larceny. He was arraigned only on the burglary charge and entered a plea of not guilty.

The State offered evidence tending to show that on 8 April 1978 Mamie Johnson and her five children lived at 1504-B Fleming Street in Greenville, North Carolina. Her daughter, Effie Cooper, aged 16 came home at about 1:30 a.m. on the morning of 8 April 1978, and after checking the doors and windows and ascertaining that they were closed, she retired, leaving a light burning in the hall.

Lester Johnson, the 15 year old son of Mamie Johnson, testified that he was awakened at about 4:30 a.m. on the morning of 8 April 1978 because he was cold and at that time observed defendant James Earl Coward standing in the lighted hallway. Defendant went down the hall and came back and sat down on Lester's sister's bed for a moment. As he was leaving, defendant said he was going to use the bathroom. Shortly thereafter, Lester observed defendant peering into the window of the bedroom.

Defendant then left the premises. Lester observed that the screen in the kitchen window was torn and bent and that the bedroom window was open. He had known defendant for a period of about two years.

Mamie Johnson gave evidence to the effect that upon being awakened by her children in the early morning hours of 8 April 1978, she immediately called the police and upon their arrival told them what had occurred. She also stated that she checked her deep freeze and found that some meat was missing.

Lee Whichard testified that he saw defendant at the home of Lillie Mae Mercer between 7:30 and 8:00 o'clock on the morning of 8 April 1978, and at that time, defendant tried to sell him some meat. The meat was frozen and had been located under some clothes in a tub on Lillie Mae's back porch. The witness said that he refused to purchase the meat.

There was evidence that the meat was carried to the home of Mamie Johnson by a man by the name of Isaac Waters and Mamie Johnson identified this meat as the meat which was missing from her deep freeze.

Officer Best testified that he arrested defendant on the morning of 8 April 1978. He also gave testimony which tended to corroborate the testimony of State's witnesses Effie Cooper and Lester Johnson.

Defendant testified and denied that he entered the home of Mamie Johnson. He offered other testimony to support his defense of alibi, and he also offered evidence which tended to contradict State's witness Lester Johnson's testimony concerning the clothes defendant was wearing during the early morning hours of 8 April 1978.

The jury returned a verdict of guilty, and defendant appealed from judgment imposing a sentence of life imprisonment.

Rufus L. Edmisten, Attorney General, by James L. Stuart, Assistant Attorney General, for the State.

Willis A. Talton for defendant appellant.

BRANCH, Justice.

[1] Defendant argues that the trial judge erred by reading to the jury that portion of the bill of indictment which charged felonious larceny.

After reading that part of the indictment which charged burglary, the trial judge continued:

> . . . And the jurors aforesaid, upon their oath aforesaid, do further present that the said James Earl Coward, late of the County of Pitt, on the 8th day of April, 1978 between 4:45 a.m. and 5:45 a.m., in the night of the same day, with force and arms at and in the county aforesaid, of the value of Twenty Dollars of the goods and chattels of Mamie Johnson in the dwelling house of Mamie Johnson, then and there being found, then and there feloniously and burglariously did steal, take and carry away one package of stew beef . . . .

The purpose of a charge is to apply the law to the evidence so as to assist the jury in understanding the case in order that they might return a correct verdict. 4 Strong's North Carolina Index 3d, *Criminal Law*, Section 111, page 564; *State v. Biggs*, 224 N.C. 722, 32 S.E. 2d 352 (1944). Obviously, it would not assist the jury in understanding a case to read to them a bill of indictment charging a crime for which defendant is not being tried. We, therefore, conclude that it was error to read that part of the indictment which charged defendant with felonious larceny. Under the particular circumstances of this case, however, we do not find this error to be prejudicial. Here defendant was arraigned only upon the burglary charge. When the case was called for trial, the district attorney (presumably in the presence of the prospective jurors) stated:

> James Earl Coward, come around please. This is Case No. 3 on the trial calendar, James Earl Coward, 78-CRS-6050, and he is represented by Mr. Willis A. Talton and stands charged in a bill of indictment with the crime of first degree burglary. He's previously been arriagned and entered a plea of not guilty.

Except for the erroneous reading from the bill of indictment, the entire charge presented to the jury the possible verdicts of

first degree burglary and the lesser included offenses of felonious breaking and entering and nonfelonious breaking and entering. The only other time that the word larceny was mentioned to the jury was when the trial judge defined the crime and explained that it was necessary for the State to prove that at the time of the breaking and entering defendant intended to commit the offense of larceny. Further, after defining and explaining the possible verdicts, the trial judge charged:

> Members of the jury, again, depending upon how you find the facts, there are four possible verdicts which you may return. You may find the defendant guilty of burglary in the first degree, or you may find him guilty of felonious breaking or entering, or you may find him guilty of nonfelonious breaking or entering, or you may find him not guilty.

Upon return of the verdict, defendant was sentenced only upon the charge of first degree burglary. Therefore, it clearly appears that at all stages of the trial, defendant, defense counsel, the court and most importantly the jury knew that defendant was not being tried for felonious larceny. Further, to correctly charge in this case, the trial judge was required to relate and explain the crime of larceny or intent to commit larceny to the charge of burglary in the first degree. Under these circumstances, we are unable to perceive that the apparently inadvertent error of the trial judge in reading the charge of larceny to the jury misled the jury or affected the verdict returned.

[2] Defendant assigns as error the trial judge's instructions concerning the meat allegedly stolen from Mamie Johnson.

The portion of the charge which defendant attacks is as follows:

> . . . The State has further offered evidence which in substance tends to show . . . that a certain quantity of meats was gone from the deep freezer. That some time thereafter, the defendant offered to sell a certain quantity of meat to a neighbor who declined to buy it and that this meat was left in the clothes basket of another neighbor and was ultimately returned to Mamie Johnson, who looked at it and identified it as being the same meat that she was missing. . . .

It is defendant's position that by this instruction the trial judge assumed the fact of identification which was a matter solely for the jury. He strongly relies upon the case of *State v. Bertha*, 4 N.C. App. 422, 167 S.E. 2d 33 (1969). In *Bertha*, defendant was charged with felonious larceny of certain property including a television set. In recapitulating the evidence, the trial judge said:

> . . . [B]ut as I recall the testimony of Ella Mae Blakeney, she saw these two defendants standing in bushes at the rear of the apartment house with *this* television set and the iron in their possession and that she saw them take it *to* this abandoned house.
>
> Now, members of the jury, if you find those to be the facts from the evidence and beyond a reasonable doubt, the court instructs you that would constitute recent possession in this case. (Emphasis added.)

One of the crucial issues in *Bertha* was whether the television set which the witness Blakeney saw in defendant's hands was in fact the stolen television. In finding error in the trial judge's instruction, the Court of Appeals reasoned that the challenged instruction by the trial judge was not supported by the evidence and did in fact establish that the television set seen in defendant's hands was the stolen property.

Instant case differs from *Bertha* in that here the trial judge correctly restated the testimony of the witnesses. His use of the words "this meat" was a reference to the meat which the evidence shows defendant tried to sell and which was later identified by the witness Mamie Johnson as meat which was missing from her freezer locker. Thus, there was no misstatement of fact or assumption of fact in the challenged instruction. This assignment of error is overruled.

[3] Defendant's next assignment of error is that the trial judge erred by failing to charge the jury on the probative value of circumstantial evidence as related to the crime of larceny.

When the State relies in whole or in part on circumstantial evidence, a general and correct charge as to the burden of proof is sufficient and the court is not required to charge on circumstantial evidence absent a special request therefor. 4 Strong's North

Carolina Index 3d, *Criminal Law*, Section 112.4, pages 574-575; *State v. Branch*, 288 N.C. 514, 220 S.E. 2d 495 (1975), *cert. denied*, 433 U.S. 907.

G.S. 1-181, in part, provides:

> (a) Requests for special instructions to the jury must be—
>
> (1) In writing,
>
> (2) Entitled in the cause, and
>
> (3) Signed by counsel submitting them.
>
> (b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

See also, G.S. 1A-1, Rule 51(b).

In instant case, just before the trial judge completed his charge, the record discloses the following:

> Anything further the defendant would have the Court charge on? Or the State?
>
> (Whispered to the Court Reporter, out of the hearing of the jurors by Mr. Talton: I asked that he charge more specifically on larceny indicating that it must be shown that the defendant committed larceny in the case, and that circumstantial evidence should be explained as to linking the meats described to the defendant's actions. He ruled against me, and I except.)

Obviously, no special request for instructions on circumstantial evidence was timely made, and, therefore, the trial court's refusal to so charge was within his sound discretion and was not error. *State v. Broome*, 268 N.C. 298, 150 S.E. 2d 416 (1966); *State v. Spillman*, 210 N.C. 271, 186 S.E. 322 (1936).

In connection with this assignment of error, we think it proper to further note that it is not incumbent on the State to prove the actual commission of the felony, which the indictment charged was intended by the defendant at the time of the breaking and entering, in order to sustain a conviction of burglary. *State v.*

Bell, 285 N.C. 746, 208 S.E. 2d 506 (1974). Thus, the fallacy in the argument which defendant attempted to present by this assignment of error is that since the State did not have to prove the actual commission of the crime of larceny, there was no necessity for an instruction on circumstantial evidence as related to larceny. We further note that the trial judge generally and correctly charged on the burden of proof.

This assignment of error is overruled.

[4] Finally, defendant assigns as error the denial of his motion to set the verdict aside.

On 6 June 1978, defendant filed the following motion for discovery:

> NOW COMES the defendant, by and through his attorney, pursuant to G.S. 15A-902(a), and moves the Court that an Order issue directing the State to provide the following items which are subject to discovery:
>
> (a) All written or recorded statements made by defendant, as provided by G.S. 15A-903(a)(1).
>
> (b) All oral statements made by the defendant which the State intends to offer in evidence, as provided by G.S. 15A-903(2). [sic].
>
> (c) A copy of any prior criminal record of the defendant available to the District Attorney, as provided in G.S. 15A-903(c).
>
> (d) The names of all witnesses the State intends to use.
>
> (e) Any physical evidence, or a sample of it, available to the District Attorney.
>
> (f) Any and all statements, written or recorded, made by any witnesses the State intends to use.
>
> In support of this motion the defendant shows unto the Court that this defendant in due time served a request for voluntary discovery on the State, to which no response has been received.
>
> WHEREFORE, defendant moves the Court that an Order issue directing the State to provide discovery of the items

described above, and for such other relief as to the Court may seem just and proper.

Judge Tillery heard this motion on 6 June 1978 and stated for the record that the district attorney had advised him that he had none of the items requested by Sections (a), (b), (c) and (e) of the motion. Further that the district attorney was willing at that time to supply the names of the witnesses he proposed to offer. The court stated for the record that should any evidence be offered at trial within the purview of defendant's motion, it would be excluded upon timely motion.

We note that the State did not offer a confession or an in custody, inculpatory statement by defendant and that the district attorney exceeded the requirements of the statute when he agreed to furnish defense counsel a list of the State's witnesses. *State v. Smith*, 291 N.C. 505, 231 S.E. 2d 663 (1977).

A motion to set aside a verdict is addressed to the trial judge's sound discretion, and his ruling will not be disturbed absent a showing of abuse of that discretion. *State v. Smith, supra.* Defendant has failed to show any abuse of discretion on the part of Judge Tillery in denying his motion to set aside the verdict.

By this assignment of error, defendant also argues that Judge Tillery's denial of his motion to set aside the verdict amounted to a denial of his constitutional right of due process. In support of this position, defendant cites *State v. Tatum*, 291 N.C. 73, 229 S.E. 2d 562 (1976), where we quoted language from *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215, 83 S.Ct. 1194, to the effect that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment. . . ." We find nothing in this record indicating that the State suppressed such evidence.

The trial judge correctly denied defendant's motion to set aside the verdict.

Our careful examination of this record discloses no prejudicial error. However, in our opinion the facts of this case warrant review by the Executive Branch for possible reduction of sentence.

No error.

STATE OF NORTH CAROLINA v. GILBERT PURCELL

No. 83

(Filed 16 March 1979)

Criminal Law § 86.5— impeachment of defendant—prior act—informal accusations—questions improper

The prosecutor's questions, "You have killed somebody haven't you, Mr. Purcell?" and "Well, it was known all around town that you killed somebody weren't it?" which were asked of defendant on cross-examination fell outside the scope of the rule allowing cross-examination for purposes of impeachment as to prior specific acts of degrading conduct, since the first question did not ask about some identifiable specific act on defendant's part and did not show by its phrasing that the act was wrongful, and since the second question asked defendant to report informal accusations that had been made against him in the community and was clearly improper.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

ON petition for discretionary review of a decision of the Court of Appeals, rendered in an unpublished opinion by *Judge Vaughn* with *Judges Britt* and *Arnold* concurring, finding no error in defendant's conviction for manslaughter at the 18 August 1975 Session of HARNETT Superior Court before *Judge Brewer*. Defendant was sentenced to serve not less than 12 nor more than 15 years in prison. This case was docketed and argued as No. 94 at the Spring Term 1978.

Rufus L. Edmisten, Attorney General, by John R. B. Matthis, Special Deputy Attorney General, for the State.

DeMent, Redwine & Askew, by Russell W. DeMent, Jr., Attorneys for defendant appellant.

EXUM, Justice.

Defendant contends the trial court committed prejudicial error in refusing to sustain his objections to two questions asked him on cross-examination by the prosecutor. These questions were "You have killed somebody haven't you, Mr. Purcell?" and "Well, it was known all around town that you killed somebody weren't it?" We agree with defendant that these questions, in the form in which they were asked, fall outside the scope of our rule

allowing cross-examination for purposes of impeachment as to prior specific acts of degrading conduct. We therefore order that defendant receive a new trial.

For some time prior to 31 March 1975, there had been bad feelings between defendant and George Willie Carroll over defendant's alleged relationship with Carroll's estranged wife. On 31 March Carroll went to defendant's house and confronted him, using abusive language and threatening him. Defendant tried to get Carroll to leave. Carroll would not. Defendant then got up and left the room, returning with a pistol tucked in the waistband of his pants. Witnesses for the state testified that the argument continued after defendant returned, and shortly thereafter he shot and killed Carroll. They stated that there was no weapon on George Carroll's person either before or after the killing and that he made no movement indicating he was reaching for a weapon. Witnesses for defendant testified that Carroll made a movement toward the inside of his jacket just prior to the shooting. Defendant himself stated, "George Carroll reached down in his belt and at that time I spied a black handle pistol, and when he went for it I shot him." Investigating officers found a .32 caliber pistol on Carroll's body.

In the course of the prosector's cross-examination of defendant, the following exchanges took place:

"Q. You have killed somebody haven't you, Mr. Purcell?

MR. STEWART: Object, your Honor.

A. I haven't never been found guilty of murder.

COURT: Overruled.

Q. I didn't ask you that?

MR. STEWART: Your Honor, we submit he can ask him what he has been tried and convicted of.

COURT: He asked him a direct question 'If he killed somebody' that is a proper question.

Q. Have you ever killed anybody, Gilbert?

MR. STEWART: Object.

COURT: Overruled.

A. (pause)

Q. Yes or no?

A. Yes, sir.

EXCEPTION NO. 1

. . . .

Q. Well, it was known all around town that you killed somebody weren't it?

MR. STEWART: Objection to what is known all around town.

COURT: Overruled.

Q. What?

A. Sir?

Q. Did you hear my question?

A. No, I didn't.

MR. STEWART: Object to arguing with the witness, your Honor.

COURT: Overruled.

Q. It was known all around town that you had killed somebody weren't it?

MR. STEWART: Object.

COURT: Overruled.

A. Yes, sir. They've said I've killed somebody. I wasn't found guilty of—I wasn't found guilty of murder.

Q. This is the second person you have killed?

MR. STEWART: Object.

COURT: Overruled.

A. Sir?

Q. This is the second person you have killed?

A. That is the second person I've been charged with.

EXCEPTION NO. 2."

Defendant has assigned as error the trial judge's overruling of his objections in each of these instances.

Defendant's character had not been put in issue. These questions were thus proper, if at all, for the purpose of impeaching defendant's credibility as a witness. There is no indication in the record that defendant was ever convicted for the act about which the prosecutor questioned him.[1] This case therefore concerns the manner in which a criminal defendant can be cross-examined for the purpose of impeaching his credibility by questions about prior bad acts that did not result in criminal convictions.

In *State v. Foster*, 284 N.C. 259, 200 S.E. 2d 782 (1973), the prosecutor was permitted to ask a criminal defendant on cross-examination whether he had committed certain other crimes for which he had not been tried and convicted. This Court held such inquiries to be proper, stating the rule as follows, *id.* at 275, 200 S.E. 2d at 794:

> "When a defendant elects to testify in his own behalf, he surrenders his privilege against self-incrimination and knows he will be subject to impeachment by questions relating to *specific acts* of criminal and degrading conduct. Such 'cross-examination for the purpose of impeachment is not limited to conviction of crimes. Any act of the witness which tends to impeach his character may be inquired about or proven by cross-examination.' " (Emphasis added.) (Citations omitted.)

In *State v. Williams*, 279 N.C. 663, 185 S.E. 2d 174 (1971), defendant was being tried for armed robbery. On cross-examination he was asked whether he was under indictment in three other towns for armed robbery. This Court, speaking through Chief Justice Bobbitt, found such an inquiry improper, holding that a defendant cannot for purposes of impeachment be cross-examined as to whether he has been indicted for criminal of-

1. The question was obviously put to defendant in the form of whether he had "killed somebody," not whether he had been criminally convicted for a homicide. Defendant admitted doing the act but later said he was found not guilty of criminal charges brought in connection with it. Defendant contends in his brief that the killing occurred in 1958 and that defendant was acquitted of the charges against him on grounds of self-defense. There is no showing in the record to this effect.

fenses unrelated to the one for which he is standing trial. The Court went on to say, *id.* at 672, 185 S.E. 2d at 180:

> "*[F]or purposes of impeachment*, a witness, including the defendant in a criminal case, may *not* be cross-examined as to whether he had been *accused*, either informally or by affidavit on which a warrant is issued, of a criminal offense unrelated to the case on trial, nor cross-examined as to whether he has been *arrested for* such unrelated criminal offense." (Emphasis original.)

The Court in *Williams* concluded by distinguishing between the kinds of questions it disapproved and proper inquiries about prior bad acts used to discredit a criminal defendant's testimony, *id.* at 675, 185 S.E. 2d at 181:

> "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. 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." (Citations omitted.) (Emphasis original.)

Thus a criminal defendant who takes the stand may be cross-examined for purposes of impeachment concerning any prior specific acts of criminal and degrading conduct on his part. Such acts need not have resulted in a criminal conviction in order to be appropriate subjects for inquiry. The scope of inquiry about particular acts is, however, within the discretion of the trial judge, and questions concerning them must be asked in good faith. It is not permissible to inquire for purposes of impeachment as to whether a defendant has previously been arrested or indicted for or accused of some unrelated criminal or degrading act.

Here the prosecutor asked defendant, "You have killed somebody haven't you, Mr. Purcell?" We think this question was improper because it did not inquire about some identifiable specific act on defendant's part. The question does not refer to

the time or the place or the victim or any of the circumstances of defendant's alleged prior misconduct. *Compare, State v. Hankerson*, 288 N.C. 632, 220 S.E. 2d 575 (1975), *rev'd on other grounds*, 432 U.S. 233 (1977) (manner of assault, *i.e.*, shooting, specified); *State v. Black*, 283 N.C. 344, 196 S.E. 2d 225 (1973) (manner of assault and names of victims included in question); *State v. Mack*, 282 N.C. 334, 193 S.E. 2d 71 (1972) (date and specific nature of criminal activity mentioned). It is instead almost categorical in nature, as is illustrated by the way the prosecutor rephrased it: "Have you ever killed anybody, Gilbert?" We specifically disapproved of this type of question in *State v. Mason*, 295 N.C. 584, 248 S.E. 2d 241 (1978). There defendant sought to cross-examine a witness for the prosecution by asking him, "Were you involved in what you call street gang operations in New York?" The trial court sustained an objection to this question and we affirmed, noting that it did not "concern a *particular act* of misconduct." Id. at 593, 248 S.E. 2d at 247. (Emphasis original.)

The purpose of permitting inquiry into specific acts of criminal or degrading conduct is to allow the jury to consider these acts in weighing the credibility of a witness who has committed them. For this purpose to be fulfilled, the questions put to the witness must enlighten the jury in some degree as to the nature of the witness' act. Questions so loosely phrased as the one here give the jury no clear indication about the witness' credibility. Under our law and the mores of our society, killing is not categorically wrong. As the Arkansas Supreme Court said when confronted with a similar issue in *Stanley v. State*, 171 Ark. 536, 537, 285 S.W. 17, 18 (1926): "A homicide is not necessarily a crime. The killing may have been an accident or entirely justifiable." Indeed, a soldier who kills the enemy in war may be thought a hero. When a question is put to a witness about some prior act for the purpose of impeaching his credibility, and the question does not show by its phrasing that the act was wrongful, an objection to it should be sustained.

Defendant's second assignment of error relates to his being required to answer over objection the question, "It was known all around town that you killed somebody weren't it?" In essence this question asked defendant to repeat informal accusations that had been made against him in the community. It was clearly an improper question under *State v. Williams, supra*, 279 N.C. 663, 185

S.E. 2d 174, and defendant's objection to it should have been sustained.

Given that the overruling of defendant's objections was error, we must now determine if it was prejudicial. *State v. Gainey*, 280 N.C. 366, 185 S.E. 2d 874 (1972). On this point, we find the present case indistinguishable from *State v. Stimpson*, 279 N.C. 716, 185 S.E. 2d 168 (1971). Defendant in *Stimpson* was charged with murder and convicted of involuntary manslaughter. While on the stand he was asked on cross-examination whether he had been indicted for murder in New York. Over objection defendant was required to answer and replied that he had been indicted for murder in New York in 1964 but "wasn't found guilty" and "wasn't sentenced for it." This Court found the failure to sustain his objection prejudicial error. It said, 279 N.C. at 725, 185 S.E. 2d at 173:

> "Defendant, on trial for murder, offered evidence and contended that the discharge of the pistol was accidental and not intentional. Under these circumstances, the admission of the testimony, for the purposes of impeachment, to the effect that he had been indicted in New York State in 1964 for murder was prejudicial."

We reach the same conclusion here.

For the reasons stated, we order that defendant receive a

New trial.

Justices BRITT and BROCK did not participate in the consideration or decision of this case.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

BENTLEY v. LANGLEY

No. 200 PC.

Case below: 39 N.C. App. 20.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 March 1979.

BOARD OF TRANSPORTATION v. JONES

No. 194 PC.

No. 110 (Spring Term).

Case below: 38 N.C. App. 337.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals allowed 6 March 1979.

CAMPBELL v. CHURCH

No. 6 PC.

Case below: 39 N.C. App. 117.

Petitions by plaintiff and defendants for discretionary review under G.S. 7A-31 denied 6 March 1979. Appeal by plaintiff dismissed 6 March 1979.

COLLINS v. INSURANCE CO.

No. 189 PC.

No. 111 (Spring Term).

Case below: 39 N.C. App. 38.

Petition by defendant for discretionary review under G.S. 7A-31 allowed 6 March 1979.

DAVIS v. DEPT. OF TRANSPORTATION

No. 10 PC.

Case below: 39 N.C. App. 190.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

DEUTSCH v. FISHER

No. 11 PC.

Case below: 39 N.C. App. 304.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

GARRETT v. GARRETT & GARRETT FARMS

No. 201 PC.

Case below: 39 N.C. App. 210.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 March 1979.

GLADSTEIN v. SOUTH SQUARE ASSOC.

No. 13 PC.

Case below: 39 N.C. App. 171.

Petition by defendants for discretionary review under G.S. 7A-31 denied 6 March 1979.

MYERS v. MYERS

No. 7 PC.

Case below: 39 N.C. App. 201.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

POAG v. POWELL, COMR. OF MOTOR VEHICLES

No. 14 PC.

Case below: 39 N.C. App. 363.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

POPE v. DEAL

No. 202 PC.

Case below: 39 N.C. App. 196.

Petition by plaintiff for discretionary review under G.S. 7A-31 denied 6 March 1979.

SCHILLING v. KUSH-N-KART

No. 15 PC.

Case below: 39 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

SHOPPING CENTER v. GLENN

No. 198 PC.

Case below: 39 N.C. App. 67.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

SNOW v. POWER CO.

No. 23 PC.

No. 113 (Spring Term).

Case below: 39 N.C. App. 350.

Petition by plaintiffs for discretionary review under G.S. 7A-31 allowed 6 March 1979.

STATE v. BLACK

No. 17 PC.

Case below: 39 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. HALL

No. 40 PC.

Case below: 39 N.C. App. 501.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

STATE v. HARTLEY and LEWIS

No. 192 PC.

Case below: 39 N.C. App. 70.

Petition by defendant Lewis for discretionary review under G.S. 7A-31 denied 6 March 1979.

STATE v. JEFFUS

No. 19 PC.

Case below: 39 N.C. App. 260.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 March 1979.

STATE v. JOHNSTON

No. 12 PC.

Case below: 39 N.C. App. 179.

Petition by defendant Johnston for discretionary review under G.S. 7A-31 denied 6 March 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 March 1979.

STATE v. LAMB

No. 9 PC.

Case below: 39 N.C. App. 334.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979. Motion of Attorney General to dismiss appeal for lack of substantial constitutional question allowed 6 March 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

STATE v. LOCKLEAR

No. 41 PC.

Case below: 39 N.C. App. 671.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

STATE v. MURPHY

No. 1 PC.

Case below: 38 N.C. App. 118.

Petition by defendant for writ of certiorari to North Carolina Court of Appeals denied 6 March 1979.

STATE v. PRINCE

No. 29 PC.

Case below: 39 N.C. App. 685.

Petition by Attorney General for discretionary review under G.S. 7A-31 denied 6 March 1979.

STATE v. STINSON

No. 22 PC.

Case below: 39 N.C. App. 313.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

STATE v. VERT

No. 197 PC.

Case below: 39 N.C. App. 26.

Petition by defendant for discretionary review under G.S. 7A-31 denied 6 March 1979.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

SWENSON v. THIBAUT

No. 38.

Case below: 39 N.C. App. 77.

Petitions by defendants Thibaut, Clark, Thompson, Taylor, Nichols, Leleux, Hawkins, Duhe, Comeaux, Bagnaud, Bares, Backus and Walton for discretionary review under G.S. 7A-31 denied 6 March 1979. Motion of plaintiff to dismiss appeal for lack of substantial constitutional question allowed 6 March 1979.

APPENDIXES

AMENDMENT TO RULES
OF APPELLATE PROCEDURE

AMENDMENT TO CODE OF
PROFESSIONAL RESPONSIBILITY

AMENDMENT TO RULES GOVERNING
ADMISSION TO THE PRACTICE OF LAW

AMENDMENT TO NORTH CAROLINA RULES OF APPELLATE PROCEDURE

Rule 30(e) of the North Carolina Rules of Appellate Procedure, reported in 288 N.C. 737, is amended by the addition of a new subsection (3) as follows:

> (3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.

This amendment to the Rules of Appellate Procedure was adopted by the Supreme Court in Conference on 5 February 1979 to become effective upon adoption. The amendment shall be promulgated by publication in the next succeeding advance sheets of the Supreme Court and the Court of Appeals.

BROCK, J.
For the Court

AMENDMENT TO CODE OF PROFESSIONAL RESPONSIBILITY

The following amendment to the Rules, Regulations and the Certificate of Organization of The North Carolina State Bar was duly adopted by the Council of The North Carolina State Bar at its quarterly meeting on January 12, 1979.

BE IT RESOLVED by the Council of The North Carolina State Bar, that Article X, Canon 2 of the Canons of Ethics and Rules of Professional Conduct of the Certificate of Organization of The North Carolina State Bar, as appears in 283 NC 783 and as amended in 293 NC 767 be and the same is hereby amended by rewriting DR 2-102 (E) to read as follows:

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(E) A lawyer who is engaged both in the practice of law and another profession, may so indicate on his letterhead, office sign and professional card.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar and that said Council did by resolution, at a regular quarterly meeting unanimously adopt said amendment to the Rules and Regulations of The North Carolina State Bar as provided in General Statutes Chapter 84.

Given over my hand and the Seal of The North Carolina State Bar, this the 16th day of January, 1979.

B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations 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 5th day of February, 1979.

Susie Sharp
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 5th day of February, 1979.

Brock, J.
For the Court

AMENDMENT TO RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The amendment below to the Rules Governing Admission to the Practice of Law in the State of North Carolina was duly adopted at the regular quarterly meeting of the council of The North Carolina State Bar on January 12, 1979.

BE IT RESOLVED that the Rules Governing Admission to the Practice of Law in the State of North Carolina be and the same are amended by rewriting Rule .0403 as appears in 289 NC 742 and 293 NC 761 as follows:

Rule .0403 FILING DEADLINE

Applications must be filed with and received by the secretary at the offices of the board not later than 5:00 p.m., Eastern Standard Time, on the second Tuesday in January of the year in which the applicant applies to take the written bar examination; provided, however, upon payment of a late filing fee of $100 (in addition to all other fees required by these rules), an applicant may be permitted to file a late application with the board no later than 5:00 p.m. on the third Tuesday in February of the year in which the applicant applies to take the written bar examination.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of The North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law in the State of North Carolina and Rules and Regulations of The North Carolina State Bar has been duly adopted by the Council of The North Carolina State Bar at a regular quarterly meeting of said Council.

Given over my hand and the Seal of The North Carolina State Bar, this the 16th day of January, 1979.

B. E. James, Secretary
The North Carolina State Bar

After examining the foregoing amendment to the Rules and Regulations 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 5th day of February, 1979.

Susie Sharp
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Rules and Regulations of The North Carolina State Bar be spread upon the minutes of the Supreme Court and that it be published in the forthcoming volume of the Reports as provided by the Act incorporating The North Carolina State Bar.

This the 5th day of February, 1979.

Brock, 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 the N.C. Index 3d.

TOPICS COVERED IN THIS INDEX

ACCOUNTS

§ 2. Accounts Stated

Where defendant claimed that plaintiff owed $3000 and claimed acknowledgement of the debt by plaintiff's signing an audit slip, plaintiff's testimony concerning what defendant's vice president and treasurer said to her about the audit slip was not violative of the parol evidence rule since plaintiff's testimony was not inconsistent with the substance of the audit slip. *Carroll v. Industries, Inc.*, 205.

Defendant was not entitled to summary judgment on its counterclaim for $3000 due on an account when defendant failed to show a promise to pay by plaintiff and plaintiff raised as a defense the existence of a condition precedent to her obligation to pay. *Ibid.*

A letter from plaintiff to defendant automobile dealer stating that parts and tools from another dealership had been placed in defendant's inventory and that the indebtedness for these parts and tools would be transferred to defendant's account was insufficient to establish an account stated. *Mazda Motors v. Southwestern Motors*, 357.

ADMINISTRATIVE LAW

§ 5. Availability of Review by Statutory Appeal

A decision by the State Board of Elections not to go forward with further investigation of alleged voter registration irregularities in Orange County did not constitute a final agency decision in a "contested case" which would be appealed to the superior court. *Lloyd v. Babb*, 416.

APPEAL AND ERROR

§ 6.2. Finality as Bearing on Appealability

An order of the trial court allowing plaintiff's motion for summary judgment on the issue of liability, reserving for trial the issue of damages, and denying defendant's motion for summary judgment was not appealable. *Industries, Inc. v. Insurance Co.*, 486.

§ 46. Presumptions Arising From Lower Court Proceedings

Where one member of the Supreme Court did not participate in a decision and the remaining six judges are equally divided, the opinion of the Court of Appeals is affirmed without precedential value. *Townsend v. Railway Co.*, 246.

§ 49.1. Sufficiency of Record to Show Prejudicial Error in Exclusion of Evidence

An assertion that excluded testimony will concern a physician's diagnosis of the party's condition, though it indicates the general subject of the testimony, is not sufficiently specific for the purposes of review. *Currence v. Hardin*, 95.

ARREST AND BAIL

§ 3.4. Legality of Warrantless Arrest for Possession of Narcotics

The arrest of defendant for illegal possession of marijuana discovered when officers attempted to serve him with a nontestimonial identification order was legal. *S. v. Carson*, 31.

ARSON

§ 4.1. Cases Where Evidence Was Sufficient

Evidence was sufficient for the jury in an arson case where it tended to show that defendant set fire to an apartment after pouring kerosene on the floor. *S. v. Jones*, 75.

ASSAULT AND BATTERY

§ 14.5. Sufficiency of Evidence of Assault With Deadly Weapon With Intent to Kill

The absence of physical evidence corroborating proper identification testimony by the victim did not warrant nonsuit. *S. v. Green*, 183.

ATTORNEYS AT LAW

§ 10. Disbarment Generally

The standard of proof to be used in a judicial disbarment proceeding is proof by clear and convincing evidence. *In re Palmer*, 638.

§ 11. Disbarment Procedure

The State may not appeal a judicial disciplinary proceeding against an attorney but may seek review in the appellate division by petition for a writ of certiorari. *In re Palmer*, 638.

§ 12. Disbarment—Grounds

An attorney is censured by the Supreme Court for violation of the Code of Professional Responsibility in failing to withdraw as counsel for a criminal defendant when he knew of an agreement between defendant and a codefendant to perpetrate a fraud on the court by having the codefendant give false testimony. *In re Palmer*, 638.

BILLS AND NOTES

§ 19. Parol Evidence

In an action to rescind an unconditional guaranty, trial court erred in excluding parol evidence of a condition precedent to plaintiffs' liability. *O'Grady v. Bank*, 212.

§ 20. Sufficiency of Evidence

Contention by one plaintiff that his signing of a note was conditioned on the comakers' liability on that note, and since the comakers were not liable, the note could not be binding on him either is without merit. *O'Grady v. Bank*, 212.

BILLS OF DISCOVERY

§ 6. Discovery in Criminal Cases

Trial court did not abuse its discretion in the denial of defendant's motion to set aside the verdict because defendant's pretrial motion for discovery had been denied. *S. v. Coward*, 719.

BURGLARY AND UNLAWFUL BREAKINGS

§ 5.11. Sufficiency of Evidence of Breaking and Entering, Assault and Rape

The absence of physical evidence corroborating proper identification testimony by the victim did not warrant nonsuit. *S. v. Green*, 183.

BURGLARY AND UNLAWFUL BREAKINGS — Continued

§ 6.4. Instructions on Breaking and Entering

Defendant's contention that the trial court erred in its jury instruction relating to breaking and entering in that it did not explain adequately the element of consent was without merit. *S. v. Williams*, 693.

CARRIERS

§ 8.1. Liability for Injuries During Unloading

Trial court properly entered summary judgment for defendants in an action to recover for injuries received when bales of acrylic fiber loaded on a trailer by defendant shipper fell on plaintiff while he was marking bales inside the trailer at defendant consignee's unloading dock. *Moore v. Fieldcrest Mills, Inc.*, 467.

CONSPIRACY

§ 6. Sufficiency of Evidence

State's evidence was sufficient for the jury in a prosecution for conspiracy to commit false pretense by overbilling the State for advertising work. *S. v. Louchheim*, 314.

CONSTITUTIONAL LAW

§ 24.7. Service of Process and Jurisdiction Over Nonresident Individuals

Where a nonresident defendant is a principal shareholder of a corporation and conducts business in N.C. as principal agent for the corporation, his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. *Buying Group, Inc. v. Coleman*, 510.

A nonresident's mere act of signing a guaranty or endorsement of a debt owed to a N.C. creditor does not per se constitute a sufficient contact upon which to base in personam jurisdiction over the nonresident. *Ibid.*

In an action to recover on promissory notes executed by nonresident defendants guaranteeing the account indebtedness of a Virginia shoe company for merchandise received from a N.C. corporation, the defendant who was a resident of Virginia and the president and primary shareholder of the Virginia company had sufficient contacts with N.C. so that the courts of this State could assert personal jurisdiction over him, but the defendant who was a medical doctor in N.Y. and only signed the note to help his brother did not have sufficient contacts to permit the assertion of personal jurisdiction over him. *Ibid.*

§ 28. Equal Protection in Criminal Proceedings

G.S. 14-21(1)(a), providing the death penalty for rape of a virtuous female child under the age of 12 by a person over 16, does not violate the equal protection clause of the XIV Amendment because it is a gender based criminal law. *S. v. Wilson*, 298.

§ 29. Fairness of Pretrial Identification Procedures

Photographing of defendant without the presence of his girlfriend did not amount to denial of his constitutional rights. *S. v. Wilson*, 298.

§ 30. Discovery

In a prosecution for arson where defendant allegedly started a fire with kerosene, defendant was entitled to a new trial because of the prosecutor's failure

CONSTITUTIONAL LAW — Continued

to provide him an SBI laboratory report showing no evidence of the presence of kerosene in defendant's outer clothing seized at the time of defendant's arrest. *S. v. Jones*, 75.

The State was not required pursuant to G.S. 15A-903(a)(2) to disclose to defendant the substance of a statement allegedly made to him by a third person. *S. v. Crews*, 607.

In a first degree murder case where the evidence tended to show that one defendant's half-brothers and half-sister were present at the scene of the crimes, trial court did not err in ordering that welfare department files concerning the half-brothers and half-sister not be released to defendants or the State. *Ibid.*

Trial court in a first degree murder case did not err in admitting in evidence a knife found among deceased's personal effects which the State had not produced before trial. *S. v. Ruof*, 623.

Trial court did not abuse its discretion in the denial of defendant's motion to set aside the verdict because defendant's pretrial motion for discovery had been denied. *S. v. Coward*, 719.

§ 49. Waiver of Right to Counsel

Evidence was insufficient to support the trial court's finding that defendant was fully informed of his rights and knowingly, understandingly and voluntarily waived his right to counsel. *S. v. Steptoe*, 711.

§ 51. Speedy Trial; Delay Between Arrest and Trial

Defendant was not denied his constitutional right to a speedy trial because of a 10-month delay between his arrest and trial. *S. v. Carson*, 31.

§ 53. Speedy Trial; Delay Caused by Defendant

Defendant who was serving a life sentence in S. C. was not denied his right to a speedy trial where the length of the delay between the indictment and trial was 16 months and most of the delay was caused by defendant's attempt to obtain witnesses who were confined in S. C. prisons. *S. v. Vaughn*, 167.

Defendant was not denied his constitutional right to a speedy trial for murder by a delay of 13 months between his indictment and trial when most of that delay was caused by defendant fighting his extradition from another state. *S. v. Love*, 194.

§ 55. Waiver of Speedy Trial

By requesting a continuance for the purpose of procuring witnesses who were confined in prisons in S. C., defendant waived his right to be tried within 120 days under G.S. 15A-761, Art. IV(c). *S. v. Vaughn*, 169.

CONTRACTS

§ 17.2. Termination

Notice and hearing provisions of G.S. 20-305(6) for termination of an automobile dealership franchise agreement apply solely to unilateral franchise terminations by the manufacturer. *Mazda Motors v. Southwestern Motors*, 357.

CORPORATIONS

§ 1.1. Disregarding Corporate Entity

Defendant could properly be convicted of obtaining property from the State by false pretense even though the false representations were made by a corporation where the corporation was the alter ego of defendant. *S. v. Louchheim*, 314.

COURTS

§ 2. Jurisdiction Generally

Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events, even when the events are of such a nature that they would have prevented jurisdiction from attaching in the first instance. *In re Peoples*, 109.

CRIMINAL LAW

§ 5. Mental Capacity in General; Insanity

The State's evidence consisting of testimony by witnesses who observed defendant at the time of the crime and who saw her flee, coupled with the presumption of sanity and the defendant's burden of proof, made the issue of insanity one which the court should properly have submitted to the jury. *S. v. Leonard*, 58.

§ 15. Venue

The State carried its burden of proving that Wake County was the proper venue in a prosecution for conspiracy to commit false pretense and obtaining money by false pretense by overbilling the State for advertising work. *S. v. Louchheim*, 314.

Admission of an affidavit in a hearing on a motion to dismiss for improper venue, if error, was not prejudicial to defendant. *Ibid.*

§ 21.1. Preliminary Hearing

Trial court did not err in denying defendant's motion to dismiss the indictment on the ground that no probable cause hearing was held prior to indictment. *S. v. Vaughn*, 169.

§ 26.5. Double Jeopardy; Same Acts Violating Different Statutes

Defendant was not subjected to double jeopardy when he was convicted of kidnapping and rape arising out of one transaction. *S. v. Wilson*, 298.

Defendant could properly be sentenced for both a kidnapping conviction and a felonious assault conviction inasmuch as the assault was not an element of the so-called "aggravated kidnapping" offense of which defendant was also convicted. *S. v. Gunther*, 578.

§ 29.1. Procedure for Raising Issue of Mental Capacity

Trial court did not abuse its discretion in denying one defendant's motion for a psychiatric examination. *S. v. Crews*, 607.

§ 33. Facts in Issue and Relevant to Issues in General

Trial court properly refused to exclude all evidence relating to defendant's association with a motorcycle club. *S. v. Ruof*, 623.

§ 34.4. Admissibility of Evidence of Other Offenses

Trial court properly admitted evidence concerning offenses committed by defendants four hours after the crimes charged. *S. v. Hopkins*, 673.

§ 48. Silence of Defendant as Implied Admission

Miranda v. Arizona did not render inadmissible testimony that defendant, while in custody, had refused to waive his constitutional rights, but the admission of such evidence was error because it lacked probative value. *S. v. Love*, 194.

CRIMINAL LAW — Continued

§ 50. Opinion Testimony in General

Testimony that the witness "thought" she saw a knife was competent. *S. v. Carson*, 31.

§ 50.2. Opinion of Nonexpert

Admission of opinion testimony by the prosecutrix that her assailant took money and food stamps from her wallet was harmless error. *S. v. Cox*, 388.

§ 56. Expert Testimony of Accountants

Testimony by an expert in accounting as to the amount defendant overbilled the State for advertising work was not incompetent because the accountant used several documents not admitted in evidence to reach his conclusions. *S. v. Louchheim*, 314.

§ 57. Evidence in Regard to Firearms

Defendant failed to show error in trial court's allowing the State to examine a ballistics expert further on the comparison between two exhibits after the court had granted defendant's motion to suppress ballistics testimony. *S. v. Crews*, 607.

§ 60.5. Fingerprints; Competency of Evidence

Evidence in a first degree murder case was insufficient for the jury where the only evidence connecting defendant to the crime was a thumbprint found at the scene of the crime but the evidence did not show that the thumbprint could have been impressed only at the time of the crime. *S. v. Scott*, 519.

§ 63. Evidence as to Sanity of Defendant

A psychiatrist's findings and diagnosis as to defendant's mental state should have been admitted into evidence and the psychiatrist should have been permitted to testify as to the content of his conversations with defendant in order to show the basis of his diagnosis. *S. v. Wade*, 454.

Requirements for admission of evidence of insanity of ancestors. *Ibid.*

§ 66.1. Identification of Defendant; Opportunity for Observation

Trial court properly refused to suppress the victim's identification testimony. *S. v. Green*, 183.

§ 66.7. Identification of Defendant From Photographs

The arrest of defendant for possession of marijuana was legal and did not taint a subsequent photographic identification procedure. *S. v. Carson*, 31.

Statutory provision requiring that an order for nontestimonial evidence contain a statement that the person is entitled to counsel was inapplicable to the photographing of defendant where officers arrested defendant for a misdemeanor while attempting to serve him with a nontestimonial identification order. *Ibid.*

Trial court did not err in denying defendant's motion to strike identification testimony since defendant never objected throughout the testimony and since the court determined that the in-court identification was of independent origin. *S. v. Holmes*, 47.

§ 66.8. Identification of Defendant From Photographs; Taking of Photographs

A defendant under arrest for a misdemeanor could be photographed by police, and such photograph could be used in a photographic identification procedure. *S. v. Carson*, 31.

CRIMINAL LAW — Continued

Taking of defendant's photograph prior to his arrest was not impermissible and illegal so as to taint in-court identification testimony. *S. v. Wilson*, 298.

§ 66.9. Identification of Defendant from Photographs; Suggestiveness of Procedure

A photographic identification procedure in a rape case was not impermissibly suggestive because the picture of defendant contained a placard on the front indicating his height, weight and other personal information. *S. v. Carson*, 31.

§ 66.18 Voir Dire to Determine Competency and Admissibility of In-Court Identification; When Required

Though a voir dire is not required to determine the admissibility of identification testimony where no pretrial identification procedures have been conducted, it would be the better practice to conduct a voir dire prior to the admission of the testimony where there has been a specific objection that the testimony is inherently unreliable or incredible. *S. v. Green*, 183.

§ 66.20. Trial court was not required to make findings of fact and conclusions of law regarding the independence and reliability of an assault victim's in-court identification since there were no pretrial identification procedures. *S. v. Green*, 183.

§ 69. Telephone Conversations

A proper foundation was laid for testimony by two officers concerning police radio dispatches advising them to be on the lookout for a described automobile, and testimony as to the dispatches was competent where it was offered to corroborate an officer's testimony and to impeach defendant's testimony. *S. v. Love*, 194.

§ 71. Shorthand Statements of Fact

Use of the word "rape" by witnesses was a shorthand statement of fact. *S. v. Pearce*, 281.

§ 73.2. Statements Not Within Hearsay Rule

An officer's testimony on redirect that he did not serve a warrant on defendant in N.Y. until a certain date because he had information that defendant had refused to waive extradition and that he would be told when he could bring defendant to N. C. was not hearsay and was competent to explain testimony brought out by defense counsel on cross-examination of the officer. *S. v. Love*, 194.

§ 73.3. Statements Not Within Hearsay Rule; Statements Showing State of Mind

Declarations made by defendant to various other persons before the date and not in contemplation of the killings with which he was charged were admissible as tending to show defendant's state of mind. *S. v. Wade*, 454.

§ 74.1. Divisibility of Confession

Trial court did not err in failing to instruct the jury that the whole of a confession must be taken together, considering those portions favorable to as well as those portions against defendant. *S. v. Hodges*, 66.

§ 75.10. Confession; Waiver of Constitutional Rights Generally

Miranda v. Arizona does not require that a person being interrogated must be informed of the crime which he is suspected of having committed before he can knowingly and intelligently waive his rights. *S. v. Carter*, 344.

§ 77.2. Self-Serving Declarations

Defendant's exculpatory statement to an investigating officer was properly excluded from evidence. *S. v. Pearce*, 281.

CRIMINAL LAW — Continued

§ 79.1. Acts of Codefendant Subsequent to Commission of Crime

The rule that neither a conviction nor a guilty plea nor a plea of nolo contendere by one defendant is competent as evidence of the guilt of a codefendant on the same charges was not violated in this case. *S. v. Campbell*, 394.

§ 80. Books, Records and Other Writings

Trial court did not err in admitting a police officer's investigative report. *S. v. Love*, 194.

§ 83. Competency of Husband or Wife to Testify For or Against Spouse

An officer's testimony that he went to defendant's residence and asked defendant's wife if defendant had a knife and that the wife left the room and came back with a small pocket knife which she gave to the officer violated the statute prohibiting a wife from testifying against her husband. *S. v. Suits*, 553.

§ 86.4. Impeachment of Defendant; Prior Accusations of Crime

Trial court erred in allowing the State to ask defendant whether there was a warrant out against him for car larceny at an earlier time but such error was inconsequential. *S. v. Crews*, 607.

§ 86.5. Impeachment of Defendant; Particular Questions and Evidence as to Specific Acts

Trial court properly allowed the district attorney to cross-examine defendant about previous convictions where defendant did not have counsel or had not waived counsel on the basis of prior acts of misconduct. *S. v. Suits*, 553.

The prosecutor's questions as to a prior act of defendant and informal accusations against defendant fell outside the scope of the rule allowing cross-examination for purposes of impeachment as to prior specific acts of degrading conduct. *S. v. Purcell*, 728.

§ 86.9. Impeachment of Accomplices

Though the trial court improperly excluded evidence which was admissible to show the witness's state of mind, defendant was not prejudiced since the witness answered the question anyway. *S. v. Holmes*, 47.

§ 87.1. Leading Questions

Trial court in a first degree rape prosecution did not err in allowing the district attorney to ask the prosecuting witness leading questions to establish the essential elements of rape. *S. v. Henley*, 547.

Trial court properly allowed leading questions where the witness had trouble understanding the gist of the questions posed to him by the State. *S. v. Hopkins*, 673.

§ 89.1. Evidence of Character Bearing on Credibility

Defendant was not prejudiced by the trial court's error in permitting the prosecutor to ask an alibi witness two questions concerning the character of the witness's associate. *S. v. Green*, 183.

§ 89.2. Credibility of Witnesses; Corroboration

It is competent for a witness to corroborate herself by testimony that she had made a statement to another person. *S. v. Pearce*, 281.

CRIMINAL LAW — Continued

Defendant's contention that the trial court erred in failing to give a restrictive instruction at the time corroborative evidence was admitted was without merit. *Ibid.*

Trial judge was not required to give limiting instructions on corroborative evidence absent a request therefor. *S. v. Cox*, 388.

§ 89.9. Impeachment of Witnesses; Prior Statements

The State could properly introduce extrinsic testimony concerning an alibi witness's prior inconsistent statement with respect to his waking and sleeping hours and defendant's whereabouts where such statement conflicted with the subject matter of his testimony at trial. *S. v. Green*, 183.

§ 91. Nature and Time of Trial

The State was not required to bring defendant to trial within 180 days after his motion for a speedy trial where there was nothing in defendant's motion to put the authorities on notice that defendant was proceeding under the Detainer Act. *S. v. Vaughn*, 167.

By requesting a continuance for the purpose of procuring witnesses who were confined in prisons in S. C., defendant waived his right to be tried within 120 days under G.S. 15A-761, Art. IV(c). *Ibid.*

§ 92.5. Severance

Trial court did not err in denying defendants' motion for severance where they were tried for the murders of the same two people. *S. v. Crews*, 607.

§ 97.1. No Abuse of Discretion in Permitting Additional Evidence

Trial court did not err in denying defendant's motion for a mistrial because a witness was permitted to give additional testimony after the State had rested and defendant's motion to dismiss had been denied. *S. v. Carson*, 31.

§ 101. Conduct Affecting Jurors

Defendant failed to show prejudice where the trial court allowed a juror to speak to her husband without admonishing the juror as required by G.S. 15A-1236. *S. v. Williams*, 693.

§ 102.5. Conduct of District Attorney in Examining Witnesses

Though remarks by the district attorney were improper, the trial judge, in light of the strong evidence of defendant's guilt, did not commit prejudicial error by failing to instruct the jury to disregard the remarks or by failing to declare a mistrial on his own motion. *S. v. Holmes*, 47.

Defendant was properly questioned about his eligibility for parole in another state where his defense to the the charge of murder was that he did not want to spend the rest of his life in the allegedly intolerable conditions of another state's prison unit. *S. v. Vaughn*, 167.

Trial court in a murder case did not err in denial of defendant's motion for mistrial when the prosecutor asked defendant whether the daughter of the woman with whom defendant had been living hadn't alleged that defendant was the father of her child where the court instructed the jury not to consider the question. *S. v. Love*, 194.

CRIMINAL LAW — Continued

§ 102.9. District Attorney's Comment on Defendant's Character and Credibility

The district attorney's characterizations of defendant as an outlaw, a violent man, a man who carried an automatic pistol, rode with a motorcycle gang and had a violent temper were supported by the evidence. *S. v. Ruof*, 623.

§ 102.13. District Attorney's Comment on Judicial Review

Defendant is entitled to a new trial on the guilt determination phase of a capital case because of the district attorney's improper argument to the jury that "if you do err in this case he [defendant] has the right of appeal. The State doesn't have that. State has no right of appeal from a case like this." *S. v. Jones*, 495.

It was improper for the district attorney during the sentencing phase of a murder trial to read to the jury the statute relating to the review of a sentence of death by the Supreme Court, to read the parole statute, and to speculate on the possibility that defendant might later be paroled if he received a life sentence. *Ibid.*

§ 111. Form and Manner of Giving Instructions

Though the procedure of submitting to the jury envelopes containing written elements of the separate offenses is usually unnecessary, there was no prejudicial error in the procedure as used in this case. *S. v. Pearce*, 281.

§ 111.1. Particular Miscellaneous Instructions

Defendant in a first degree burglary case was not prejudiced by the court's error in reading to the jury a portion of the bill of indictment charging felonious larceny. *S. v. Coward*, 719.

§ 112.6. Instructions on Insanity

Trial court's instructions on presumption and burden of proof with respect to insanity were proper. *S. v. Leonard*, 58.

§ 113.5. Instructions on Alibi

Trial court's instruction that evidence of alibi was to be considered like any other evidence "tending to disprove the evidence of the state" did not imply that the burden was placed upon defendant to prove his defense of alibi, and the court's charge on alibi was not insufficient in failing to contain a specific instruction that defendant did not have the burden of proving his defense of alibi. *S. v. Cox*, 388.

§ 114.1. Disparity in Time Consumed in Stating Evidence for Parties

Trial court did not express an opinion in his charge by devoting more time to recapitulating the State's evidence than defendant's evidence. *S. v. Pearce*, 281.

§ 114.2. No Expression of Opinion in Statement of Evidence or Contentions

The trial judge did not assume the fact of identification of stolen meat by his reference in the charge to "this meat." *S. v. Coward*, 719.

§ 117.2. Instructions on Interested Witnesses

Trial court's jury instructions concerning the testimony of an interested witness were proper. *S. v. Holmes*, 47.

§ 128. Discretionary Power of Court to Set Aside Verdict and Order Mistrial

Defendant was not entitled to a mistrial when a witness was improperly called but defendant made no motion to strike and the witness's testimony was not prejudicial. *S. v. Pearce*, 281.

CRIMINAL LAW — Continued

Trial court did not abuse its discretion in the denial of defendant's motion to set aside the verdict because defendant's pretrial motion for discovery had been denied. *S. v. Coward*, 719.

§ 131. New Trial for Newly Discovered Evidence

In a prosecution for arson where defendant allegedly started a fire with kerosene, defendant was entitled to a new trial because of the prosecutor's failure to provide him with an SBI laboratory report showing no evidence of the presence of kerosene in defendant's outer clothing seized at the time of defendant's arrest. *S. v. Jones*, 75.

§ 138.2. Cruel and Unusual Punishment

A 50 year sentence imposed on defendant after conviction of second degree rape was not cruel and unusual. *S. v. Pearce*, 281.

§ 166. The Brief

An appellant should include in his brief a non-argumentative factual summary in addition to a concise statement of the case dealing with the procedural posture of the case. *S. v. Hopkins*, 673.

§ 169.3. Admission of Evidence; Error Cured by Introduction of Other Evidence

Defendant's objection to the admissibility of corroborative evidence by one witness was waived where seven other witnesses gave substantially similar corroborative evidence and the defendant made no objection. *S. v. Henley*, 547.

§ 177. Determination and Disposition of Cause; Defendant Entitled to New Trial

The granting of a new trial on the guilt determination phase of a bifurcated trial requires a new trial on the sentencing phase of such trial. *S. v. Jones*, 495.

DIVORCE AND ALIMONY

§ 16.6. Alimony Without Divorce; Sufficiency of Evidence

The evidence in an action for alimony without divorce presented a jury question as to whether defendant abandoned plaintiff or whether the parties had agreed to separate. *Murray v. Murray*, 405.

§ 17.2. Alimony Upon Divorce From Bed and Board; Effect of Divorce Decree

Defendant was estopped from asserting an absolute divorce as a bar to plaintiff's alimony rights where the trial judge was informed by both parties that their dispute as to child custody, child support and alimony had been settled although a consent order had not been drawn up, and the same judge then granted defendant a divorce on the assumption that a formal agreement would be reached. *Hamilton v. Hamilton*, 574.

§ 19.5. Modification of Alimony Decree; Effect of Separation Agreements and Consent Decrees

A consent judgment ordering payment of alimony was an order of the court which could be modified pursuant to G.S. 50-16.9(a). *White v. White*, 661.

Where it was not clear whether the parties intended provisions in a consent judgment for support payments and property division to be reciprocal consideration for each other or independent and separable, evidence of the situation of the parties at the time they consented to the judgment was essential to the resolution of that issue. *Ibid.*

DIVORCE AND ALIMONY — Continued

Plaintiff's allegation that support payments she is receiving are totally inadequate under current circumstances is a sufficient allegation of changed circumstances to support modification of the support payments. *Ibid.*

Where the issue of separability of provisions in a separation agreement or consent judgment adopted and made a part of an order by the court is not adequately addressed in the document itself, there is a presumption that the provisions are separable and subject to modification for changed circumstances, and the party opposing modification has the burden of proof on the issue of separability by a preponderance of the evidence. *Ibid.*

§ 24.9. Child Support; Findings

Decision of the Court of Appeals affirming an order holding defendant in contempt for willful failure to comply with a child support order is affirmed by the Supreme Court. *Beasley v. Beasley*, 580.

DURESS

§ 1. Generally

Evidence supported the trial court's finding that an agreement terminating an automobile dealership franchise was not the result of economic coercion or duress. *Mazda Motors v. Southwestern Motors*, 357.

ELECTIONS

§ 2.1. Qualification of Electors

The challenge procedure of Art. 8 of G.S. Ch. 163 did not provide an effective administrative remedy insofar as plaintiffs alleged continuing improprieties in the practices of the Orange County Board of Elections in registering students of the University of N.C. who are not actually domiciled in Orange County, but the challenge procedure did provide an effective administrative remedy for removing from the voting rolls those who had been improperly registered. *Lloyd v. Babb*, 416.

The evidence in the record was insufficient to support findings that the Orange County Board of Elections has not required students who apply for voter registration to prove their domicile, and the court erred in issuing a preliminary mandatory injunction against the Orange County Board. *Ibid.*

Determination of domicile of a student for voting purposes by use of a questionnaire which is not used for other would-be registrants is not unconstitutional. *Ibid.*

The use of a rebuttable presumption that a student who leaves his parents' home to go to college is not domiciled in the place where the college is located does not violate the Equal Protection Clause of the U.S. Constitution. *Ibid.*

A student who intends to remain in his college community only until graduation should not for that reason alone be denied the right to vote in that community. *Ibid.*

§ 2.3. Qualification of Electors; Registration

A decision by the State Board of Elections not to go forward with further investigation of alleged voter registration irregularities in Orange County did not constitute a final agency decision in a "contested case" which could be appealed to the superior court. *Lloyd v. Babb*, 416.

ELECTRICITY

§ 5. Position or Condition of Wires

In an action to recover for damages sustained by plaintiff when a ladder which he was handling came in contact with electrical wires maintained by defendant, there was a genuine issue as to a material fact relating to defendant's duty to insulate the wires. *Williams v. Power & Light Co.*, 400.

§ 7.1. Sufficiency of Evidence of Defendant's Negligence

Where plaintiff, while repairing a house gutter, sustained injuries when his ladder came in contact with electrical wires maintained by defendant, reasonable minds could differ as to whether it was foreseeable that plaintiff's injury could result from defendant's alleged negligence. *Williams v. Power & Light Co.*, 400.

§ 8. Contributory Negligence

In an action to recover for damages sustained by plaintiff when a ladder he was handling came in contact with electrical wires maintained by defendant, evidence did not show that plaintiff was contributorily negligent as a matter of law. *Williams v. Power & Light Co.*, 400.

EMINENT DOMAIN

§ 4.3. Delegation of Power to Other Agencies

G.S. 62-190 clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of N.C., regardless of whether their pipelines originate in N.C. *Pipeline Co. v. Neill*, 503.

§ 5. Amount of Compensation

Land owned by an individual and adjacent land owned by a corporation of which the individual is the sole shareholder cannot be treated as a unified tract for the purpose of assessing condemnation damages. *Board of Transportation v. Martin*, 20.

ESTOPPEL

§ 5. Parties Estopped

Defendant was estopped from asserting an absolute divorce as a bar to plaintiff's alimony rights where the trial judge was informed by both parties that their dispute as to child custody, child support and alimony had been settled although a consent order had not been drawn up, and the same judge then granted defendant a divorce on the assumption that a formal agreement would be reached. *Hamilton v. Hamilton*, 574.

EXTRADITION

§ 1. Generally

Trial court properly denied defendant's motion to dismiss made on the ground that N.Y. officials violated a N.Y. extradition statute by detaining him in that state beyond the period provided by N.Y. law. *S. v. Love*, 194.

FALSE PRETENSE

§ 1. Nature and Elements of the Crime

Defendant could properly be convicted of obtaining property from the State by false pretense even though the false representations were made by a corporation where the corporation was the alter ego of defendant. *S. v. Louchheim*, 314.

§ 3.1. Nonsuit

Evidence was sufficient for the jury in a prosecution for false pretense in overbilling the State for advertising work. *S. v. Louchheim*, 314.

FRAUDULENT CONVEYANCES

§ 3.4. Sufficiency of Evidence

A triable issue of fact existed as to whether adequate consideration was given for a conveyance which plaintiff alleged to be fraudulent. *Bank v. Evans*, 374.

GAS

§ 6. Pipeline Easements

G.S. 62-190 clearly confers the right of eminent domain upon interstate pipeline companies incorporated or domesticated under the laws of N.C., regardless of whether their pipelines originate in N.C. *Pipeline Co. v. Neill*, 503.

GRAND JURY

§ 3. Challenge to Composition

Defendant's contention that the grand jury which indicted him was improperly constituted due to improper procedures used in drawing up the final jury list from which members of the grand jury were selected is without merit. *S. v. Vaughn*, 167.

GUARANTY

§ 1. Generally

In an action to rescind a guaranty agreement, a question of fact existed and was not resolved by the trial court as to whether one plaintiff implicitly agreed to and authorized the omission from the guaranty agreement of a primary obligor on the note which the guaranty was to secure. *O'Grady v. Bank*, 212.

Defendant's contention that a guaranty executed by two plaintiffs covered not only the joint debts of the three men listed as primary obligors but also applied to the individual debt of any one of those primary obligors was without merit. *Ibid.*

If a principal ratified his agent's unauthorized signature on a note, then there were three makers of the note who were jointly and severally liable, and plaintiffs could be held liable on their guaranty which applied to the collective debts of those three makers. *Ibid.*

HOMICIDE

§ 2. Principals and Accessories

The crime of accessory before the fact to second degree murder is a lesser included offense of second degree murder. *S. v. Holmes*, 47.

HOMICIDE — Continued

§ 7.1. Defense of Unconsciousness

In view of the overwhelming evidence of defendant's intoxication, trial court did not err in refusing to instruct the jury on the defense of unconsciousness. *S. v. Williams*, 693.

§ 15.4. Expert and Opinion Evidence

Though a hypothetical question as to intoxication and defendant's responsibility was not very clear, an expert witness's answers were not prejudicial to defendant. *S. v. Williams*, 693.

§ 19.1. Evidence of Character or Reputation

Defendant was not prejudiced by the court's error in sustaining the State's objections to questions to defendant which sought to elicit evidence that defendant shot deceased because he knew of deceased's reputation as a dangerous man and was afraid of him where defendant received the benefit of such evidence. *S. v. Hodges*, 66.

Defendant will not be granted a new trial because the State presented evidence of deceased's good character and evidence that he was neither a dangerous nor violent man where defendant failed to object to such evidence. *Ibid.*

§ 20. Real and Demonstrative Evidence

Trial court in a first degree murder case did not err in admitting into evidence a knife found among deceased's personal effects which the State had not produced before trial. *S. v. Ruof*, 623.

§ 20.1. Photographs

Trial court properly admitted a photograph of deceased to validate a witness's testimony and a photograph of defendant to explain identification testimony. *S. v. Ruof*, 623.

§ 21.5. Sufficiency of Evidence of First Degree Murder

State's evidence, though circumstantial, was sufficient for the jury in a prosecution for first degree murder. *S. v. Thomas*, 236.

State's evidence was sufficient for the jury on the issue of defendant's guilt of first degree murder. *S. v. Love*, 194.

Evidence in a first degree murder case was insufficient for the jury where the only evidence connecting defendant to the crime was a thumbprint found at the scene of the crime but the evidence did not show that the thumbprint could have been impressed only at the time of the crime. *S. v. Scott*, 519.

Evidence in a first degree murder case was sufficient for the jury to find premeditation and deliberation. *S. v. Ruof*, 623.

§ 21.7. Sufficiency of Evidence of Second Degree Murder

State's evidence was sufficient for the jury in a second degree murder case. *S. v. Hodges*, 66.

§ 30.2. Submission of Manslaughter

It was not error for the trial court in a murder prosecution to submit involuntary manslaughter with appropriate instructions and to exclude voluntary manslaughter from the list of permissible verdicts. *S. v. Fleming*, 559.

Trial court in a murder prosecution did not err in failing to submit voluntary manslaughter as an alternate verdict. *S. v. Williams*, 693.

INJUNCTIONS

§ 2. Inadequacy of Legal Remedy

The challenge procedure of Art. 8 of G.S. Ch. 163 did not provide an effective administrative remedy insofar as plaintiffs alleged continuing improprieties in the practices of the Orange County Board of Elections in registering students of the University of N.C. who are not actually domiciled in Orange County, but the challenge procedure did provide an effective administrative remedy for removing from the voting rolls those who had been improperly registered. *Lloyd v. Babb*, 416.

INSURANCE

§ 2.3. Action Against Agent for Failure to Procure Insurance

The evidence was sufficient for the jury on defendant's counterclaim against plaintiff insurance agent for breach of an oral agreement to procure insurance on a Franklin logger which was subsequently destroyed by fire, notwithstanding there was no evidence of the exact nature of the risk to be insured against or the duration of the risk. *Sloan v. Wells*, 570.

JUDGES

§ 7. Misconduct in Office

Jurisdiction in a proceeding to remove a district court judge from office for misconduct was not divested by the judge's resignation which became effective two days after the complaint was filed, nor was the proceeding rendered moot by such resignation. *In re Peoples*, 109.

A judge may not with propriety handle any financial transaction for a defendant which is incident to a case in which he sits in judgment. *Ibid.*

A judge may be removed from office and disqualified from holding further judicial office only for the offense of wilful misconduct in office. *Ibid.*

A district court judge was removed from office by the Supreme Court, disqualified from holding further judicial office and disqualified from receiving retirement benefits for wilful misconduct in office. *Ibid.*

The provisions of G.S. 7A-376 which bar a judge who has been removed for misconduct from future judicial office are authorized by Art. IV, § 17(2) and Art. VI, § 8 of the N.C. Constitution. *Ibid.*

JURY

§ 6. Voir Dire Examination

Trial court did not abuse its discretion in denying defense counsel permission to ask each prospective juror, rather than the entire panel, a question. *S. v. Leonard*, 58.

§ 7.6. Time of Challenge for Cause

Trial judge did not err in allowing the State's challenge for cause of a prospective juror who had been passed by the State and defendant because the juror indicated on voir dire that he had known defendant's family all his life and it would be uncomfortable for him to sit as a juror. *S. v. Carson*, 31.

LIS PENDENS

§ 2. Property Within Doctrine

A claim for relief by a creditor seeking to set aside a fraudulent conveyance constitutes an action affecting title to real property within the meaning of the lis pendens statute. *Bank v. Evans*, 374.

MALICIOUS PROSECUTION

§ 13.2. Sufficiency of Evidence of Probable Cause

In an action for malicious prosecution, conflicts in the evidence presented a jury question as to the existence of probable cause and precluded the entry of summary judgment for defendant. *Pitts v. Pizza, Inc.*, 81.

MASTER AND SERVANT

§ 55.5. Workmen's Compensation; Injury Arising Out of Employment

The death of a 14-year-old employee of a sanitary district while attempting to wade across a reservoir to complete his work of cutting weeds on the other side arose out of and in the course of his employment, although he had received general instructions not to go into the water. *Hensley v. Caswell Action Committee*, 527.

§ 60.4. Injuries During Recreation or Amusement

The death of a 15-year-old laborer by drowning while swimming in a lake on his employer's premises during his lunch hour did not arise out of and in the course of his employment. *Martin v. Bonclarken Assembly*, 540.

§ 65.2. Back Injuries

Where there was evidence that plaintiff suffered leg pain related to his compensable back injury, the Industrial Commission erred in failing to find facts as to whether plaintiff had suffered any permanent loss of use of either or both legs. *Perry v. Furniture Co.*, 88.

§ 71.1. Computation of Average Weekly Wage Under Exceptional Circumstances

Under G.S. 97-2(5), compensation for the death of a minor employee must be based on the average weekly wage of adults employed in a similar class of work by the same employer to which decedent would probably have been promoted had he not been killed if such method can be used. *Hensley v. Caswell Action Committee*, 527.

§ 72. Partial Disability

The language of G.S. 97-31 compels the conclusion that if by reason of a compensable injury an employee is unable to work and earn any wages he is totally disabled and entitled to compensation for permanent total disability under G.S. 97-29 unless, as in this case, all his injuries are included in the schedule set out in G.S. 97-31. *Perry v. Furniture Co.*, 88.

§ 96.1. Review of Findings of Industrial Commission

Evidence was sufficient to support the findings of the Industrial Commission that plaintiff sustained a 50% permanent partial disability or loss of use of his back and that the healing period had ended on or before 25 March 1976. *Perry v. Furniture Co.*, 88.

MASTER AND SERVANT — Continued

§ 109. Unemployment Compensation; Strikes

An employer's inability to reinstate previously replaced employees after they abandoned their strike and unconditionally offered to return to work changed the cause of unemployment from a labor dispute in active progress to unavailability of work and lifted the disqualification for unemployment compensation. *In re Sarvis*, 475.

The Supremacy Clause of the U.S. Constitution, Art. VI, cl. 2, did not require that unemployment benefits be withheld from employees who were replaced by employer before they abandoned their strike and offered unconditionally to return to work. *Ibid.*

MORTGAGES AND DEEDS OF TRUST

§ 32.1. Restriction of Deficiency Judgments on Purchase-Money Mortgages

G.S. 45-21.38 not only abolished deficiency judgment after forclosure of a purchase-money mortgage but also prohibits a suit upon a purchase-money note without foreclosure of the mortgage. *Realty Co. v. Trust Co.*, 366.

MUNICIPAL CORPORATIONS

§ 2.2. Annexation: Requirements of Use and Size of Tracts

Military personnel living on an air force base in an area to be annexed were properly counted in determining whether the area had a total resident population of two persons per acre and thus was developed for urban purposes. *In re Annexation Ordinance*, 1.

§ 2.6. Extension of Utilities to Annexed Territory

The City of Goldsboro properly annexed the Seymour Johnson Air Force Base and was not required to duplicate services provided on the base by the federal government. *In re Annexation Ordinance*, 1.

NARCOTICS

§ 1.3. Elements of Offenses

The offense of possession of more than one ounce of marijuana is not a lesser offense of possession with intent to sell or deliver marijuana so that the State was not required to make an election between the two offenses; however, defendant could not be punished for both offenses because of possession of the same contraband. *S. v. McGill*, 564.

§ 4.1. Evidence Insufficient for Jury

Conviction of defendant for possession, possession with intent to sell, and sale of MDA is reversed. *S. v. Board*, 652.

NEGLIGENCE

§ 57.10. Sufficiency of Evidence in Action by Invitee

Evidence was sufficient for the jury in an action to recover damages for personal injuries sustained by plaintiff when she fell in the parking lot of defendant's motel. *Rappaport v. Days Inn*, 382.

OBSCENITY

§ 3. Disseminating Obscenity

When a business is declared a nuisance because of the exhibition or sale of obscene matter, the trial judge is not required to enjoin the future distribution of any and all obscene matter but has the discretion to define what conduct is prohibited. *Andrews v. Chateau X*, 251.

Trial court's order was not erroneous in enjoining defendants from selling obscene matter only when such matter "constitutes a principal or substantial part of [their] stock in trade." *Ibid.*

G.S. 19-1.2(2) does not place the burden of proving non-obscenity on the defendant in a nuisance action. *Ibid.*

An order restraining defendants from selling or exhibiting any obscene matter in the future which depicts specified sexual conduct does not constitute an illegal prior restraint. *Ibid.*

PRINCIPAL AND AGENT

§ 5.2. Scope of Agent's Authority

A person signing a note under power of attorney did not have authority to do so and his principal was not liable on the note merely by virtue of the agent's signature. *O'Grady v. Bank*, 212.

§ 6. Ratification and Estoppel

A question of fact existed as to whether a principal ratified his agent's unauthorized signature on a note. *O'Grady v. Bank*, 212.

PROCESS

§ 9. Personal Service on Nonresident Individuals in Another State

G.S. 1-75.4(5)a provided statutory authority for the exercise of personal jurisdiction by the courts of this State over nonresident defendants in an action to recover on promissory notes executed by defendants securing account indebtedness of a Virginia shoe company to a N.C. corporation. *Buying Group, Inc. v. Coleman*, 510.

A nonresident's mere act of signing a guaranty or endorsement of a debt owed to a N.C. creditor does not per se constitute a sufficient contact upon which to base in personam jurisdiction over the nonresident. *Ibid.*

Where a nonresident defendant is a principal shareholder of a corporation and conducts business in N.C. as principal agent for the corporation, his corporate acts may be attributed to him for the purpose of determining whether the courts of this State may assert personal jurisdiction over him. *Ibid.*

In an action to recover on promissory notes executed by nonresident defendants guaranteeing the account indebtedness of a Virginia shoe company for merchandise received from a N.C. corporation, the defendant who was a resident of Virginia and the president and primary shareholder of the Virginia company had sufficient contacts with N.C. so that the courts of this State could assert personal jurisdiction over him, but the defendant who was a medical doctor in N.Y. and only signed the note to help his brother did not have sufficient contacts to permit the assertion of personal jurisdiction over him. *Ibid.*

PUBLIC OFFICERS

§ 3. Term of Office

When a resignation of a public officer specifies the time at which it will take effect, the resignation is not complete until that date arrives. *In re Peoples*, 109.

RAPE

§ 5. Sufficiency of Evidence

State's evidence was sufficient to support a jury finding that defendant used a deadly weapon to overcome the resistance of the victim and that he was guilty of first degree rape. *S. v. Carson*, 31.

Evidence was sufficient in a prosecution for second degree rape to show use or threatened use of force and lack of consent. *S. v. Pearce*, 281.

§ 6. Instructions

Defendant was not prejudiced by the court's instruction that a knife allegedly used in a rape was a deadly weapon. *S. v. Carson*, 31.

§ 6.1. Instructions on Lesser Degrees of the Crime

Trial court in a rape case did not err in failing to submit lesser included offenses. *S. v. Carson*, 31.

In a prosecution for second degree rape, trial court's incorrect instruction on assault with intent to commit rape was more favorable to defendant than was required. *S. v. Pearce*, 281.

§ 8. Carnal Knowledge of Female Under Age Twelve

G.S. 14-21(1)(a), providing for the death penalty for rape of a virtuous female child under the age of 12 by a person over 16, does not violate the equal protection clause of the XIV Amendment because it is a gender based criminal law. *S. v. Wilson*, 298.

§ 11. Sufficiency of Evidence of Carnal Knowledge of Female Under Twelve

Testimony by the victim as well as medical testimony was sufficient for the jury to infer that the victim was penetrated. *S. v. Wilson*, 298.

RULES OF CIVIL PROCEDURE

§ 12. Defenses and Objections

A trial court cannot make "findings of fact" conclusive on appeal on a motion to dismiss for failure to state a claim under Rule 12(b)(6). *White v. White*, 661.

§ 56.4. Summary Judgment: Sufficiency of Material In Opposition

When materials stipulated into evidence for consideration upon motion for summary judgment support opposing conclusions with respect to a material fact, the non-moving party may not be charged with failure to offer rebuttal evidence and thus incur dismissal by way of summary judgment. *Pitts v. Pizza, Inc.*, 81.

SEARCHES AND SEIZURES

§ 8. Search Incident to Warrantless Arrest

Officers had probable cause to search defendant six or seven hours after she was arrested, and the lapse in time did not make the search too remote to be a search incident to lawful arrest. *S. v. Hopkins*, 673.

SEARCHES AND SEIZURES — Continued

§ 12. Stop and Frisk Procedures

Officers were reasonably warranted in approaching and detaining the occupants of a van for purposes of investigating their activities and determining their identity, and an officer lawfully seized narcotics he saw in an open, recessed area of the dashboard while leaning into the passenger side of the van to obtain identification from the driver. *S. v. Thompson*, 703.

§ 15. Standing to Challenge Lawfulness of Search

Defendants had no standing to object to the search of a trunk since the trunk belonged to neither defendant but had been stolen by them, and neither defendant was present at the time of the search. *S. v. Crews*, 607.

§ 23. Evidence Sufficient to Show Probable Cause for Warrant

A search warrant was not invalid because the affidavit contained false information. *S. v. Louchheim*, 314.

§ 24. Evidence From Informants Sufficient to Show Probable Cause for Warrant

There was a substantial basis for a magistrate to conclude that business records relating to a State advertising contract were probably located at defendant's business office on the date a search warrant was issued where informants had seen some of the records in defendant's business office some 14 months earlier. *S. v. Louchheim*, 314.

STATE

§ 6. Employees of State Within Tort Claims Act

A County Director of Social Services and his staff are agents of the Social Services Commission of the Dept. of Human Resources with respect to placement of children in foster homes, and the Industrial Commission has jurisdiction under the Tort Claims Act of a claim against the County Director and his staff based on alleged negligence in the placement of a child in a foster home. *Vaughn v. Dept. of Human Resources*, 683.

TAXATION

§ 22. Exemption of Property of Educational Institution

Forest land owned by a nonprofit corporation which had been leased to a paper company was not used exclusively for educational and scientific purposes and was not exempt from ad valorem taxation. *In re Forestry Foundation*, 330.

§ 25.3. Property Subject to Discovery for Ad Valorem Taxes

Where, from 1969 to 1973, a foundation made payments of 10 cents per acre for its timberland in lieu of "county taxes otherwise assessed," and the option of making payments in lieu of taxes was not available after 1973, failure of the county tax supervisor to give the foundation notice of the discovery and listing of the property in 1974 was not fatal to the 1974 tax assessment on the property. *In re Forestry Foundation*, 330.

UNIFORM COMMERCIAL CODE

§ 36.1. Letters of Credit

If the court finds on retrial that an agent gave the bank officials notice of one plaintiff's condition for issuing a letter of credit, the presentment of the note and

WORD AND PHRASE INDEX

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